

Exhibit 2

Article 22 of the Constitution but with Article 29 which guarantees private property. However, in Article 29 there is a similar wording to that in Article 22 stating that private property can be restricted only for the purpose of promoting public welfare. Therefore, an analogy can be drawn from this case and applied to situations involving the freedom of business activities under Article 22. As touched upon earlier, in the *Forestry Law* case, the Supreme Court struck down a provision in the law which provided that a piece of woodland owned by a plural number of individuals could not be parcelled out unless the owner requesting partition owned at least 50 per cent of the whole land.

This provision in the *Forestry Law* was clearly a policy law type regulation since the purpose of this legislation was the protection of natural resources. The Supreme Court held that this provision in the *Forestry Law* was not appropriate for achieving the purpose of this law (that is, conservation) and held that it was an unnecessary restriction. We may observe that the Supreme Court looked into the substance of a policy law and scrutinized the compatibility between the objective of the law and the substance of this provision.

We should also note that the Supreme Court did not pass a judgment on the wisdom of the conservation policy which lay behind this legislation. It merely examined the usefulness of the provision in question in achieving the purpose of the law. Nevertheless, it should be stressed that we can discern a slight shift of direction as regards the attitude of the Supreme Court when dealing with cases in which the public welfare issue in relation to private enterprise activities is at issue.

1.4 International Trade Agreements

A. DIFFERENT KINDS OF INTERNATIONAL AGREEMENTS

Japan is a party to many multilateral and bilateral international trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the Friendship, Commerce and Navigation Treaty between the United States and Japan. The purpose of this section is to enquire what status international trade agreements have in the context of Japanese law.

In Japanese law, the most formal type of international agreements are treaties. Article 73(3) of the Constitution declares that the Cabinet is vested with the power to conclude treaties with foreign nations. However, the Cabinet must obtain a prior, or if the circumstances demand, subsequent, approval of the National Diet when it concludes a treaty with a foreign nation. If an international agreement is a treaty, it enjoys, under Article 98(2) of the Constitution, higher status than domestic laws. It is

generally agreed that an international agreement is a treaty under Article 73(3) of the Constitution if it affects the rights and obligations of private individuals in Japan.¹⁸ If, therefore, an international agreement contains provisions such as the restriction of an individual's conduct, it is a treaty and must be approved by the National Diet in order for it to have legal force domestically.

If an international agreement is concluded between the Japanese government and a foreign country but the agreement is not approved by the National Diet, then the agreement is regarded as an executive agreement. An executive agreement duly concluded by the Japanese government with a foreign country is part of the Japanese legal order and possesses a certain level of legal effect, even though the status and effect of an executive agreement is somewhat lower than those of a treaty. There will be a detailed discussion of the status and effect of treaties and executive agreements in a later section.

There are many types of international agreements to which the Japanese government is a party. They include: *jōhyaku* (treaty), *kyōyaku* (convention), *kyōtei* (agreement), *torikime* (arrangement), *sengen* (declaration), *giteisho* (protocol), *ketteisho* (act), *kōkanbunsho* (exchange of notes), *kōkanshokan* (exchange of letters), and *oboegaki* (memorandum). Whether an agreement falls under the category of treaties as provided in Article 73(3) of the Constitution or executive agreements depends on the substance of the agreement in question rather than the formal name for it.

Some important international trade agreements have been approved by the National Diet and are, therefore, international treaties. Prominent examples include the GATT, the IMF Treaty, and the World Bank Treaty. The Protocol of Terms of Accession of Japan to the GATT was drafted and signed on 7 June 1955 and approved by the National Diet on 29 July of the same year.

There is no need for an approval of the National Diet with regard to certain international trade agreements. They are: (1) an international agreement concerning technical details of diplomacy, (2) an international agreement concluded to provide for detailed rules of implementing a treaty that has already been approved by the National Diet, and (3) an international executive agreement within the scope of the powers authorized to the Cabinet by legislation.¹⁹

Often the Executive Branch takes a relaxed interpretation of the requirement for obtaining approval of the National Diet and does not

¹⁸ A comprehensive treatise in Japan on this subject is: Iwasawa, *Joyakuno Kokunaihōteki Kōryoku* (*Domestic Law Effect of Treaties*) (Tokyo, 1985).

