# Exhibit 14

## Enforcement of Foreign Judgment — Judgment by a State Court in California — Compensatory and Punitive Damages — Enforcement of Punitive Damage Awards Refused Because of Contrariety to Public Policy in Japan

Supreme Court Judgment, 11 July 1997; 51 Minshu (6) 2573 [1997]

Northcon I , Oregon Partnership, v. Mansei Kogyo Co., Ltd., et al.

Northcon I, the plaintiff in the case at the bar, is an Oregon partnership created for the project to develop in Oregon a facility for Maruman Integrated Circuits, Inc. (hereinafter referred to as MIC), a California corporation. MIC was a subsidiary of Mansei Kogyo Co. (hereinafter referred to as Mansei Co.), first defendant in the present case, a Japanese corporation. A dispute arose from a lease agreement between Northcon I and MIC, and MIC filed an action in the Superior Court of the State of California against Northcon I. The present case ensues from the counterclaim presented by Northcon I against Mansei Co. and its chief executive officer, Yoshitaka Katayama (hereinafter referred to as Katayama), second defendant in the case at hand, and other officers of Mansei Co. and MIC.

According to Section 3294 of the California Civil Code,[1] in an action for the breach of an obligation not arising from contract, where it is proven that the defendant has been guilty of fraud, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

On May 19, 1982, the Superior Court of California rendered the judgment as stated below on grounds of fraudulent acts by Mansei Co., Katayama, and others in making the lease agreement. Mansei Co. and Katayama are to pay $425,251 as compensatory damages and $40,104.71 as costs. In addition, Mansei Co. is to pay $1,125,000 as punitive damages. On May 12, 1987, the Court of Appeals of the State of California affirmed this judgment (hereinafter referred to as the Foreign Judgment) and the Foreign Judgment became irrevocable.

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(1) Section 3294(a) of the California Civil Code:

'In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.'

Northcon I filed this action in the Tokyo District Court against Mansei Co. and Katayama for permission to enforce the foreign judgment in the case. On February 18, 1991, the District Court granted enforcement of the compensatory damages, including interest, not contained in the text of the foreign judgment in the case. On the other hand, enforcement of the punitive damages was refused on the ground that such enforcement was contrary to public policy in Japan as laid down in indent iii of Article 200 of the Code of Civil Procedure.(2) Both plaintiff and defendants appealed to the Tokyo High Court. The High Court affirmed the judgment of the District Court and dismissed both appeals.

Plaintiff Northcon I appealed to the Supreme Court, in particular to grant enforcement of the punitive damages on defendant Mansei Co. On the other hand, defendants Mansei Co. and Katayama appealed to the Supreme Court to deny the enforcement of the interest not contained in the text of the judgment.

The following Supreme Court judgment deals only with the appeal by plaintiff Northcon I. For the judgment on the appeal by defendants Mansei Co. and Katayama, see Supreme Court Judgment, 11 July, 1997; Minsyu (vol.51, No. 6) 2530 [1997], infra p. 107.

Held: 'The appeal regarding appellee Mansei Co., Ltd. is dismissed.'

Upon the grounds stated below:

'2. (a) In an action for enforcement of a foreign judgment, it is determined pur-

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(2) Minji Sosho Ho (the Code of Civil Procedure) [1890 Act No. 29 as amended by 1948 Act No. 149, etc.] Article 200:

'An irrevocable judgment in a foreign court shall have its effect in so far as it satisfies the following conditions:

(i) the jurisdiction of the foreign court is not denied either by law or a treaty

(ii) if the defeated defendant is a Japanese, the defendant was served a summons or an order necessary for the commencement of the procedure other than by service by publication, or has voluntarily appeared without being so served;

(iii)the judgment of the foreign court is not repugnant to the public policy in Japan; and

(iv) reciprocity is given.'

Article 200 was amended and renumbered as Article 118 in the New Code of Civil Procedure (1996 Act No. 109, which went into effect on January 1, 1998). While Article 118 maintains the basic structure of Article 200 of the old Code, indent ii extends to non-Japanese and indent iii covers "the judgment and procedure of the foreign court."

suant to Article 24 of the Civil Execution Act[3] whether it satisfies the conditions set forth in Article 200 of the Code of Civil Procedure. In particular, indent iii of Article 200 of this Code requires that the foreign judgment not be contrary to the public policy of Japan. It would not be correct, of course, to jump to the conclusion that it is contrary to Japanese public policy from the mere fact that the foreign judgment contains something that our legal system has not adopted. However, if it is found to be incompatible with the fundamental principles or basic tenets of the Japanese legal system, it must be said to be contrary to Japanese public policy under the above provision.

(b) The punitive damage system under the California Civil Code is to order the offenders who have performed a malicious act to pay damages in addition to the payment of actual damages, which clearly intends to punish the offenders and to deter future acts of the same kind. Thus, in terms of the purpose, the system has the same function as a fine and other criminal punishment in this country. In contrast, the Japanese system of compensatory damages based on torts purports to restore a victim to the state in which it would have been if torts were not performed by the offender, by assessing the actual loss caused to the victim in terms of the pecuniary sum and making the offender compensate the victim for that sum (See Supreme Court Judgment, March 24, 1993...). It is not meant as a punishment of the offender or the deterrence of similar conduct in the future (i.e., general prevention). Of course, imposing on the offender liability for damages may have the effect of punishment of the offender or of general prevention. However, such is only a subordinate effect derived from the liability for damages which is imposed on the offender in order to

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(3) Minji Shikko Ho (Civil Execution act [1979 Act No. 4 as amended by 1989 Act No. 91, etc. and 1996 Act Nos.108 and 110])

'Article 24:

(1) An action for a judgment granting execution of a judgment of a foreign country shall be under the jurisdiction of the court of the general forum of the debtor or, in a case where there is no such general forum, it shall be under the jurisdiction of the district court where the matter subject to the claim or any attachable property of the debtor is located.

(2) A judgment granting the execution shall he rendered without inquiring into the correctness of the adjudication.

(3) An action under paragraph (1) shall be dismissed where the conclusiveness of the foreign judgment is not proved, or where it does not fulfill the conditions set forth in the subparagraphs of Article 200 of the Code of Civil Procedure.

(4) In a judgment granting the execution, it shall be declared that an execution is granted under the judgment of a foreign court.

restore the loss incurred by the victim. Thus, our liability system is essentially different from the punitive damages system, which has the primary purpose of punishment and general prevention. In this country, it is left to the criminal or administrative sanctions to punish the offender and to deter similar conduct in the future. Thus, it is incompatible with the fundamental principles or basic tenets of the Japanese system of damages based on torts to hold that between the parties in a tort, the victim may receive from the offender damages intended for punishment and general prevention in addition to the damages caused by the actual loss.

(c) Therefore, enforcement of the part of the Foreign Judgment ordering the appellee company punitive damages — in addition to the compensatory damages and costs shall have no effect because it is contrary to the public policy of Japan.

3. Accordingly, we affirm the judgment of the Tokyo High Court denying the enforcement of the part of the Foreign Judgment ordering payment as punitive damages....'

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Enforcement of Foreign Judgment — Judgment by a State Court in California — Enforcement of Interest Based on the Foreign Judgment

Supreme Court Judgment, 11 July 1997; 51 Minshu (6) 2530 [1997]

Mansei Kogyo Co., Ltd., et al. v. Northcon I, an Oregon Partnership

The following Supreme Court judgment deals only with the appeal by defendants Mansei Kogyo Co., Ltd. (hereinafter referred to as Mansei Co.), and its chief officer, Yoshitaka Katayama (hereinafter referred to as Katayama), to prevent the enforcement of the interest not contained in the text of the judgment. For the judgment on the appeal by plaintiff Northcon I, seeking the enforcement of the punitive damages on defendant Mansei Co., see Supreme Court Judgment, 11 July 1997; 51 Minshu (6) 2573 [1997], translated supra p. 104. The facts other than stated below are also found in the above translation.

According to Section 3294 of the California Civil Code, in an action for the breach of an obligation not arising from contract, where it is proven that the defendant has been guilty of fraud, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

On May 19, 1982, the Superior Court of the State of California rendered the judgment as stated below on grounds of fraudulent acts by Mansei Co., Katayama, and others in making a lease agreement. Mansei Co. and Katayama are to pay $425,251 as compensatory damages and $40,104.71 as costs. In addition, Mansei Co. is to pay $1,125,000 as punitive damages. On May 12, 1987, the Court of Appeals of the State of California affirmed this judgment (hereinafter referred to as the Foreign Judgment) and the Foreign Judgment became final.

Under California law, the money ordered in a judgment to be paid bears 7 percent interest from the date of judgment to June 30, 1983, and 10 percent interest from July 1, 1983. Such interest is enforceable even if it is not contained in the text of a judgment.

The original court granted compulsory execution based on part of the Foreign Judgment, excluding part that orders punitive damages against the defendant-appellant company, which orders the defendants-appellants to pay compensatory damages, costs, and the interest (hereinafter referred to as "the interest in question") on that sum at 7 percent a year on and after 19 May 1982 until 30 June 1983, and at 10 percent on and after 1 July 1983.'

Held: 'The appeal is dismissed.'

Upon the grounds stated below:

'In a decree to enforce a judgment, it is declared that compulsory execution based on a judgment of a foreign court is granted (Civil Execution Act, Art. 24 (4) ), and the compulsory execution is carried out in accordance with the judgment of the foreign court accompanied by the irrevocable decree to enforce the judgment (Civil Execution Act, Art. 22 (4)). In such a system, the declaration by the executory decree to grant the compulsory execution should be limited in principle to what is stated in the judgment of a foreign court. However, the Foreign Judgment before us makes no mention of the interest in question. On the other hand, when the clear and calculable interest is incurred on the sum of money ordered to be paid by the judgment, it is a technical matter to have the awarding of the interest stated in the judgment itself or to make it enforceable by the force of statutory provisions. To recognize the effect of the judgment of a foreign court in Japan is to recognize the effect which the very judgment has in the relevant foreign country. According to the law of the State of California, the interest in question is to occur in connection with the sum of money ordered to be paid by the judgment and is to be enforceable as such. For the foregoing reason, the judgment below should be affirmed in that it granted

the enforcement of part of the Foreign Judgment, which ordered the payment of the interest in question in addition to the payment of compensatory damages and cost.'

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## Applicable Law — Formation and Validity of International Arbitration Agreement

Supreme Court Judgment, 4 September 1997; 6 Saibansho-Jiho (1203) 6 [1997]

Nihon Kyoiku-sha Co., Ltd. v. Kenneth J. Feld

Plaintiff-Appellant Nihon Kyoiku-sha Co., Ltd. (hereinafter referred to as the Plaintiff), is a Japanese corporation and Defendant-Appellee Kenneth J. Feld (hereinafter referred to as the Defendant) is the representative of a corporation of the United States of America (hereinafter referred to as "Ringling Inc."). On October 2, 1987, Plaintiff and Ringling Inc. entered into an Agreement for the performance of the Ringling circus in Japan during 1988 and 1989 (hereinafter referred to as the Show Agreement). At the time of making the Show Agreement, Appellant and Ringling Inc. made an arbitration agreement as follows (hereinafter referred to as the Arbitration Agreement). If a dispute including the interpretation or application of the provisions of the Show Agreement is not settled, that dispute shall be submitted to arbitration, by the request of one of the parties, in accordance with the rules and procedures of the International Chamber of Commerce relating to the arbitration of commercial disputes. Arbitration initiated by Ringling Inc. shall be submitted to arbitration in Tokyo, and arbitration initiated by the Plaintiff shall be submitted to arbitration in New York City.