¹⁹ See n. 5, above, pp. 83-4.

introduce international agreements into the National Diet for approval on the grounds that they belong to one or other of the categories mentioned above.²⁰

Also the Executive Branch takes a view that as long as an international agreement is not self-executing and requires domestic legislation to implement it, the Cabinet need not submit the agreement to the National Diet for approval since implementation takes place through domestic legislation enacted by the National Diet. In 1974, the United States and Japan entered into the United States-Japan Textile Agreement in which the Japanese government promised to impose a quantitative restriction on the export of textile products directed from Japan to the United States. The implementation of this agreement required the restriction of the export of textile products to the United States and, therefore, involved a restraint imposed on individuals' activities. However, this agreement was never submitted to the National Diet for approval.

Questions were posed by the opposition parties in the National Diet about why the agreement had not been submitted to the National Diet for approval. The Director General of the Cabinet Legislation Bureau answered the questions and stated that the agreement in question was no more than an executive agreement which did not directly impose obligations on private individuals and, therefore, there was no need to bring it before the National Diet.²¹ According to this rationale, the agreement would have no effects on Japanese exporters of textile products. However, in reality, the government invoked the export licensing requirement under the Control Law and imposed export restraint on the export of textile products to the United States. Again the rationale used by the government was that the government had been authorized by the Control Law to impose such restrictions.

B. TREATY-MAKING POWER

Treaty-Making Process

As stated earlier, the Cabinet has the power to conclude treaties with foreign nations under Article 73(3) of the Constitution subject to the approval of the National Diet. In the language of Article 73(3), prior approval is required in principle and subsequent approval is permitted only exceptionally. In practice, however, international trade agreements are often submitted to the National Diet for approval subsequent to their conclusion. So far there have been eleven cases in which the Cabinet

²⁰ See *ibid.* 84-5.

²¹ See *ibid.* 85.

sought the subsequent approval of the National Diet including the Protocol of Terms of Accession of Japan to the GATT.

Under Article 61 of the Constitution, in approving a treaty, the Lower House votes first, and, in cases of disagreement between the Lower House and the Upper House with regard to approving or not approving, the Lower House prevails.

As mentioned before, if an international agreement imposes restrictions on the rights and obligations of individuals, that is, if it changes an existing law, requires enactment of a new law, or abolishes an existing law, then it is necessary for the Cabinet to introduce it to the National Diet and obtain its approval.

Validity of a Treaty and Executive Agreement

The question of the validity of a treaty in Japanese law should be distinguished from that of the direct applicability. The question of validity is concerned with whether or not a treaty has the force of law in Japan whereas that of direct applicability is concerned with whether or not a treaty applies as a law without implementing legislation. Article 98(2) of the Constitution declares: 'Treaties concluded by Japan and established laws of nations shall be faithfully observed.' This provision is couched in generalities and the exact content is not immediately clear. However, it states that the government and citizens are obligated to respect treaties. From this, it follows that treaties are part of Japanese law and have the force of law.

The natural interpretation is that an executive agreement also has the force of law under Article 98(2) of the Constitution. This should be the correct interpretation of Article 98(2) which states that 'established laws of nations' shall be faithfully observed. Established laws of nations means customary international law and Article 98(2) requires that customary international law be faithfully observed. An executive agreement duly concluded by the Japanese government with a foreign nation should be at least equated with established customary international law which consists of cases, practices, understandings, and usages among nations. Compared with customary international law, an executive agreement provides for more formal and clear rights and obligations between the Japanese government and a foreign nation.

Direct Applicability of a Treaty

The question of whether or not treaties are directly applicable is separate from the question of their validity as discussed above. The validity question requires an inquiry into whether treaties are part of Japanese law and have the force of law in Japan. On the other hand, the question of direct applicability of treaties is that of whether treaties are self-executing or not. If a treaty is self-executing, then it can be applied without any

implementing domestic legislation. However, if it is not self-executing, in order for it to be domestically applicable, it needs implementing domestic legislation.

Whether or not a treaty is self-executing is determined by the wording employed, the intent of the contracting parties, and the circumstances under which the treaty came into force. Generally speaking, it should be maintained that treaties are applicable as law in Japan since their observance is mandated by Article 98(2) of the Constitution and, from this constitutional command, it can be inferred that treaties are applicable as law.

However, sometimes there are phrases in a treaty which can be interpreted as not having been intended to be self-executing. If so, the treaty in question should be held as not self-executing. A good example is the decision of the Supreme Court in the *Shiomi* case²² which was handed down in 1989. In this case, the petitioner was a disabled person who had been naturalized to Japan. She was born in Korea when Korea was part of Japan. Her naturalization took place in 1970. She applied for a welfare pension under the Welfare Pension Law which came into effect in 1959 but was denied for the reason that pensions could be granted only to Japanese citizens and when the law in question came into effect she was not a citizen of Japan. She argued that the International Covenant on Economic, Social, and Cultural Rights (ICESC), to which Japan was a party and which stated in Article 9: 'The State Parties . . . recognize the right of everyone to social security', required the Japanese government to grant pension rights to her.

The Supreme Court rejected the argument of the petitioner on the ground that Article 2(1) of the Convention stated that the member states 'take steps with a view to achieving progressively the full realization of the rights . . .'. This clause indicated that the Convention did not confer a right on individuals but merely imposed an obligation on the member states progressively to take steps to realize the content of the Convention.

In the ICESC, there were clauses which clearly stated that the member states were obligated progressively to take steps to realize the rights of individuals to social security. However, courts may rule that even an international agreement which contains no clear wording indicating that it is not self-executing has no direct applicability.

C. TREATIES AND DOMESTIC LAWS

An Overview

When the requirement under a treaty and that under a domestic law are in conflict, which prevails over the other? This question is directly related

²² Decision of the Supreme Court, 2 Mar. 1989, *Shomu Geppo*, 35 (1989), 1754 *et seq.*

to that of the applicability of treaties, since no question arises as to whether a treaty or a domestic law prevails when they are in conflict if a treaty is not directly applicable because then there would be no clash between the two requirements or obligations to be reconciled. However, if a treaty is directly applicable and provides for certain rights or obligations and if a law exists which carries conflicting rights and obligations, then one or the other should prevail.

Many commentators in Japan maintain that a treaty should override a conflicting domestic law.²³ Among the reasons given by the commentators, that based on Article 98(2) of the Constitution is probably the most important. Article 98(2) declares that treaties and the established laws of nations shall be faithfully observed. Under this article, treaties are given a special constitutional status as compared with regular domestic laws. From this constitutional provision, it follows that the National Diet is obligated to enact a law which would not conflict with the requirement of a treaty. If the National Diet did enact a law which conflicted with a treaty, then the legislation would be contrary to the constitutional requirement and should be overridden.

However, there is no court decision yet in which a domestic law which was in conflict with a treaty obligation was held invalid for that reason. In the *Jewellery Smuggling* case (1961),²⁴ the Kobe District Court dealt with a violation of the Customs Law. A foreigner smuggled jewellery into Japan declaring that the jewellery he possessed was his 'personal effects' although in fact it was for sale in Japan. The court found him guilty of evasion of the Customs Law.

The defendant argued that Article 8(3) of the GATT, which stated that the Contracting Party shall not impose a penalty for minor breaches of customs regulations, restrained the Japanese government from imposing any penalty in this case. The court rejected the defence on the ground that the defendant's conduct was more than a minor offence. However, in referring to Article 98(2) of the Constitution, the court stated: 'the principle of faithful observance of treaties . . . is understood to proclaim superiority of treaties [over domestic law].'

The Kyoto Necktie Decision

The *Kyoto Necktie* decision is probably the most important decision with regard to the relationship between treaties and domestic laws. There are three decisions with regard to the *Kyoto Necktie* case: the decision of the

²³ See e.g. Sato, *Nihonkoku Kenpo Gaisetsu (A General Explanation of the Constitution of Japan)* (Tokyo, 1980), 467-9; Takano, *Kokusaiho Gairon (A General Theory of International Law)* (Tokyo, 1969), 84.