The Plaintiff filed this action in the Tokyo District Court against the Defendant seeking for damages based on a tort on the part of the Defendant. In addition to the assertion that the performance by Ringling Inc., was not as contemplated in the Show Agreement, it is alleged that the Defendant deceived the Plaintiff regarding the share of the profits from the sale of such products as featured the circus and the duty to pay for tents used to house animals. The Defendant moved to dismiss the action, asserting that the Arbitration Agreement between the appellant and Ringling Inc. has effect on the present action.

The Tokyo District Court granted the Defendant's motion and dis-

# Exhibit 15

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# The Blocking Legislation as a Countermeasure to the US Anti-Dumping Act of 1916: A Comparative Analysis of the EC and Japanese Damage Recovery Legislation

Mitsuo MATSUSHITA[1] and Aya IINO[2]

## I. INTRODUCTION

The US Act under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916, or, more commonly known as the "Anti-Dumping Act of 1916" (hereinafter, the 1916 Act), has not only served as the basis for lawsuits filed in the US by US entities against Japanese and EC companies, but in itself has also caused indirect chilling effects on exporters of those countries. Against these backdrops, Japan and EC brought a case against the United States for violation of the relevant WTO Agreements by the 1916 Act, a dispute which has yet to be resolved since 1998.

In the World Trade Organization (WTO), the Dispute Settlement Body (DSB) has adopted the reports of the panel and the Appellate Body (AB), confirming the US violation. In spite of such findings, the United States had not, until only very recently, signed the bill repealing the 1916 Act. According to the Understanding on Rules and Procedures Governing the Settlements of Disputes of the WTO (Dispute Settlement Understanding, or DSU), if a losing party does not implement the recommendation and rulings of the DSB, the complaining party can proceed to the process for suspension of concessions or other obligations (hereinafter, retaliation or retaliatory measures) after a certain period. Pursuant to such provisions, Japan and the EC made requests for authorization of respective retaliatory measures, and the arbitral award for the EC request was subsequently issued (while Japan requested suspension of the proceedings upon mutual agreement with the United States).

While such arbitral awards recognized to a certain extent the right for the EC to retaliate, encompassing a basis for calculating a verifiable amount of nullification or impairment suffered by the EC, the issued arbitral award set for calculation some parameters, including final judgment or disclosure of the terms of settlements, where the former was nonexistent and the latter undisclosed for commercial reasons. For Japan and the EC, such an award did not stand as a basis for retaliation in practice, since

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their companies were still left exposed to lawsuits in the United States all along these proceedings. Therefore, the EC took the first steps to adopt Regulation No. 2238/2003, which serves as a so-called "blocking legislation" for "protecting against the effects of the application of the United States Anti-Dumping Act of 1916, and actions based thereon or resulting therefrom".

As for Japan and her companies, in December 2003, Goss International Corporation, a US maker of newspaper printing presses, brought the case against its rival Japanese manufacturer, Tokyo Kikai Seisakusho (TKS) under the 1916 Act before the US District Court for the Northern District of Iowa, where after the jury verdict TKS was judged to pay around US$ 30 million. This case is now pending before the 8th Circuit Court of Appeals. Furthermore, the trustee in bankruptcy of a US marine engine company sued the company's former Japanese rivals including Yamaha and Honda under the 1916 Act at the end of 2004. Seeing these cases unfold, the momentum arose in Japan to introduce a blocking legislation similar to that of the EC, which subsequently led to the enactment of the Law No. 162 (8 December 2004).

Based on these developments, this article will review the following:

1. Dispute settlement proceedings under the DSU for both cases brought by Japan and the EC, including the substance of the reports by the panel and the AB, and the arbitral award regarding the WTO-consistency of the authorization request for retaliation;
2. EC's blocking legislation; and
3. Japan's blocking legislation.

## II. Proceedings in the WTO and the EC's Blocking Legislation

### A. Overview of the proceedings in the WTO

As mentioned above, both Japan and the EC brought the case against the United States in the WTO, but the EC's case preceded that of Japan.[3] Both procedures were unified at the appellate review phase, and were more or less in unison until the expiration of the "reasonable period of time (RPT)" for implementation after the adoption of the reports. However, when it came to the retaliation stage, they started to show some divergence. While the EC quickly stepped up to request authorization for her retaliatory measure and entered into arbitral phase, Japan chose to induce the United States to implement the DSB's recommendations and rulings, that is the repeal of the 1916 Act. The two different responses seem to have stemmed from the fact that

[3] As for the EC case, the request for consultation was made in June 1998, and then followed the Panel request followed in November. The Panel report was issued in March 2000. In Japan's case, the request for consultation was made in February 1999, followed by the Panel request in June, and the Panel report was issued in May 2000. The two Panel reports show no inconsistency with additional respective findings for independent claims brought up by either of the two.

while Japan had the above-mentioned case (*Goss International Co. v. TKS*) still pending, cases brought against EC companies were settled in the United States by the time of arbitration.[4]

The following will briefly describe the 1916 Act, the reports of the Panel and the AB, and the arbitral award.

## B. THE 1916 ACT

The 1916 Act prohibits the business activity, which is a form of international price discrimination containing two basic components: 1) an importer must have sold a foreign-produced product within the United States at a price which is "substantially less" than the price at which the same product is sold in the county of the foreign producer, (2) the importer must have undertaken this price discrimination "commonly and systematically". The condition for criminal or civil liability under the 1916 Act is that the importer must have undertaken this price discrimination with "an intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such article in the United States". The Act also provides for a private right of action in a federal district court and the remedy of treble damages for a private complainant, based on the injury sustained by that complainant in its business or property, as well as for criminal penalties in an action brought by the US government.[5]

A further striking feature of the 1916 Act is the absence of its application since its enactment in 1916 for a variety of reasons including the difficulty in establishing the "intent" requirement. The Act has been invoked, indeed, but all of the cases resulted in dismissal or settlement, until the single recent case against the Japanese company. This feature of the Act makes a significant impact when paired with the required calculation of the level of the nullification or impairment for retaliatory measures in the WTO process. In the absence of applications, how can the level of nullification or impairment caused by the 1916 Act be calculated? Or verification of the effect or damage caused by the law as such? Can the so-called chilling effect from the 1916 Act be included in the calculation? All of these questions arose at the implementation phase.

## C. BRIEF SUMMARY OF THE REPORTS OF THE PANEL/AB

The Panel and the AB focused mainly on three issues during the review. Those are: the relationship between Article VI of the GATT and the Anti-Dumping Agreement (ADA) (only in the Japanese case); the distinction of the 1916 as either

[4] Goss International Co. brought the case against TKS in December 2003, while it reached a settlement with German company in December 2002. The arbitration was suspended in January 2002, and was reopened in September 2003. WT/DS135/ARB, footnote 87 s.

[5] WT/DS162/R, paras 2.2–2.4.

mandatory or discretionary doctrine; and the applicability of GATT Article VI as well as the ADA to the 1916 Act. Besides these three issues, the injury requirement embodied in Article VI:1 was on the table due to the argued lack of such requirement in 1916 Act. We will briefly touch upon the findings and conclusions of the panel and the AB in the following subsections.[6]

### 1. *Jurisdiction Issue: Relationship between Article VI of the GATT and the ADA*

This issue arose in the US response to the claim by Japan that the 1916 Act is concurrently inconsistent with GATT Article VI and the ADA. The United States argued that in light of Article 17.4 of the ADA as well as the precedents such as *Guatemala—Cement*[7] and *Brazil—Desiccated Coconut*[8], the panel does not have jurisdiction to review the consistency of the 1916 Act as such with the ADA. The United States insisted that in *Guatemala—Cement*, the AB found that the only matters challengeable under the ADA are the anti-dumping measures set forth in Article 17.4 of the ADA (either a definitive measure, acceptance of a price undertaking, or a provisional measure), and in *Brazil—Desiccated Coconut*, the Panel decision, upheld by the AB, denied its jurisdiction to decide a claim under Article VI by noting that Article VI is not independently applicable to a dispute to which the ADA is inapplicable.[9]

The Panel in this case concluded that Article 17 of the ADA does not prevent itself from reviewing the conformity of the law as such with GATT Article VI as well as the ADA, first because there is no explicit limitations on the application of the DSU in ADA Article 17, second because such confinement to specific applications taken will result in nullification of the Article 18.4, which requires WTO Members to make their AD laws conform to the Marrakesh Agreement, and third because the factual situation of this case is different from that of the precedents upon which the United States relied.[10] The Panel also noted that Article VI of GATT and the ADA form parts of an "inseparable package of rights and obligations" and that it can make findings under GATT Article VI without the findings under the ADA, and vice versa.[11]

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[6] Other issues include: (1) the consistency of criminal liability under the 1916 Act with GATT Article VI:2 which stipulates that the only permissible remedy under the Agreement Establishing the World Trade Organization (hereinafter, Marrakesh Agreement) is AD duties; (2) the consistency with the various Articles of the ADA regarding the investigation procedures; (3) the consistency with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the ADA that require the conformity of domestic laws with WTO Agreements (and Article 18.1 of the ADA by Japan Panel only); and (4) the consistency with Article III:4 of the GATT requiring equal treatment to both imported and domestic products. The US was found to violate those Articles, except 4) where the Panel exercised judicial economy.

[7] *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, 19 June 1998, WT/DS60/R, 98-2418, 25 Nov. 1998, WT/DS60/AB/R, 98-4190.

[8] *Brazil—Measures affected desiccated coconut and coconut milk powder*, WT/DS30.

[9] WT/DS162/R, paras 6.10, 6.81–82.

[10] The Panel pointed out that the issue in *Guatemala—Cement* was whether either of the three measures should be identified or not in relation to the initiation and conduct of anti-dumping investigation, and in *Brazil—Desiccated Coconut*, the findings dealt with the non-applicability of the Agreement on Subsidies and Countervailing Measures to existing measures or investigations initiated pursuant to applications made before the entry into force of that Agreement. WT/DS162R, 6.88–6.91.

[11] WT/DS162/R, paras 6.93–6.94.

The AB supported the rights of Japan and the EC to raise the issue of inconsistency of the 1916 Act as such with GATT Article VI and the ADA, thereby upholding the findings by the Panel on jurisdictions thereof based on such grounds as the practice of GATT Panels that developed the concept of mandatory/discretionary law.[12] (Article 18.4, ADA Article 18.1, and the interpretation of dispute settlement procedures under ADA Article 17.1[13]).

2. *Nature of the 1916 Act: "Mandatory/Discretionary"*

The parties fought over the issue because the United States defended, first that with respect to both civil and criminal proceedings, US courts could interpret the 1916 Act consistently with the WTO obligations (and in fact have done so), and second, that the Department of Justice (DOJ) under the 1916 Act has the discretion on whether to initiate the criminal proceedings or not, and thus the Act is a discretionary legislation which should be found non-violative of the WTO Agreements in accordance with the GATT/WTO practice. In addition, the United States referred to *US—Cigarettes*, which ruled that the burden of proof for inability of consistent interpretation lies on the complaining party, to push that such burden must be carried by the complaining parties in this case as well.[14]

The Panels, on the first point, noted that it is simply a question of assessing the current meaning of the law.[15] Furthermore, it noted that, in *US—Cigarettes* the burden was on the complaining parties because the ambiguous term of the law had never been applied, but in contrast, the courts had applied the 1916 Act, and that the complaining parties only had to prove that the Act fell within the scope of GATT Article VI. Thus, the panels said that the factual situation in this case was different from that in *US—Cigarettes*.[16]

On the second point, the Panels noted that it indeed was a question of mandatory/discretionary doctrine[17] and after finding that the 1916 Act did fall within the scope of GATT Article VI as well as the ADA,[18] ruled that the 1916 Act could not be considered as discretionary on the basis of the DOJ's such discretion, following the precedents that found that the discretion in initiating AD investigations could not be

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[12] Particularly pointing to the "acquis" of Article XVI:1 of the Marrakesh Agreement as the relevant provision. WT/DS136/AB/R, WT/DS162/AB/R, para. 61.