²⁴ Decision of the Kobe District Court, 30 May 1961, *Kakyū Keishū*, 3/5-6 (1961), 519 *et seq.*

Kyoto District Court,²⁵ that of the Osaka High Court,²⁶ and that of the Supreme Court.²⁷ The background to this case is rather complicated, and an account is given below.

Japan was at one time the major producer and exporter of raw silk. However, in recent decades, Japanese raw silk farmers have lost their international competitiveness because of the spiralling costs of production in Japan compared with those in neighbouring countries, especially Korea and the People's Republic of China.

To deal with this situation, the National Diet enacted the Silk Price Stabilization Law which established a price stabilization programme. Under this law and its regulations, the government set upper and lower price limits within which the domestic price of raw silk should stay. When the market price went above the upper limit, the Silk Business Agency (Sanshi Jigyodan, a government corporation) sold raw silk from the stockpile it held and brought the price down to within the predetermined limits. If the price of raw silk went below the lower limit, then the Agency purchased raw silk to make the price go above the lower limit. In this way, the price was manipulated to stay within the predetermined range.

So, under the stabilization programme, the government was authorized to engage in either selling or buying operations depending on the market situation. However, the real problem with which silk growers in Japan were faced was that of over-production and falling prices. Consequently, the main function of the Agency was to engage in the purchase of raw silk and to support of the market price in Japan. If low-priced foreign raw silk had been allowed to enter the Japanese market freely, then the price stabilization programme under the Silk Price Stabilization Law would have been disrupted since the imported silk would have pushed the domestic price below the lower limit even though the Agency bought up domestically produced raw silk.

An amendment was made to the Silk Price Stabilization Law and, under this amendment, the Silk Business Agency was given the exclusive right to import raw silk from abroad. Under the law, the Agency imported raw silk from abroad but was prohibited from selling it in the domestic market when the domestic price was below the price limit described above. When it sold imported silk in the domestic market, it had to sell it at a price within the price band determined by the Minister of Agriculture. Under this price-stabilization programme, the exclusive import of foreign-

²⁵ Decision of the Kyoto District Court, 29 June 1984, *Hanrei Taimuzu*, 530 (1984), 265 *et seq.*

²⁶ Decision of the Osaka High Court, 25 Nov. 1986, *Hanrei Taimuzu*, 634 (1986), 186 *et seq.*

²⁷ Decision of the Supreme Court, 2 Feb. 1990, *Soshō Geppō*, 36/12 (1990), 242 *et seq.*

produced silk by the Agency and the restricted price at which imported silk was sold, meant the price of raw silk in Japan was much higher than the international price of this product. Japanese producers of neckties in the Kyoto area had to use fabrics made of this high-priced raw silk. In Europe, raw silk is not produced and there are no protective measures for raw silk production and imports of raw silk are freely accepted. The price of raw silk in Europe was much lower than in Japan. Producers in Korea and Mainland China exported raw silk to the European countries. European necktie producers produced ties using fabrics made of inexpensive raw silk, and they exported the ties to Japan. Even though 17 per cent *ad valorem* tariff was imposed on imported ties in Japan, Japanese tie producers had difficulty in competing with imported ties from Europe because of the differences in costs.

Tie producers in the Kyoto area brought a legal action in the Kyoto District Court against the government and claimed that their interests were adversely affected by the restrictions on the import and the high price of raw silk. They maintained that this measure of the government protected silk growers at the expense of tie producers, unreasonably restricted the right of tie producers freely to import silk from abroad, and violated Article 22(1) of the Constitution.

The plaintiffs also alleged that the measure was in violation of Article 2(4) of the GATT, which stipulated that whenever a tariff concession under the GATT had been made for a commodity which was an object of state trading, a contracting party should not sell the commodity in the domestic market at a price which was above the actual import price plus tariff, i.e. earn a profit, and in violation of Article 17 of the GATT which required that state trading agencies operate on commercial considerations only in terms of price, quality, and availability. Their argument was that the Silk Business Agency was required by law to sell imported raw silk at the price which was artificially determined by the government and this was contrary to those articles of the GATT, and, since the GATT had been ratified by the National Diet as a treaty, it should override a conflicting law under Article 98(2) of the Constitution.