[13] Article 18.4 obliges WTO Members to bring their legislation into conformity with the ADA. Article 18.1 requires the specific actions against dumping to conform with the ADA. Article 17.1 does not distinguish between claims of law as such and law as applied; in particular, Article 17.4, purpose of which is to balance on the one hand the rights of the complaining parties who seek to redress the effect of AD measures that may be inconsistent with the WTO Agreements and on the other the rights of the responding parties who face the risk of wasting their resources by being complained at some phase during AD investigations, has no influence over the rights of complaining parties to make claims of law as such. Ibid., para. 73.

[14] WT/DS136/R, paras 6.82, 6.85, WT/DS162/R, paras 6.95, 6.98.

[15] WT/DS136/R para. 6.84, WT/DS162/R para. 6.97.

[16] WT/DS136/R paras 6.86–6.90, WT/DS162/R paras 6.100–6.104.

[17] WT/DS136/R para. 6.84, WT/DS162/R para. 6.97.

[18] WT/DS136/R, 31 March 2000, paras 6.163–165, WT/DS162/AB/R, paras 6.182–184.

the basis of a discretionary legislation, and the obligation under ADA Article 18.4 to bring the AD legislation itself into conformity with the ADA.[19]

The United States repeated its claims in the AB proceedings, but the conclusion of the panel was upheld. To start, the AB stated that the GATT practice regarding mandatory/discretionary doctrine was summed up in *US—Cigarettes*, which found that a law that merely gave the discretion to the executive branch to act inconsistently with the GATT could not be challenged as such.[20] The AB then noted that the civil action initiated by private parties under the 1916 Act were not confined to the discretion of the executive branch and that the 1916 was indeed a mandatory legislation. Moreover, as for the criminal action, it continued that the discretion of the DOJ did not transform such nature of the 1916 Act into a discretionary legislation.[21] In addition, the AB agreed with the Panel's finding that the interpretation of the US courts did not fall under the discretion of the executive branch and so unrelated to the mandatory/discretionary doctrine. Thus, it supported the findings of the Panels considering the issue as a matter of determining the meaning of the law.[22]

### 3. *Applicability of GATT Article VI and ADA to the 1916 Act*

#### (a) *Applicability of GATT Article VI and ADA*

This issue was disputed because the United States argued that GATT Article VI only addresses actions taken for the purpose of offsetting or preventing injurious dumping and it is inapplicable to the antitrust law, such as the 1916 Act.[23]

The panel for the EC case stated that while GATT Article VI and the ADA are "inseparable package of rights and disciplines", this fact did not prevent the Panel from making separate findings accordingly to the reference made by the complainant, the EC.[24] The Panel found that there was a "very strong similarity" between "dumping" as defined in GATT Article VI:1 and "transnational price discrimination test" provided in the 1916 Act, and since subjectability to Article VI was defined as counteractions to "dumping" as in Article VI:1, it concluded that the 1916 Act was indeed subject to Article VI.[25] Further, the EC Panel ruled that the additional conditions found in the 1916 Act such as "substantial", "commonly and systematically", and "intention" besides the price difference test were simply the additional requirements,[26] and that neither the antitrust objective nor such categorization as an antitrust law in the United

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[19] *EC—Audio Cassette*, WT/DS136/R, para. 6.168, WT/DS162/R, para. 6.189.
[20] WT/DS136/AB/R, WT/DS162/AB/R, para. 88.
[21] Ibid., paras 90–91.
[22] Ibid., para. 101. The US appealed not the Panel's finding but its reasoning as for the discretion of the Department of Justice. The AB in any case rejected the US argument (paras 92–99).
[23] WT/DS136/R paras 6.94–95.
[24] WT/DS136/R para. 6.97.
[25] Ibid., paras 6.108, 6.118.
[26] Ibid., para. 6.112.

States changed the conclusion unless such objective or categorization altered the operation of the 1916 Act.[27]

However, the Panel for the Japan case, after noting that if the 1916 Act fell within the scope of GATT Article VI, then it also fell within the ADA,[28] it considered the following three points to determine the consistency of the 1916 Act with Article VI: (1) whether the 1916 Act addresses the same type of price differentiation as Article VI; (2) that being the case, whether the aforementioned additional requirement in the 1916 Act is relevant in determining the subjectability of the 1916 Act to Article VI; and (3) whether the measures taken under the 1916 Act are also relevant to determining the same subjectability.[29]

On the first point, the Japan Panel, as the EC Panel did, found "a very close similarity" between the two, and reached the same conclusion on the applicability of the GATT Article VI.[30] As for the second and third points, the Japan Panel followed along the similar reasonings drawn by the EC panel and concluded that those elements are not relevant in determining the scope of Article VI of the GATT.[31]

In addition to the aforementioned findings, the Japan Panel took note of the age of the 1916 Act, which is nearly 80 years old, and considered the historical context and the legislative history as well as the US case law of the 1916 Act, only to find that such consideration does not affect the conclusion.[32]

At the appellate review stage, the United States appealed these Panels' conclusions by arguing that in order for GATT VI to be applicable, the law must impose anti-dumping duties and "specifically target" dumping within the meaning of Article VI:1. The United States emphasized that the 1916 Act provides for treble damages or criminal penalties besides dealing with predatory pricing, instead of "specifically targeting" dumping, thereby making GATT VI inapplicable to the 1916 Act.[33] The United States further argued that by stipulating that the Members "may levy" AD duty, GATT Article VI:2 allows Members to choose measures which are either bound or unbound by Article VI where the former corresponds to the three measures[34] provided in ADA Article 1 as subject to GATT Article VI,[35] and the latter to measures other than those three.[36]

In light of such US arguments, we will touch upon the Panels' review on GATT Article VI:2 before turning to the findings of the AB.

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[27] Ibid., para. 6.117.
[28] WT/DS162/R, para. 6.108.
[29] Ibid., para. 6.114.
[30] Ibid., paras 6.119–6.128.
[31] Ibid., paras 6.135, 6.137.
[32] WT/DS136/R paras 6.119–162, WT/DS162/R paras 6.139–181.
[33] WT/DS136/AB/R, WT/DS162/AB/R para. 104.
[34] Definitive anti-dumping duties, price undertakings and provisional measures.
[35] Article 1 of the AD Agreement in relevant part states: "an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement..."
[36] Ibid., para. 112.

(b) *Findings of the Panel on GATT Article VI:2*

The EC argued that the purpose of the verb "may" in Article VI:2 of the GATT is not to oblige Members to impose anti-dumping duties, as confirmed by Articles 1 and 18 of the ADA. Hence, the 1916 Act which imposes measures other than anti-dumping duties such as treble damages or criminal penalties runs foul of GATT Article VI:2. Japan basically followed the EC's line. However, the United States rebutted that the verb "may" allows for WTO Members to apply measures other than anti-dumping duties, which is evident in references including the negotiating history.[37] The panels interpreted Article VI:2 of the GATT as such that the purpose of the anti-dumping measures is "to offset or prevent dumping" instead of imposing punitive measures, and thus the verb "may" gives Members the choice between anti-dumping duties which are either equal to, or lower than, the dumping margin. The Panels, consequently, concluded that the ordinary meaning of the above-mentioned terms support the view that the anti-dumping duties are the only type of remedies allowed under Article VI.[38] In addition, the Panels confirmed its conclusion by referring to the contexts of Article VI:2 such as Articles 1 and 18.1 of the ADA (including footnote 24), the negotiating history, the objective and purpose of the GATT, the ADA, and the Marrakesh Agreement.[39]

(c) *Findings of the AB*

The AB upheld the rulings of the Panels and rejected the US arguments. The AB firstly noted that the verb "may" in Article VI:2 of the GATT gives Members only a choice between imposing an anti-dumping duty or not, as well as a choice between imposing an anti-dumping duty equal to, or lower than, the dumping margin, and that "an anti-dumping measure" as provided in Article 1 of the ADA is inclusive of all measures against dumping without any explicit exemptions. In addition, it viewed that the phrase, "specific action against dumping" embodied in Article 18.1 of the ADA is action "taken in response to situations presenting the constituent elements of 'dumping'", which must, at minimum, encompass actions that may be taken "only when the constituent elements of 'dumping'" are present.[40] From these perspectives, the AB found that the 1916 Act requires the presence of the constituent elements of dumping, and such are built into civil and criminal liability under the 1916 Act as essential elements, thereby upholding the conclusion of the Panels that Article VI of the GATT as well as the ADA is applicable to the 1916 Act. As for the intention test found in the 1916 Act, the AB saw no relevance to the applicability of the Article VI to the 1916 Act, viewing it only as an additional requirement.[41]

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[37] WT/DS136/R paras 6.183–6.185, WT/DS162/R, paras 6.201–203, 6.207.
[38] WT/DS136/R para. 6.190, WT/DS162/R, para. 6.212.
[39] Only Japan panel referred to the object and purpose.
[40] WT/DS136/AB/R, WT/162/AB/R paras 116–122.
[41] Ibid. para. 132.

### 4. *Other Issues: the Consistency with Article VI:1 of the GATT*

Article VI:1 of the GATT provides for the injury requirements to impose anti-dumping measures. The EC argued that the 1916 Act is inconsistent with GATT Article VI:1 and ADA Article 3 that stipulates "material injury" requirement, because nothing in the 1916 Act ensures the correspondence with such requirement.[42] Japan added the violation of Article VI:6(a) to the EC's claims on a similar basis.[43]

The Panels took note of the intent test in the 1916 Act, but viewing that such test does not necessarily require the finding of actual injury or actual threat of injury, and concluded the 1916 Act violates Article VI:1.[44] As for the VI:6(a) violation claimed by Japan, the Panel did not make further rulings, since it saw the Article as requiring injury determination by relevant authorities of the importing Member, but not an additional obligation.[45] The United States appealed this finding solely based on the argument that the 1916 Act is out of the scope of GATT Article VI as well as the ADA, which the Panel found, being upheld by the AB, otherwise.

## D. Brief Summary of the Arbitration under Article 22.6 of the DSU

After the adoption of the reports of the Panels and the AB in September 2000, the RPT for implementation was set to expire on 26 July 2001, which was subsequently extended, in order to induce US compliance, to expire on 31 December 2001, or the date on which the session of the US Congress adjourned, whichever the earlier, upon parties' agreements. However, the 1916 Act was not repealed by the deadline of the RPT, hence the pending cases in the US domestic courts involving the companies of Japan and the EC under the 1916 Act continued.

In accordance with Article 22 of the DSU, which stipulates the process of the retaliatory stage, Japan and the EC requested the DSB for authorization of retaliation in January 2002. They both sought for suspension of their obligations under WTO Agreements in order to introduce measures similar to the 1916 Act, measures often referred to as a "mirror legislation," to be authorized.[46] This is characteristically unique to this case, because most of the past requests under Article 22 of the DSU involved suspension of concessions, which imply raising tariff concessions, together with suspension of obligations.