The Kyoto District Court held that the freedom of business activities guaranteed under Article 22(1) of the Constitution was subject to restriction for the public welfare and that courts should refrain from lightly passing judgment on the wisdom of legislation designed to achieve a socio-economic policy objective. This is nothing but a repetition of the doctrine which had been enunciated by the Supreme Court, as we have already seen in a previous section.²⁸

The court also held that the tariff imposed on imported ties protected

²⁸ See 1.3, below.

domestic producers of ties, that the government could invoke Article 19 of the GATT and take safeguarding measures if the condition of Japanese tie producers had seriously deteriorated, and that, for the above reasons, the plaintiffs had not been disproportionately disadvantaged by the government protection of silk growers.

With regard to the compatibility of the exclusive import system under this law with the GATT, the court rejected the arguments of the plaintiffs and upheld the validity of this law and measure. The court stated that the exclusive right to import and the price stabilization system in this case were designed to protect raw silk producers from the pressure of imports for a while and this had the same effect as the emergency measures permitted under Article 19 of the GATT;²⁹ that although there should be a limit to the period for the exclusive right to import judging it as an emergency measure, such a limit should be determined flexibly depending on the situation; and that, since this period should be decided in relation to the duration of the pressure of imports, the provision of the law for the exclusive right to import could not be regarded as unreasonable.

As above, the court argued that, as an emergency measure, the exclusive right to import was not incompatible with the GATT which would permit this under Article 19 of the GATT. As long as the exclusive right to import was lawful under the GATT, it was not necessary for the court to decide the effectiveness of the Silk Price Stabilization Law and the exclusive right to import raw silk as a domestic law. However, the court went on to state its position on this matter in the form of a dicta.

The court stated that, following a violation of a provision of the GATT, it would pressure the country to rectify the violation by confronting that country with a request from another member country for consultation and retaliatory measures. However, it further stated that it would have no more power than that and, therefore, it would not necessarily follow that the legislation in question was invalid as a domestic law simply because it was contrary to the GATT.

The position expounded by the court was that a violation of the GATT should be remedied by resorting to the dispute settlement procedure provided in Article 23 of the GATT and that even though a domestic law was contrary to the GATT, it would not be deprived of its legal effectiveness by that reason alone.

The case was taken to appeal in the Osaka High Court which handed down a decision on 25 November 1986. With regard to the issue of whether the exclusive right to import in question was contrary to the freedom of business activities as guaranteed under Article 22(1) of the

²⁹ Article 19 of the GATT permits contracting parties to take emergency measures to protect a domestic industry from the impact of an increase in imports by way of import quotas or tariffs when a domestic industry is suffering serious injury from it.

Constitution, the Court upheld its compatibility by simply reiterating the doctrine pronounced by the Supreme Court in previous cases.

As to the issue of the compatibility of the exclusive right to import with the GATT and the validity of this law, the Osaka High Court distorted the issue by stating that the appellants argued that the sale price of imported raw silk was contrary to Article 2(4) and Article 17 of the GATT and that the sale price was determined by the Silk Business Agency on the basis of the standard price established by the Minister of Agriculture. The Court held that the argument of the appellants did nothing but use the action of the Silk Price Agency as the basis for the illegality of the legislation and, therefore, was wrong.

An appeal was taken by the petitioners to the Supreme Court. The petitioners presented a detailed petition. An account of the part of the petition which deals with the relationship between the Silk Price Stabilization Law and the GATT is made below since its contents are relevant to our discussion. The petitioners argued that under Article 2(4) of the GATT, a state trading agency shall not sell imported products in the domestic market at a price above the import price plus the amount of tariff and earned extra profit when the imported product in question is subject to tariff concession under the GATT. Also under Article 17(1) of the GATT, each Contracting Party promises that its state trading agency operates on commercial considerations only. The exclusive right to import is established under Articles 12.13.2 and Article 12.13.3 of the Silk Price Stabilization Law. These provisions of the law are contrary to Articles 2(4) and 17(1) of the GATT and the enactment of those provisions is illegal in that the Diet passed provisions of law which violate the GATT. The petitioners argued that the damage had been caused by this illegal legislation and did not argue that the actions of the Silk Business Agency were contrary to the GATT.