Against such request by Japan and the EC, the United States revoked Article 22.6 of the DSU, which enables a defending party to object the level of requested suspension, or to claim that the principles and procedures under the DSU were not

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[42] WT/DS136/R, para. 6.178.
[43] WT/DS162/R, para. 6.251.
[44] WT/DS136/R, paras 6.180–181, WT/DS162/R, paras 6.252–253.
[45] WT/DS162/R, para. 6.253.
[46] WT/DS136/15, WT/DS162/18. Unlike the EC, Japan's request simply seeks for suspension of the application of the relevant obligations under the relevant agreements solely against the US, not describing the measures in detail (WT/DS162/18).

properly followed through the arbitration.[47] The arbitral proceedings were once suspended when the bill repealing the 1916 Act was brought into the US Congress. When the bill failed, the proceedings were reactivated in September 2003, upon request by the EC.

Meanwhile, the EC introduced Council Regulation (EC) No.2238/2003, a so-called "blocking legislation", in December 2003. The essence of this regulation is, firstly, to prohibit recognition or enforcement within the EC of any judgments or actions in the United States under the 1916 Act, and secondly, to entitle EC companies or individuals that suffered from the litigations in the United States to sue those original complainants, the relevant US companies, in the EC courts to recover the damage and the costs for litigation.[48] During the arbitral proceedings, the United States argued that such introduction of the blocking legislation confirmed the level of nullification or impairment of the EC is "zero," but the arbitrators found such legislation was not within their terms of reference.[49] Section V further touches upon the EC's blocking legislation.

### 1. *Brief Description of the EC's "Mirror Law"*

According to the EC's request for authorization from the DSB, the "mirror legislation" has the following characteristics:[50] allows the EC "to impose on US companies found to dump their products in the EC additional duties corresponding to three times the amount of the damage suffered by companies in the EC" for the period of anti-dumping duties normally imposed that is five years; carries requirements for imposing the measures such as "certain specific intents" as well as other procedural aspects which are "analogous to those required under the 1916 Act"; provides that investigations be carried out by the EC authorities responsible for the application of its anti-dumping legislation instead of the courts; and will not pay back the additional duties collected to complainants.

The EC also provided the so-called "Methodology Paper" in response to the request of the arbitrators to describe the measure subject to arbitration as well as the methodology for calculating the proposed level. This paper featured the "mirror legislation" as follows: basing on the equivalent requirements as under the 1916 Act, the condition for the application of special duties are (1) the finding of dumping by a US company, (2) damage to the complaining EC company(ies), and (3) the intent to destroy or injure an industry in the EC, or to prevent the establishment of an industry in the EC, or to restrain or monopolize any part of trade and commerce of such

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[47] The US grounds for the referral of the matter to the arbitration differentiate between Japan and the EC. With respect to the EC case, the "level" was at an issue, while the violation of Article 22.3 prescribing the procedures for request for authorization was also claimed against Japan. The arbitration between Japan and the US will not be touched upon in this article, since it was suspended in February 2002 and thereafter.

[48] European Commission HP (http://trade-info.cec.eu.int/wtodispute/).

[49] WT/DS136/ARB paras 3.16–20.

[50] WT/DS136/15.

products in the EC; but differs from the 1916 Act in that it does not provide for fines or imprisonment, EC anti-dumping authorities impose duties instead of the courts, duties collected are not paid to the complainants, and there are no procedural violations of the ADA.[51]

2. *Brief Summary of the Award of the Arbitration*

In reviewing the case, the arbitrators first examined the procedural issues, and then specified their mandates as determining the equivalency of the level of retaliation requested for authorization to the level of nullification or impairment sustained by the complaining party as a result or non-compliance by the responding party.[52] When the level is determined as non-equivalent, then the arbitrators are to determine the equivalent level of retaliation, being enjoined from examining "the nature of the concessions or other obligations to be suspended".[53] In addition, as a premise of examination, the arbitrators noted that the fundamental objective of the suspension of obligations is "to induce compliance" and the concept of "equivalence" is to secure that obligations cannot be suspended "in a punitive manner".[54]

(a) *How to measure the equivalency: "qualitatively equivalent" or "quantitatively equivalent"*

The arbitrators in this case faced the examination of suspension of "qualitatively equivalent" obligation. As mentioned in the previous section, the 1916 Act has never been applied to any case but one since enactment, the fact which renders assessment of nullification or impairment sustained by the complaining party under the 1916 Act difficult. In fact, this is the very reason why Japan and the EC have requested the suspension of obligation under the covered agreement to introduce mirror legislations as retaliatory measures against US non-compliance. However, it is difficult to indicate the level of suspension quantitatively in such a form. This case is the first case where a WTO Member sought suspension of "qualitatively equivalent" obligations.[55]

In this regard, the EC argued that it is unnecessary to limit the application of the mirror legislation quantitatively, since there is no quantitative limit for the application of the 1916 Act, nor does DSU Article 22.4 set an obligation to specify a quantitative level of nullification and impairment.[56] However, the United States rebutted that rough

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[51] WT/DS136/ARB para. 2.9.

[52] Procedural issues examined are the burden of proof and the necessity for the EC to specify the obligation to be suspended. The arbitrators set the burden of proof for a violation of the alleged Article on the claimant, the US, and the rebuttal obligation to the proved presumption of such violation on the EC. They also obliged both members for establishing the existence of a specific facts, and cooperation with the arbitrators in presenting evidence. They denied the EC's obligation to specify the obligation to be suspended in light of the wording of Article 22.6 and past practices. Ibid. paras 3.4–3.6, 3.10–15.

[53] WT/DS136/ARB paras 4.5, 4.9.

[54] Ibid., para. 5.7, para. 5.8.

[55] Ibid., para. 5.17.

[56] Ibid., paras 5.10, 5.11.

similarity between the mirror legislation and the 1916 Act does not create a presumption that the level of suspension of obligations is equivalent to the level of nullification or impairment of benefits and thus there is no such equivalency. The United States further objected that US companies could be imposed a treble damage without any limitations under the mirror law, even though in the United States no company has ever been subjected to a treble damage award under the 1916 Act since its enactment. In addition, the United States argued that the past precedents consistently specified the quantifiable level of trade impairment or economic harm sustained by the complaining party as a result of non-compliance of the responding party during the RPT based on hard evidence.[57]

The arbitrators, in light of Article 22 of the DSU and precedents, noted that the suspension of obligation equal to or below the level of nullification or impairment would be considered consistent with Article 22, but punitive when applied in an exceeding manner.[58] Applying this standard to the present case, the arbitrators noted that the trade or economic effect suffered by the EC due to the 1916 Act has to be determined numerically or monetarily, and that since the mirror legislation of the EC could be applied to the US exports to the EC without limit,[59] the equivalency would not be ensured, thereby finding that the United States fulfilled its burden of proof on this point.[60]

(b) *Examination of the nature of the suspension of the obligations*

Article 22.7 of the DSU provides that the arbitrators shall determine the equivalency of the requested retaliatory measure, but not its nature. In this regard, the United States argued that the EC is asking the arbitrators to examine the nature of the measures for suspending obligations, by requesting the examination of the mirror legislation. Agreeing with the United States, the arbitrators viewed that the examination of the mirror legislation relates to the nature of the measure, and that it is out of their jurisdiction to determine the equivalency between the two measures, one being the mirror legislation which suspends obligations and the other being what caused the nullification or impairment, and hence declined to examine the mirror legislation. Then, the arbitrators moved on to determine the level of the nullification or impairment sustained by the EC under the 1916 Act so as to compare its level with that of the requested suspension of the obligations.[61]

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[57] Ibid., paras 5.13–5.16.

[58] Ibid., paras 5.21, 5.22.

[59] The Arbitrators illustrated the following hypothesis: WTO Member X exporting $10 billion worth of goods of WTO Member Y. Imposition of 10% *ad valorem* tax on all of the exports leads to the economic or trade impact worth $1 billion. When such a measure is found to be inconsistent with the WTO Agreement, X seeks to impose 10% *ad valorem* tax on all of the imports from Y, which is "qualitatively equivalent" measure (10% *ad valorem* tax). In such a case, if Y exports $100 billion worth of goods, the economic or trade impact will amount to worth $10 billion. In other words, the Arbitrators agree that "similar or even identical measures can have dissimilar trade effects" as the US argues.

[60] Ibid., paras 5.34–35.

[61] Ibid., paras 5.37–44.

(c) *The level of nullification or impairment sustained by the EC as a result of the 1916 Act*

According to the United States, the level of nullification or impairment sustained by the EC at the end of the RPT resulting from the 1916 Act is "zero," since no order was in place against EC products nor affected EC trade, and if by then the 1916 Act had been repealed, it would not have resulted in an increase in EC trade.[62] However, the EC argued that the United States owes the obligation to accept the conclusion of the Panel and the AB confirming that the 1916 Act has nullified and impaired benefits accruing to the EC. In addition, the EC argued that the level of nullification or impairment must be determined in relation to the direct or indirect benefits accruing to a WTO Member under the relevant Agreement, which includes not only the financial losses but also the deterrent effect from the 1916 Act.[63]

The arbitrators rejected the US argument by rendering the level of nullification or impairment to "something greater than zero" in light of the conclusions of the panels and the AB, but stressed that it is necessary to rely on "credible, factual, and verifiable information" as much as possible, when determining the level. The arbitrators then proceeded to the examination of the level in accordance with the prudent approach taken by earlier arbitrators to avoid claims that are "too speculative," "too remote" (*EC—Hormone (US)*; Article 22.6 arbitration), and "not meaningfully quantified" (*Canada—Aircraft Credits and Guarantees*; Article 22.6 arbitration).[64] In so doing, the arbitrators pointed to two parameters, which are the "final judgments under the 1916 Act (the amounts payable either after the appeals have been completed, or the appeal periods have expired that are made public readily verifiable)" and "settlements under the 1916 Act (disclosed, and that portions attributable to the 1916 Act could be confirmed)". However, they rejected as a parameter "deterrent or chilling effect" as too speculative and too remote in the present case. "Litigation costs" were not accepted as a parameter, either, due to lack of basis in the WTO Agreements, absence of any prior case permitting such a claim, and moreover, lack of clarity in which fees in what circumstances could be included.[65]

Applying these parameters in this case, the arbitrators found that final judgments under the 1916 Act could be included when they come out for a future calculation of the level of nullification or impairment sustained by the EC. As for the settlement under the 1916 Act, while the EC explained that the settlements among the entities of the EC and the United States were not disclosed due to their nondisclosure agreement, the arbitrators found that they could be included for EC's calculation if disclosed, and that this applies to future settlements as well, as long as determined by credible, disclosed information.[66] In essence, the award allowed the EC to suspend obligations

[62] Ibid., para. 5.45.
[63] Ibid., paras 5.47, 5.52.
[64] Ibid., paras 5.54–5.57.
[65] Ibid., paras 5.58–79.
[66] Ibid., paras 6.5–6.17.

under the GATT and the ADA on the condition that the level of such suspension would not exceed the level determined based on the parameters above.

The EC has not invoked the retaliatory measure since the issuance of the award. The terms of settlements the EC entities have agreed upon are yet to be disclosed, thus seemingly still rendering the EC unable to verifiably calculate the level of the retaliatory measure.

### E. "BLOCKING LEGISLATION" OF THE EC

The Council Regulation (EC) No. 2238/2003, a so-called "blocking legislation," triggered the introduction of a similar legislation in Japan.[67] We will analyse Japan's blocking legislation in section III of this article, so before getting into the details, we will overview the EC's blocking legislation in this section.

#### 1. *Overview of the EC's "Blocking Legislation"*

EC's blocking legislation is comprised of a preamble and four articles. The core of the legislation is Article 1 through Article 3 as well as the preamble that inscribes the background history of the legislation. The point of the entire legislation is, first, to prohibit recognition and enforcement within the EC territory of the judgments of the US courts on the 1916 Act ruling liability by the EC entities. Second, it enables the EC entities to bring a case against US entities within the EC territory to recover damages those entities suffered from lawsuits (hereinafter, the clawback provision).

Article 1 in essence provides that no judgment of a court or a tribunal and no decision of administrative authority based on the 1916 Act in the United States shall be recognized or enforced. Article 2 entitles EC entities to recover damages or costs incurred by them as a result of the application of the 1916 Act or by actions based thereon or resulting therefrom. Those that are entitled to recover are set out in Article 3 as (a) any natural person being a resident in the Community, (b) any legal person incorporated within the Community, (c) any natural or legal person referred to in Article 1(2) of Regulation (EEC) No. 4055/86,[68] and (d) any other natural person acting in a professional capacity within the community, including in territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State.

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[67] The Press Secretary/Director-General for Press and Public Relations of Ministry of Foreign Affairs, in his statement on the repeal of the 1916 Act on 4 December 2004 mentioned that Japanese government submitted a Bill similar to the EC's blocking legislation to the current extraordinary session of Parliament, recognizing the necessity of such a legislation also in Japan, and the Bill came into effect. This part of the statement appears immediately after the brief description of the EC's blocking legislation.
For the statement, http://www.mofa.go.jp/mofaj/press/danwa/16/dga_1204.html (in Japanese only)

[68] Article 1 of Regulation (EEC) No. 4055/86 states as follows:
"The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation."

Recovery under this legislation may be obtained as soon as an action under the 1916 Act is commenced (Article 2.2), claiming against those that originally brought a claim under the 1916 Act as well as any other relevant person or entity (Article 2.3). Such relevance will be determined by factors, as provided in Article 2.3 (a)–(d), including the status of business partner relationships, control relationships, and sharing employees.

The form of the recovery is prescribed in Article 2.4 as seizure and sale of assets held by the defendant who is a complainant in the US case under the 1916 Act. Assets subject to sale include shares held in legal person incorporated within the EC.

### 2. *Some Thoughts on the Blocking Legislations*

How to characterize the nature of the aforementioned blocking legislation in the WTO perspective is a difficult question. Japan wisely added an explanatory phrase, when referring to the status quo of the 1916 case in its White paper,[69] noting that such legislation is not a WTO-related measure, much less an inconsistent measure with the WTO Agreements. EC, as well, made a reference to the irrelevancy of her blocking legislation to the WTO Agreements in the press release.[70] However, these references rather cast doubts with regard to the relevance of the blocking legislation to the WTO regimes.

One may argue that such blocking legislations fall within the WTO scope as a retaliatory measure, and that the introduction of such legislation without the DSB authorization could be considered as unilateral that is prohibited under the DSU, namely Article 3.1 and Article 23.[71] Even if so, one could argue that the blocking legislation is a WTO-consistent regulation with a level equal to, or not exceeding the level of the nullification or impairment sustained by the original complainants, but only lacking the procedural formality, that is an authorization of the DSU. Following this line, however, if the legislation is another retaliatory measure, the question comes to whether a dual retaliation, the blocking legislation on the one hand and the mirror legislation on the other hand, is available to the WTO Member under the DSU. As we already discussed, Japan and the EC had already requested for authorization for their "mirror legislations" as a retaliatory measure against non-compliance of the United

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[69] Ministry of Economy, Trade and Industry, *The 2005 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners*, pp. 21–22 (English version). Japan refers her blocking legislation as "Damage Recovery Act". She insists that the Act does not seek the "redress" in the meaning of Article 23.1 of the DSU, which is interpreted as "an action to restore the balance of rights and obligations that form the basis of the WTO Agreement" in *EU—Import Measures* (WT/DS165/R), thereby rendering the Act "not violat(ing)" such Article.

[70] European Commission, "WTO Arbitrators Agree on EU Request for Sanctions in Dispute over US 1916 Anti-Dumping Act" (No. 28/04), February 24, 2004. At the last sentence, she states that her blocking legislation "does not affect any obligations of the EU and therefore did not require authorization from the WTO".

[71] Antonis Antoniadis, "The European Union and WTO Dispute Settlement: in search of a normative framework for autonomous measures", EUSA Ninth Biennial International Conference Austin, Texas 31 March–2 April 2005, p. 24.

States. It could be said that if such a dual procedure is permitted under the DSU, the legal stability might be undermined.

Other than the DSU, one may view the rights conferred to private parties to bring lawsuits to recover their damages under the clawback provisions as "an actionable subsidy" within the meaning of the Subsidies and Countervailing Measures Agreement of the WTO.[72]

On the contrary, the blocking legislation could be considered to fall outside of the WTO perspectives on the grounds that it focuses on the litigations between the private parties, and that it does not fall into the "measures" of the WTO Members, which the DSU[73] intend to cover. Under such views, the purpose of the blocking legislation could be deemed just as a confirmation for a denial of recognition and enforcement of court judgments or decisions by administrative bodies that are in any case covered by their domestic civil laws. Therefore, the blocking legislation by necessity is not a suspension of concessions or obligations as defined in the DSU. Indeed, this seems to be the very view of Japan and the EC reflected in the phrases in the aforementioned policy publications.

The position of the arbitrators in this case is rather vague. They only found that the blocking legislation falls outside of their mandate for the procedural reasons that it was not referred in the EC's request for arbitration, and noted that the United States can bring the new proceedings under the DSU if the United States sees such legislation as exceeding the level of nullification or impairment.[74] The United States has not brought the claim in the WTO to this date, supposedly because the 1916 Act has been under the repeal process anyway.

## III. A Critical Review of the Japanese Blocking Legislation (The Damage Recovery Law)

### A. Summary of legislation

In light of the legal development in the WTO and the EC as examined in section II, we will now turn to Japan's reaction to the situation by reviewing her blocking legislation or a clawback law, as well as its policy implications stemming from the introduction of such a law.

In Japan, the draft of blocking legislation or a clawback law as a countermeasure to the US 1916 Act was prepared by the Government (The Ministry of Economics, Trade and Industry, METI). The draft of legislation was submitted to the National Diet and the law passed the National Diet in December 2004. This legislation is referred to as

[72] Ibid., p. 28.

[73] Article 4.4 and 6.2 respectively requires the identification of the "measure at issue" in case of request for consultation and establishment of the Panel.

[74] WT/DS136/ARB paras 3.19–3.29.

"The Damage Recovery Law". This law has a long formal title[75] and, for the sake of brevity, it will be referred to as "the Law" in this article.

In short, the Law allows Japanese enterprises to bring a law suit in Japanese courts against US enterprises (U.S. plaintiff) which successfully collected treble damage from the Japanese enterprise (Japanese defendant) in a US court under the 1916 Act. The amount recoverable by the Law includes the amount of money that a Japanese defendant had to pay to the US plaintiff by a US court order under the 1916 Act, the attorney fees and legal or other expenses incurred. Article 2 (1) of the Law defines the US 1916 Act to be the law in the United States which was the subject-matter of recommendation adopted by the WTO Dispute Settlement Body on 26 September 2000. The Law provides that a Japanese corporate entity has the standing to bring a suit under this law. According to Article 2 (2) of the Law, the standing is given to a corporate entity established according to Japanese laws, other organizations or a person who has Japanese citizenship.

Article 3 (1) stipulates that a US plaintiff who collected treble damages by a US court decision under the 1916 Act from a Japanese defendant and thereby caused damage to the Japanese defendant is liable to pay back to the Japanese defendant the amount thus collected plus interests. Article 3 (2) further states that, if the Japanese defendant incurred legal and other expenses in dealing with the law suit in the United States, the US plaintiff is liable to pay that amount to the Japanese defendant.

Article 3 (3) provides for a joint and several liability of a subsidiary of the US plaintiff. According to this provision, a person who owns 100 percent of stocks of the US plaintiff or who is a wholly-owned subsidiary of the US plaintiff is obligated to pay the above amount jointly and severally with the US plaintiff. This provision envisages a situation where a US plaintiff has no establishment such as branch but there is a wholly owned subsidiary of the US plaintiff in Japan. By holding this subsidiary jointly and severally liable, the enforcement of the Law would be easier than otherwise.

Article 4 of the Law is concerned with the statute of limitation, i.e., any claim under the Law expires after the lapse of three years from the time when the claim arose. Article 5 provides for courts in jurisdiction. According to this provision, any legal action as provided for in Article 3 can be brought to the court which has the jurisdiction on the Japanese defendant (the plaintiff in the Japanese proceeding under the Law). Article 6 states that any judgment of a foreign court under the 1916 Act cannot be enforced in Japanese courts.

Annex of the Law states that the Law expires when the 1916 Act is abolished except for the fact that the effect of the Law continues in respect to lawsuits which had been brought up before abolition of the 1916 Act.

[75] The formal title of this law is "The Law to Provide Special Measures for the Obligation to Return the Benefit Gained Under the 1916 Act in the United States of America and Related Matters".

## B. Review of the Law

### 1. *Applicable Law*

The Law provides for recovery of damages sustained by a Japanese defendant by a court decision in the United States ordering the Japanese defendant to pay a treble damage caused to the US plaintiff because of an alleged dumping to the US market on part of the Japanese defendant. As touched upon later, an action by a Japanese defendant (the plaintiff in Japan) for the recovery of such damage is regarded as based on unjust enrichment or tort claim. Article 11 of the International Private Law[76] (a set of conflict rules) in Japan states that the applicable law for a claim based on unjust enrichment and tort is *lex loci delicti commissi* or the law of the place where the wrong was committed. However, in our situation, the wrong was committed in the United States since the US plaintiff brought a claim against the Japanese defendant in the United States and gained a judgment to collect a treble damage.

Therefore, according to the conflict rule mentioned above, it should be US laws (whether federal law or state law) which govern the dispute in the Japanese court in jurisdiction. However, if a US law applies to the situation here, it is certain that the Japanese defendant cannot recover any monetary damage sustained in the United States since the 1916 Act is a valid US law despite the fact that it was held as inconsistent with the WTO Agreements and a US law does not recognize the legal effect of WTO Agreements in the United States if there is any conflict between US law and WTO law. In the above situation, Japanese courts will probably invoke Article 33 of the International Private Law which stipulates that the applicable foreign law is not applied if, by such application, the public order of Japan is injured.[77]

### 2. *A Question About the Scope of Application*

As mentioned above, the Law is invoked only against a grant of damage awarded under the 1916 Act. However, the Law may be easily circumvented because the United States may enact a new law which authorizes similar actions, or existing US laws such as antitrust laws may authorize similar legal actions.[78] In light of this, the Japanese

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[76] *Horei* (Law 10, 1899). *Horei* can be translated as: "The Law on Application of Laws". Article 11 of *Horei* states: "The legal effect of claim regarding management of affairs without mandate, unjust enrichment or tort shall be determined in accordance with the law of the place in which the fact which has given rise to that claim occurred."

[77] Article 33 of *Horei* states: "In situations in which a provision of a foreign law applies, that provision of the foreign law does not apply if, by applying this provision, the public order or good moral in Japan is injured."

[78] For example, Section 2 of the Sherman Act may apply to a predatory pricing exercised internationally, e.g., by maintaining a high price in the country of exportation and lowering export price to the United States below the cost of production using extra-profit in the domestic market. This situation is similar to dumping covered by the 1916 Act. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 US 574 (1986); Antitrust Enforcement Guidelines for International Operations (issued by the US Department of Justice and the Federal Trade Commission, April 1995), p. 8 *et seq.*

government could have adopted a legislation which generally authorizes relief against a foreign law which is inconsistent with international treaties or conventions or which injures the trading interest of the country seriously.