The Osaka High Court, however, was mistaken in its understanding of this legal issue and decided the matter on a wrong basis. If the arguments of the petitioners in the Osaka High Court had been unclear, then the Osaka High Court should have used its power for requesting explanation of the meaning and come up with the correct interpretation of the issue.

The Osaka District Court did not touch upon the question of whether the exclusive right to import and the price stabilization programme violated Articles 2(4) and 17(1) of the GATT and the measures granted under those provisions amounted to a safeguard measure as permitted under Article 19 of the GATT. Article 19 of the GATT permits a safeguard measure when there is an increase of imports due to unpredictable circumstances. However, in this case, an increase of imports of raw silk from abroad had been long anticipated and, therefore, the measures did not satisfy the requirements of Article 19.

Also, Article 19 permits a safeguard measure within the necessary limit and time period. However, the exclusive right to import provides an excessive protection to domestic growers of raw silk and a permanent system for import control. Therefore, such measures cannot be permitted under Article 19 of the GATT.

Moreover, the decision of the Kyoto District Court states that the effect of a violation of a GATT provision is simply that the violating country will be faced with the request for consultation under Article 23 of the GATT or with a retaliation and that there is no legal effect other than this. However, in the view of the petitioners, the measures designed to guarantee the effectiveness of treaty observance are an entirely separate issue from the validity of a domestic statute in violation of the GATT and, therefore, cannot provide the grounds for holding that a domestic law in violation of the GATT is valid.

The Supreme Court handed down a decision in this case on 6 February 1990. The decision consisted of only twenty-five lines and said very little. The Supreme Court briefly touched on the constitutionality of the exclusive right to import under the Silk Price Stabilization Law, cited the previous decisions rendered by the Supreme Court, and noted that, in view of the precedents, the judgment as to whether domestic silk growers should be protected belonged to the realm of legislative discretion which should not be lightly interfered with by courts and that the decision of the National Diet to protect domestic silk growers by means of the price stabilization programme and the exclusive right to import could not be legally challenged unless the law provided protection to one group to the undue detriment to other members of the society or the means for achieving the legislative objective was unreasonable. For this reason, the Supreme Court upheld the decisions of the lower courts.

With regard to the issue of whether or not the exclusive right to import and the price stabilization programme violated articles in the GATT and was, for this reason, invalid, the Supreme Court merely stated: 'In light of the reasoning given by the original court, the judgment of that court can be approved. Therefore, there is no illegality in the decision as claimed by the petitioners.'

An Evaluation of the Case Law with regard to the Relationship between Treaties and Domestic Laws

There is a wide gap between the legal doctrine with regard to the superiority of treaties over conflicting domestic laws propounded by commentators and some court decisions on the one hand, and the consequences of the decisions which deal with this relationship on the other. In brief, treaties are given a very high status in the legal order in the

Japanese legal system but, in actuality, courts have never nullified domestic laws on account of their incompatibility with treaties.

The only court case in which this issue was squarely dealt with is the *Kyoto Necktie* case. In this case, the Kyoto District Court recognized that there was a possibility of conflict between the treaty obligation under the GATT and the domestic regulation incorporated in the Silk Price Stabilization Law. But, after examining the issues, the court held that there was no conflict between the articles of the GATT and the provisions of the law. One of the reasonings given by the court for holding that the exclusive right to import and the price stabilization programme did not violate Article 2(4) and Article 17(1) of the GATT was that the import measures in question could be justified under Article 19 of the GATT, which recognizes the power of Contracting Parties to use import quotas and other import measures temporarily and with compensations to other Contracting Parties when an increase in imports is causing serious injury to the domestic industry producing the same or competing products.