Article 2(2) of the Law provides that only a Japanese corporate entity, an organization or individual who has Japanese citizenship is entitled to bring a claim based on the Law. This means that the standing to bring a suit under the Law is based on the nationality principle. A question arises as to the nature of interest that the Law seeks to protect, i.e., whether it is aimed at protecting "Japanese enterprises" or the export interests of the country. The 1916 Act would apply not only to a Japanese enterprise but also to an enterprise of any nationality as long as it is engaged in dumping from Japan to the US market. For example, a foreign company establishes a branch in Japan and, through this branch, sells domestically and also exports products to the United States. If dumping occurs, the foreign company or its branch can be subject to a challenge under the 1916 Act. Even if a treble damage is collected from this company under the 1916 Act in the United States, this company is not eligible to bring a claim on the basis of the Law against the US plaintiff in Japan since it is not a Japanese company.

However, a foreign company contributes to the export interests of Japan as long as it is engaged in export from Japan through, for example, the use of ports and warehouses, export insurance and employment of persons in connection with the export. There could have been a different legislative policy under which any enterprise (whether domestic or foreign) which is engaged in export from Japan to the United States is entitled to bring a suit in Japan against a US plaintiff when it is ordered by a US court decision to pay a treble damage to the US plaintiff under the 1916 Act.

However, a Japanese enterprise is entitled to bring a suit under the Law if it is engaged in export from a foreign country to the United States as long as the enterprise operates as a Japanese enterprise in that foreign country without establishing a foreign subsidiary. This seems to raise a policy question. It seems that whether to allow a countermeasure to any action against invocation of the 1916 Act to alleged dumping from that country to the United States belongs to the realm of policy decision of that country and Japanese courts should not lightly intervene into this field.

### 3. *Should a Claim to Recover the Amount Paid under the 1916 Act be Regarded as the Recovery Based on a Bad Faith Unjust Enrichment?*

Article 3 is the core of the Law and consists of three parts, e.g. the obligation on the part of a US plaintiff which collected a treble damage under a US court decision from a Japanese defendant (a) to pay back to the Japanese defendant the amount collected from the Japanese defendant (Article 3(1)), (b) to compensate the Japanese defendant the amount incurred by the execution of litigation in the United States such as legal expenses including attorney fees (Article 3(2)), and (c) the joint and several responsibility of the Japanese subsidiary of a US plaintiff.

Article 3(1) stipulates that a US plaintiff which has gained a treble damage at a US court under the 1916 Act must pay back that amount with interests to the Japanese defendant. The nature of this obligation is considered to be that of returning the benefit of unjust enrichment. Unjust enrichment is defined in Article 703 of the Civil Code as "Any person who has benefited by the property or services of another person without a legal reason and caused damage to that person is obligated to return the benefit to the extent that the benefit still exists." Article 704 of the Civil Code provides for unjust enrichment of a bad faith beneficiary by stating that "A bad faith beneficiary must return the gained benefit with interests". "Bad faith" signifies that a person who benefits from a property or services of another person knows or should have known that the benefit is without any legal basis.

Regarding the nature of obligation under the Law, an official of the METI (The Ministry of Economics, Trade and Industry) who was engaged in drafting the Law explained as follows:

> While the payment by an order under the 1916 Act can be considered to be without a legal cause for the reason that the 1916 Act is in violation of the WTO Agreement, it is hard to imagine that US enterprises engaged in international business are unaware of the fact that the Dispute Settlement Body of the WTO handed down a judgment that the 1916 Act is inconsistent with the WTO Agreement. US enterprises intending to bring suits under the 1916 Act usually consult with trade lawyers and it belongs to common sense among trade lawyers that this Act is contrary to the WTO Agreement.[79]

What this statement is purported to stress is that a US enterprise which brings a claim in the United States on the basis of the 1916 Act is in bad faith in the sense that it knows an inconsistency of the 1916 Act with the WTO Agreement and, therefore, should be treated as such in litigation under the Law.

The Law authorizes a Japanese defendant to recover expenses including legal and other fees incurred during the process of litigation under the 1916 Act in the United States. Such expenses cannot be considered as unjust enrichment on the part of the US plaintiff because the US plaintiff does not benefit from them. Although not specifically explained, the nature of this claim is regarded as a tort claim. Article 709 of the Civil Code which provides for tort claim states that: "Any person who has caused damage to another person intentionally or by negligence is liable to pay the damage". Therefore, there is a similar problem of how to explain the nature of claim with regard to the recovery of such expenses.

The above explanation maintains that the Law is *lex speciales* in relation to the Civil Code and the nature of legal claim according to the Law is akin to that of the Civil Code. However, the validity of this legal construction is questionable for the reason that, while the WTO Agreement is regarded as an international treaty and is above

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[79] Takashi Hirose, *Damage Recovery Act concerning the US Anti-Dumping Act of 1916*, Journal of the Japanese International Business Law (Kokusai Shoji Homu), Vol. 32, No. 12 (December 2004), pp. 1593–1599, Vol. 33, No. 1 (January 2005), pp. 25–35 (this article is in Japanese).

domestic laws in Japan,[80] the WTO Agreement is nothing but an executive agreement in the United States and has no superior power over domestic laws in the United States. Moreover, Section 102(a) of the Uruguay Round Agreements Act which implemented WTO Agreements in the United States explicitly states that, in the event of conflict between an existing US federal law and a provision of a WTO Agreement, the provision in the WTO Agreement cannot be given legal effect.[81] When a US plaintiff brings an action under the 1916 Act in the United States, it brings a suit in the context that the 1916 Act is valid and enforceable in the United States. Therefore, it seems inappropriate to attribute a subjective or personal liability factor to the US plaintiff in the sense of bad faith and hold the US plaintiff liable in Japanese law for that reason.

A more persuasive legal explanation of the nature of the Law would be to state that the legal liability of a US plaintiff is based on absolute liability or no-fault liability. A government can enact a law designed to accomplish a policy objective and, to accomplish this objective, create absolute civil liability or no-fault liability of individuals. Examples of absolute liability or no-fault liability in Japan are found, *inter alia*, in the Nuclear Energy Law, the Mining Law, the Anti-Air Pollution Law, the Anti-Water Pollution Law, the Labor Law and the Antimonopoly Law. It provides for the promotion of the nuclear energy industry and enterprises engaged in this industry are responsible to pay the whole damage caused by accidents regardless of whether there is negligence or not on the part of a nuclear energy enterprise in which premise accident occurred. In this instance, an absolute or no-fault liability is used to promote the governmental policy to promote the safety of nuclear energy and provide for the security of the people.

Likewise it is an important trade policy of the Japanese government to maintain the multilateral trading system as expressed in the WTO regime. For this purpose, it is important to secure the observance of WTO Agreements by WTO Members. To promote this policy, the Government is entitled to enact a law to take a countermeasure to a measure of other Member which violates WTO Agreements. From this viewpoint, the government can enact a law which authorizes courts to grant relief to Japanese enterprises which had to pay a treble damage in the United States under a US law which had been held as inconsistent with the WTO Agreement. The Law incorporates this trade policy and provide for relief to Japanese victims which were subjected to the 1916 Act in the form of the right of recovery. Here what matters is not a subjective responsibility on the part of a foreign enterprise as bad faith or negligence but a Japanese governmental policy to discourage suits in the United States under the 1916 Act. A

[80] Article 98, para. 2 of the Japanese Constitution states that: "Treaties that Japan has concluded and the established rules of international law shall be faithfully observed".

[81] Section 102 (a) of the Uruguay Round Agreements Act which is entitled as "Relation to the Agreements to United States Law and State Law" states that "(1) United States Law To Prevail In Conflict No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." See, for details, Uruguay Round Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements: Message from the President of the United States (24 September 1994), 103d Cong., 2d Sess., House Document 103–316, Vols 1–2.

person can be held liable even if there is no bad faith in the conduct in question if it is necessary for that policy reason. The above rationale seems to make more sense rather than a constructed or fictitious bad faith on the part of a US enterprise which brought a suit in the United States.

### 4. *Joint and Several Liability of the Subsidiary*

Article 3 (3) of the Law provides for a joint and several liability of a subsidiary of a US plaintiff by providing that a corporate entity which owns all of the stocks of the beneficiary of the 1916 Act or a corporate entity of which all of the stocks are owned by the beneficiary is jointly and severally liable to pay back the amount of the benefit and indemnify the damage. This is a device to increase chances for securing enforceability of an order of a Japanese court under the Law to grant to the Japanese defendant the recovery of benefit and damage. US plaintiffs may have no establishments in Japan and this makes the enforcement of the Law difficult. This provision is an example of application of the "piercing corporate veil" doctrine. The doctrine of piercing corporate veil signifies that when two corporate entities are separate and independent only in form but act together in substance and functionally integrated, the separateness of corporate entity can be disregarded and these two corporate entities can be treated as a single entity. Therefore, a subsidiary of a US plaintiff has a subrogate responsibility for conducts of the parent.

However, there is a loophole in this provision. Article 3 (3) of the Law requires that 100 percent stocks of a subsidiary be owned by a US plaintiff in order for the subsidiary to be covered by Article 3 (3). When a suit under the Law occurs or a suit is imminent in Japan, the US plaintiff, a prospective defendant in the Japanese proceeding, can dispose of a portion of the stocks of the subsidiary it owns and then the subsidiary is not any more qualified as an entity covered by Article 3 (3) of the Law.

### 5. *Court in Jurisdiction*

Article 5 of the Law states that a legal action on the basis of Article 3 of the Law can be brought to the court which has the jurisdiction on the plaintiff (the Japanese defendant in US court proceeding under the 1916 Act). Normally the court in jurisdiction is the court which has the jurisdiction on the residence of the defendant.[82] Article 5 of the Law is a deviation from this jurisdictional principle in that it gives the jurisdiction to the court in which the Japanese plaintiff resides. In this respect, the

[82] Article 4, para. 1 of the Civil Procedure Code states that: "A claim belongs to the court which has the jurisdiction on the place in which the defendant resides".

jurisdictional rule is somewhat anomalous.[83] The legislative intent was that the Law anticipates that, in many instances, US plaintiffs (defendants in the Japanese proceeding under the Law) have no residency in Japan and, for this reason, gives Japanese enterprises intending to bring actions to come forward to the courts which have jurisdiction over the Japanese plaintiffs, i.e., their residency. However, if a subsidiary of a US plaintiff which is a Japanese corporate entity is made the defendant in a proceeding under the Law, the regular rule of the Civil Procedure Code should apply and the court in jurisdiction should be the court which has the jurisdiction on the residency of the defendant.[84]

### 6. *Non-recognition and Non-enforcement of US Court Decision Under the 1916 Act*

Article 6 of the Law declares that a judgment against a Japanese defendant rendered in a US court has no legal effect in Japan. This is a provision for non-recognition and non-enforcement of a US court decision granting the recovery of a treble damage to a US plaintiff which is contrary to the WTO Agreement. This relates to Article 118 of the Code of Civil Procedure in Japan which states that a foreign judgment cannot be recognized and enforced if it is contrary to the public order and good moral in Japan. The question here is whether or not a judgment in the United States based on the 1916 Act granting the recovery of a treble damage is contrary to the public order in Japan.

The Japanese Supreme Court handed down a decision to the effect that a US judgment which granted the recovery of multiple damage is contrary to the public order in Japan in so far as it grants the recovery of damage in excess of actual damage sustained by the plaintiff.[85] It follows from this Supreme Court decision that a judgment of a US court granting the recovery of a treble damage under the 1916 Act is contrary to the public order in so far as it grants the recovery of damages above the amount that the plaintiff has actually sustained, e.g. that part which is in excess of the actual damage. It further follows that the decision of the US court granting the recovery of damages is recognizable and enforceable with regard to the part which is equal to the actual amount of damages sustained.

One might argue that the 1916 Act is held as inconsistent with the WTO Agreement which incorporates "the international public order", that this international public order is incorporated in the Japanese public order and that any decision of a foreign court which is contrary to the international public order is not recognizable in Japan for this reason. However, at this development of international law, any principle

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[83] This may raise the issue of *forum non-convenience*. See, e.g. *Asahi Metal Indus. Co. v. Superior Court*, 480 US 102 (1987).

[84] See note 8, *supra*.

[85] Decision of the Supreme Court, 11 July 1997, Minshu (Supreme Court Civil Cases Reporter), Vol. 51, No. 6, p. 2573 *et seq.* A summary of this decision in English is found in The Japanese Annual of International Law (1998), No. 41, p. 104 *et seq.* For details of the enforcement of foreign judgments in Japan regarding business activities, see Nozomi Tada, Enforcement of Foreign Judgments in Japan Regarding Business Activities, The Japanese Annual of International Law (2003), No. 46, p. 75 *et seq.*

in international law cannot be regarded automatically as a domestic rule. Therefore, this argument is probably too speculative and premature. The framers of the Law simply wished to override the limitation of Article 118 of the Civil Procedure Code and make sure that no part of a judgment of a US court under the 1916 Act granting the recovery of the damages sustained by a US plaintiff is recognized and enforced in Japan.

## IV. Conclusion

The Law is destined to be short-lived because it will expire when all of the pending suits in the United States against Japanese companies are finished. However, it is the first time that the Japanese government enacted a blocking statute or a clawback statute as a countermeasure to a foreign law which is inconsistent with the WTO Agreement. The Law may be an important precedent in the Japanese trade policy and may indeed signify a shift of trade policy toward "aggressive legalism".

# Exhibit 15-1

said jurisdiction agreement which is not against the spirit of International Maritime Transportation Law should be held as not being against public policy and good morals.

(5) In view of the foregoing, there is no legal ground to hold null and void at least that part of the said jurisdiction agreement concerning suits to be brought by shippers against the Defendant, so said jurisdiction provision was validly executed between the Defendant and the Institute so far as said part is concerned.

4. The Scope of the Effect of the International Exclusive Jurisdiction Agreement in the Instant Case.

The Plaintiff brought this suit demanding compensation for damages, arguing that the Plaintiff, insuren, as subrogator was entitled to the claim for damages for the destruction of the cargos that Nanyo Bussan, which the consignee of said bill of lading from the sender Institute, was entitled to. Therefore, this Court now renders its decision on whether or not the effect of said international jurisdiction agreement applies to this suit.

Firstly, the rights which the Plaintiff claims as the subject of this suit concurrently consist of, first, the claim for compensation for damages due to non-performance of the duty of the Defendant under said transportation agreement and, second, the claim for compensation for damages due to tort. It follows from the interpretation of said jurisdiction agreement that a suit maintaining the former claim as well as a suit maintaining the latter claim is a suit subject to said international exclusive jurisdiction agreement.

Secondly, this Court considers whether or not the effect of said international jurisdiction agreement between the Defendant and the Institute binds the Plaintiff. An agreement of international jurisdiction is an agreement concerning a suit. However, so far as the parties can freely determine the legal matters which are agreed to be the subject of such agreement, the effect of such agreement is interpreted to bind the successor of said legal matters.

Anything can be freely indicated in a bill of lading except matters restricted under the International Maritime Transportation Law, and the contents of covenants under the transportation agreement and a bill of lading are to be freely determined by the parties thereto. Therefore, this Court is of the opinion that the effect of said international exclusive jurisdiction agreement binds the Plaintiff.

5. Accordingly, the jurisdiction of the Japanese courts over this suit is precluded by said international exclusive jurisdiction agreement, and the suit filed with this Court is improper. Hence, this Court dismisses this suit and renders a judgment to the effect of text of the Judgment, above, applying Article 89 of the Code of Civil Procedure.

(Judges: Yoshio Murakami, Takashi Morimoto and Naoyuki Kuroda)

## TOKYO DISTRICT COURT, APRIL 26, 1965*

*Private International Law—Labor Contract—Although personal services agreement between American pilot and American air service company stipulated U.S. law, where services were rendered by employee in and employee was dismissed in Japan, as a matter of public policy the contract and the effects of dismissal will be interpreted according to Japanese law.*

PETITIONER:

Name: Frank S. George.
Nationality: The United States of America.
Address: No. 17, Kogai-cho, Azabu, Minato-ku, Tokyo.

ATTORNEYS FOR THE PETITIONER:

Michael A. Braun, Hiroshi Kawajima.

RESPONDENT:

Name: International Air Service Company Limited.
Representative: William R. Rivers.
Nationality: The United States of America.
Address: Operation Center of The Japan Air Lines, Limited, Tokyo International Air Port, Edomi-cho, Haneda, Otaku, Tokyo.

ATTORNEY OF THE RESPONDENT:

Franklin E.N. Warren.
Sub-Attorney of the Respondent: Shigeo Oshima.

Concerning the Case No. (*Vo*) 2237-1964 between the above-mentioned Petitioner and Respodent concerning a petition for provisional disposition for maintenance of position, the Court orders as follows:

TEXT OF THE ORDER:

The Respondent shall provisionally pay the Petitioner the amount of ten thousand two hundred and sixty dollars ($10,260).

The expense of the petition shall be borne by the Respondent.

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* *The Hanreijiho* (Judicial Reports) (408) 14 (June 11, 1965).

REASONS FOR THE ORDER:

The facts found by the Court based upon the explanatory materials produced by the Petitioner and the Respondent, and the legal judgment made by the Court on the basis of such fact-finding, are as follows:

I. The Process Resulting in Dismissal, etc.

The Respondent International Air Service Company Limited (hereinafter called the "Respondent Company") is a corporation organized under the laws of the State of California, U.S.A., has its head office at 1299 Bayshore Highway, Burlingame, California, and is mainly engaged in supplying crewmen to air line companies or air transporters of various countries. It is now supplying fifty-two (52) crewmen, in total, to Japanese domestic air line companies or air transporters, namely, forty-five (45) to Japan Air Lines Limited (hereinafter called "JAL") and seven (7) to Japan Domestic Air Lines Limited (hereinafter called "JDAL") (total number of the crewmen presently supplied by the Respondent Company to various countries including Japan amount to one hundred and fifty-five (155), and its business of such supply is conducted at its office established in the Operation Center of JAL, Tokyo International Airport, Edomi-cho, Haneda, Otaku, Tokyo. The Petitioner was employed by the Respondent Company on April 1, 1960 as a planemaster for a period of one (1) year, which period has been extended to date. The agreement concluded by the Respondent Company and the Petitioner involves, among others, a provision that he would be assigned to JAL during the term of the agreement, and also a provision that his claims concerning death and all kinds of diseases and injuries incurred by him in the course of, and in connection with, the exercise of his business even during the period of being assigned to JAL, would be settled in accordance with the Workmen's Accident Compensation Law of California, and he has been working as a planemaster of domestic lines of JAL since the beginning of 1961, when he was sent to JAL pursuant to the said provision.

On April 1, 1964, the Respondent Company established a seniority system with respect to the assignment of planemasters and engineers to JAL and, at the same time, it entered into an agreement with JAL containing the following matters (hereinafter called the "Agreement"):

1. Thereafter, JAL would have the authority to control the acts of the crewmen assigned to JAL by the Respondent Company, and supervise, instruct and control such crewmen, in the exercise of their business, *provided*, however, that the Respondent Company might substitute a crewman already assigned to JAL with another or replace a crewman for another, during the period of their respective assignments, in accordance with its seniority system, subject to the prior consent of JAL;

2. In case of any complaint from crewmen, the Respondent Company would be responsible for the settlement thereof if such complaint related to terms of employment or working conditions, and the representatives of both companies would make their best efforts to settle such complaint if the complaint related to interpretation of the Agreement.



The provision with respect to terms and conditions of employment in the said Agreement was deemed to constitute a part of the Labor Agreement between the Petitioner and the Respondent Company when the said Labor Agreement was renewed on April 1, 1964. On September 11, 1964, the Petitioner made a complaint in writing to James C. Jack, the manager of Tokyo Office in charge of planning and the chief of foreigners' business, of the Respondent Company, that the Respondent Company neglected the seniority right of the Petitioner which was one of the terms and conditions of the aforementioned Labor Agreement, by recommending to JAL as crewmen of jet liners, Charles Dietlich and William Bowers who were subsequent to the Petitioner in the seniority list, to promote their positions. However, the complaint was rejected by the Respondent Company. Moreover, since there were many other planemasters who thought that the said recommendation and promotion were made quite regardless of their seniority rights and there were also those planemasters who complained that the Respondent Company neglected the seniority system, the Petitioner formed a "Temporary Employees Committee" (hereinafter called the "Temporary Committee") with Albert Guinser and John Sottalery, who were prior to the Petitioner in the seniority list among the employees of the Respondent Company assigned to JAL, to talk with the Company about the selection of crewmen to be assigned to the jet liners. On September 21, 1964, they notified H. Odagiri, a person in charge of foreign operation center of JAL, of the above-mentioned complaint, and proposed that the selection of crewmen for the jet liners should be postponed until the complaint would be treated in accordance with the Agreement, because the aforementioned promotion of some employees to the crewmen of jet liners which was made in complete negligence of the existence of many others who had prior seniority rights, was not in conformity with the practice of the seniority system maintained by the Respondent Company and the spirit of the Agreement between JAL and the Respondent Company. At the same time, the Petitioner distributed circulars in the name of the Petitioner among the crewmen of the Respondent Company assigned to JAL, and informed them that—

1. He had made complaints to the Company that it neglected the seniority system, and notice of the complaints had been given to officials of JAL;

2. He had formed the Temporary Committee with Guinser and Sottalery to protest the acts of the Respondent Company, and had arranged a meeting with James C. Jack who had the above-mentioned post in the Respondent Company;

3. Upon this opportunity, crewmen should be elected in more appropriate manner.

On October 3, 1964, these three members of the Temporary Committee consulted with Jack concerning the way in which the foreign engineers would be elected the jet liners' engineers, the appropriate retirement age of engineers of the Respondent Company, etc., and reached the agreement with him that the Respondent Company and a committee representing employees of the Company (namely, a committee consisting of three members who would be elected from the six candidates comprised of three members of the Temporary Committee and the three others eliminated from among the employees of the Company) would have periodical meetings to concern about labor conditions, and any agreement

which might be reached as a result of such meeting would be submitted to the meetings of the Board of Directors of the Respondent Company for its approval. On the fifth day of the same month, the Petitioner, as the chairman of the Temporary Committee, sent the following documents in the name of the Temporary Committee to all the crewmen of the Respondent Company, namely, 1) a document reporting that the above-mentioned agreement was made as a result of consultation with the Respondent Company, and requesting elections for the determination of the three candidates as members of the committee representing employees; and 2) ballots of the election for the determination of the candidates for the members of the committee representing employees (the ballots contained not only the remark that they should be sent back to the Petitioner after the names of a candidate being filled in, but also the column to answer whether or not they would agree to the idea of forming a labor union to represent the employees if the management would not admit the establishment of the committee representing the employees, which column was accompanied by the statement that it was illegal in Japan as well as in the U.S.A. to prevent the employees from uniting for the purpose of collective bargaining).

Meanwhile, on September 28, 1964, R. Henderson, the acting chief pilot of the Respondent Company, ordered the Petitioner to submit a document of detailed explanation concerning the document which the Petitioner sent to Odagiri of JAL on September 21, and, the document being submitted by the Petitioner on October 3, the Respondent Company sent the Petitioner a written notice dated October 7 to dismiss him as of October 30, which notice was received by the Petitioner on October 10. The said notice says that the reason for the dismissal is that the Petitioner acted against the interest of the Company and its employees assigned to JAL, by sending the above-mentioned document to Odagiri of JAL on September 21, and by using stationery of the Company without permission for preparing the said document.

The salary to be paid to the Petitioner by the Respondent Company as of the time of the dismissal was U.S.$1,710, consisting of U.S.$1,440 as principal salary and U.S.$270 in various allowances. However, no salaries have been paid since October 1, 1964.

Incidentally, the Petitioner brought an appeal to the Eighth Local Division of the Federal Labor Relations Board of the United States on December 14, 1964, asserting that the dismissal of the Petitioner by the Petitioned Company constituted an unfair labor practice, which appeal was rejected by an official in charge of the local disputes of the Federal Labor Relations Board on January 21, 1965.

II. Effect of Dismissal and Claims to be Preserved.

The Petitioner asserts that "since the dismissal of the Petitioner constituted unfavorable treatment for the purpose of interrupting preparation by the Petitioner of the organization of a labor union, and the reasons for dismissal given by the Respondent Company are merely ostensible, the dismissal is null and void because of a violation of the provisions of Article 7, Item 1 of the Labor Union Law." On the contrary, the Respondent Company asserts as follows: "(1) This case is not subject to the jurisdiction of the Japanese courts because the Respondent Company has no office, place of business, or any person in charge of its business in Japan. (2) Even if it is subject to the jurisdiction of the Japanese courts, effect of the dismissal should be considered in accordance with the laws of California, because the dismissal relates to the Labor Agreement. (3) Even if the effect of the dismissal is to be considered in accordance with Japanese law, the dismissal is effective since it was made for the reason of 'breach of the Agreement, especially an act of grave misconduct,' by the Petitioner who arbitrarily engaged in direct negotiation with JAL with respect to the treatment of complaints, and for no other reasons whatsoever. (4) Even if the dismissal should be invalid, the Petitioner cannot claim payment of wages for the period following December 1, 1964, since the Labor Agreement between the Petitioner and the Respondent Company was terminated as of November 30, 1964, because the Petitioner was subsequent to others in the seniority list at the time when the number of the planemasters to be assigned to JAL under the Agreement between JAL and the Respondent Company was decreased twenty-three (23) as of December 1, 1964."



The court will consider these points *seriatim* in the following:

1. Jurisdiction

It goes without saying that a corporation organized under the laws of a foreign country is subject to the jurisdiction of the Japanese courts if it has offices in Japan and is engaged in business in Japan. Article 4, paragraph 3 of the Code of Civil Procedure should he construed to presuppose this conclusion. Accordingly, the assertion of the Respondent Company that the Japanese courts have no jurisdiction over it, cannot be supported, since, as discussed above, the Respondent Company is doing business at the present office first above-written, by offering fifty-two (52) crewmen to Japanese air line companies. Since the said office must be regarded as a "place of business in Japan" as provided for in Article 4, paragraph 3 of the Code of Civil Procedure, the Respondent Company has the general forum there, and this petition of provisional disposition is subject to the jurisdiction of this Court which has jurisdiction over the district of the said general forum of the Company. Incidentally, the fact that the Petitioner brought an appeal before the Local Division of the Federal Labor Relations Board of the United States does not affect this judgment.

2. Applicable Law

With respect to the Labor Agreement, the Court considers that the both parties have selected, as the applicable law, either the federal laws of the United States or the laws of the State of California, since the Agreement was concluded, (1) in California, the United States, between the Respondent Company, a corporation of the State of California, and the Petitioner, a national of the United States, and (2) on the condition that the Petitioner should have his domicile in the United States, or its territories, dominions or its surrounding islands during the

term of the Agreement, "in order to avoid a jurisdiction of any government other than that of the Unites States concerning labor conditions." However, the declaration of intention of the dismissal was made by James C. Jack, the manager of Tokyo Office in charge of planning and the chief of foreigners' business, of the Respondent Company, to the Petitioner who resides in Minato-ku, Tokyo, was assigned to JAL pursuant to the Labor Agreement, and has been working as a planemaster of its domestic airliners in accordance with the instructions of JAL. Under such circumstances, although the dismissal relates to the Labor Agreement, the effect of such dismissal must be considered in accordance with the labor laws of Japan where the labor is actually supplied, and the provision of Article 7 of the Law Concerning the Application of Laws in General [Horei] should not be applied so far as this matter is concerned. The reason is that, since labor laws regulating labor relations do not have a nature which is common to different nations, contrary to the general private laws which also regulate contract relations between management and labor, and each nation intervenes, from its own necessities, in labor agreements by which labor is actually supplied in said country, to restrict or regulate the freedom of conclusion of labor agreements in different ways, the Court believes it reasonable to construe that, if the labor is actually supplied in Japan on a continuous basis as seen in the present case, the principle of freedom to designate an applicable law as provided for in Article 7 of the Horei is restricted by the labor laws containing a public policy which has only a limited territorial effect.

3. Now, the Court will consider the effect of dismissal in the light of the public policy contained in Article 7, Item 1 of the Labor Union Law. The reason for the dismissal given by the Respondent Company is that "the Respondent Company assigned to JAL as well as the Respondent Company by using papers of the Company without its consent, and by negotiating directly with JAL, a customer of the Respondent Company, to give JAL the impression that the Respondent Company itself would request that the air crewmen of the Respondent Company be promoted to jet crewmen." However, although it might be a little imprudent of the Petitioner to have used the stationery of the Respondent Company for writing the letter to JAL, without its consent, there was no fear whatsoever that the letter might cause the misunderstanding that the request was made by the Respondent Company itself, because (1) the letter was written in the name of the Petitioner to inform JAL that "the complaint had been made to the Respondent Company", and (2) it only proposed to JAL to postpone an election of jet crewmen until the complaint was treated in accordance with provisions of the Agreement between the Respondent Company and JAL. Moreover, in view of the fact that the complaint had not been accepted by the Respondent Company for about ten (10) days after September 11, 1964, it would not be conceivable that the Petitioner's act of making the said proposal to JAL and his act of requesting its cooperation would necessarily result in impairing the interests of the Respondent Company and its employees; nor is there evideuce which would prove such a fact. On the other hand, the Court has found the following facts: (1) Although the dismissal is pretended to have been made after an explanatory statement had been submitted to the Respondent Company by the Petitioner on



October 3, 1963, which explanatory statement was demanded by Henderson, the acting chief pilot of the Respondent Company, on September 28 of the same year, in fact the dismissal was made in accordance with instructions given by William R. Rivers, a representative director of the Respondent Company, on September 19, namely, before the submission of the explanatory statement by the Petitioner. (2) Although the above-mentioned Jack, receiving from the Petitioner on September 21 a request to have a meeting with the Temporary Committee, promised to have the meeting around the 23rd of the same month, he went to San Francisco where the representative director Rivers was working, and the said instruction was given while Jack did not fulfil the promise after his return to Japan. (3) When Jack started for San Francisco, he had a fear that the Petitioner might form a labor union with crewmen of the Respondent Company. Taking all these facts into consideration, the Court considers it reasonable to conclude that the said instruction and the dismissal based upon it were made for the purpose of interfering with preparations to establish a labor union. Therefore, the dismissal is null and void because of its conflict with the public policy contained in Article 7, Item 1 of the Labor Union Law.

4. The Labor Agreement between the Petitioner and the Respondent Company was renewed on April 1, 1966, and the new effective term was determined to be a period of twelve (12) months thereafter, during which period the Petitioner would work as a planemaster, unless immediately terminated in accordance with the terms and conditions set forth in the Agreement between JAL and the Respondent Company. The Respondent Company asserts that the Agreement was terminated on November 30, 1964. However, the Court cannot find any evidence supporting such assertion. Accordingly, the Labor Agreement between the Petitioner and the Respondent Company continued until the last day of March, 1965, in spite of the declaration of intention by the Respondent to dismiss the Petitioner. Therefore, the Petitioner has wages receivable from the Respondent in the sum U.S.$10,260 in total, consisting of U.S.$8,640, six months' basic wage for the period between October 1, 1966 and March 31, 1966, and U.S.$1,620, six months' allowances for the same period, since the said sum can be obtained based upon such amount of basic wage and allowances as of the date of declaration of intention as are referred to in 1 above.

Incidentally, as aforementioned, the parties to the Labor Agreement selected as the applicable law either the federal laws of the United States or that of the State of California. However, it would not be necessary to look into the intention of the parties as to which of these laws they selected, since, in any event, a labor agreement gives an employee the right to receive wages from an employer. Moreover, although it is not entirely clear to the Court whether the Petitioner can sue directly for the payment of wages under each of the aforementioned laws, in case the Respondent Company is in default of performing its obligation, the Court is of the opinion that the laws of Japan, where the litigation is instituted, should govern with respect to (1) the possibility of suing for the performance of a contractual obligation of an obligor who is in default of such performance and (2) the procedures to preserve the right of an obligee. Since it goes without saying that the wage is a claim the direct performance of which

can be sued for under Japanese law, it is qualified as a claim to be preserved by provisional disposition.

III. Necessity of the Provisional Disposition.

1. Since the Petitioner has not received the wages of the aforementioned amount since October 1, 1964, and since it is self-evident, in the light of the facts as found above, that the non-payment of the wages will cause a great difficulty to the life of the Petitioner, the Court thinks that there is an emergent necessity for the Petitioner to preserve the right by this provisional disposition.

2. The Respondent Company asserts that there is no necessity of the provisional disposition, since, even if an order of provisional disposition is issued, such order will not be enforced because the Respondent Company has no assset in Japan. However, the necessity of the provisional disposition cannot be denied merely because of the non-existence in Japan of the assets which can be the object of enforcement, so long as there is a possibility of voluntary performance of the order.

IV. Conclusion.

Thus, the Court is of the opinion that the petition requesting the provisional disposition is well grounded. Accordingly, the Court grants the provisional disposition without security being furnished, and renders its decision as stated in the text by applying Article 89 of the Code of Civil Procedure with respect to the expenses of the Petition.

Dated: April 26, 1965.

Tokyo District Court, the 19th Civil Division:

Presiding Judge Justice, Toshioki Kawazoe. Justice Hidenobu Sonohe. Justice Yoshisada Matsuno.



*Hague Convention provision prohibiting confiscation of private property is merely declaratory of customary international law.*
*International Law—Customary international law may be overriden by particular agreements, except where such agreements are contrary to internationally accepted standards of public order and good manners.*
*Instrument of Surrender—The Instrument of Surrender of Japan and Orders thereunder authorizing the confiscation of private property, are not contrary to international law.*

DESIGNATION OF CASE:

Decision of the Tokyo District Court, February 28, 1966, Case No. 8, 428 (*wa*) of 1959.

PLAINTIFF:

Tokyo Suikosha (Juridical Foundation).

DEFENDANTS:

Tokyo Masonic-Lodge Association.
Tokyo Masonic Association (Juridical Foundation).

ASSISTANT INTERVENER FOR DEFENDANTS:

The State (Japanese Government).

JUDGMENT:

1. All the claims of the plaintiff are dismissed on the merits.
2. The costs of litigation shall be borne by the plaintiff.

FACTS:

I. Claims of the plaintiff.

The attorneys for the plaintiff seek the following judgment, and a declaration of provisional execution as to para. 1:

1. It is confirmed that the plaintiff owns the immovable listed on the accompanying sheets (hereinafter called "the immovable in this case").

2. The defendant Tokyo Masonic Association shall take proceedings for the

* *The Hanreijiho* (Judicial Reports) (441) 3-12 (May 1, 1966).

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