The reasoning of the Kyoto District Court in this regard is hardly persuasive. Whereas Article 19 of the GATT requires that there be serious injury to the domestic industry; that relief measures be temporary, and compensation be granted to other Contracting Parties, the measures provided in the Silk Price Stabilization Law do not require serious injury to be found nor is there any procedure in the law to determine serious injury. The exclusive right to import under the Silk Price Stabilization Law should last 'for a while' but, in actuality, it has lasted since its enactment (i.e. for seventeen years) and there is no prospect of its being revoked. This hardly satisfies the requirement that the relief be temporary. Furthermore, there is no provision for compensation. The Supreme Court could have given a close look at this issue and stated its legal position with regard to it.

The Kyoto District Court further stated that the provisions in the Silk Price Stabilization Law for the exclusive right to import and the price stabilization programme would not be denied validity as domestic laws for the reason that they were incompatible with the provisions of the GATT even if they were contrary to those provisions. The reason given by the Kyoto District Court is that the GATT provided in Article 23 as relief to violations of its provisions, that the violating party would be confronted with the possibility of consultation or retaliation, and that relief in the GATT should be sought in this dispute-settlement mechanism.

As argued by the petitioners, however, the simple fact that the GATT provides for the dispute-settlement process does not mean that there should be no remedy in the domestic legal order if a domestic law is in violation of the GATT and a party is suffering from this violation. Moreover, private parties cannot utilize the dispute-settlement process as

provided by Article 23 of the GATT. It is only the government of a Contracting Party which can make use of this process. Viewed in this way, the rationale, used by the Kyoto District Court for denying relief to the plaintiffs, that the remedy provided in Article 23 of the GATT for violations of provisions of the GATT precludes other relief in domestic law is hardly persuasive, since the private plaintiffs could not have utilized the procedure under Article 23 of the GATT. Also, in this case, it was the Japanese government which exercised the restrictions of imports which were alleged to be in violation of the GATT and, therefore, the private plaintiffs could not have petitioned the Japanese government to invoke the dispute-settlement procedure under Article 23 of the GATT. In any event, the Japanese government is not obligated to bring a claim under Article 23 of the GATT even though private parties have petitioned the government to that effect.

As stated earlier, Article 98(2) of the Constitution provides for the supremacy of treaties over domestic laws. Also, as some commentators argue, it follows logically that the National Diet is obligated not to pass laws which contravene treaties and that, if the National Diet does enact a law which violates a treaty, then that domestic law should be overridden by the treaty.³⁰

It may be observed that this high constitutional status of treaties may have had the paradoxical effect of inhibiting courts from closely examining the relationship between treaties and domestic laws when they come into conflict and declaring the domestic laws as invalid. And this may have serious political consequences. For example, if the Supreme Court decided that a law setting up the import quotas on agricultural products (say 'rice') was in violation of Article 11 of the GATT and, for this reason, null and void, then all the laws and regulations which establish such quotas or restrictions may have to be held invalid as the matter of domestic law in Japan. Even though this may be a desirable consequence in the long run, the political impact of such decisions is far-reaching and is going to produce strong reactions from interest groups, at least in the short run. Yet the Supreme Court and lower courts may have no choice but to hold that a domestic law in violation of the GATT and other international trade agreements is null and void under Article 98(2) of the Constitution. The only alternative is to avoid the issue.

As examined earlier, there are some court decisions which confirmed the supremacy of treaties over domestic laws but such statements were made as *dicta* and in situations in which courts did not have to invalidate the domestic laws in question. The Kyoto District Court did squarely face the question of whether or not a domestic law was in violation of the

³⁰ See writings cited in n. 23, above.

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GATT and, if so, whether the domestic law should be held invalid. The Court decided against those questions but with dubious reasonings. As we saw, the Osaka High Court distorted the issue and, in effect, avoided facing such questions. The Supreme Court simply did not take up the question.

As we have seen, the petitioners in the *Kyoto Necktie* case brought forth detailed arguments as to the relationship between the GATT and the exclusive right to import and the price-stabilization programme under the Silk Price Stabilization Law, and distinguished the legal points they wished to bring up from the decision of the Osaka High Court. From simply reading the briefs of the petitioners, it is clear that they clarified their positions with regard to this issue. In light of this, it is quite strange that the Supreme Court dismissed the argument of the petitioners simply declaring that there was no fault in the decision of the Osaka High Court. A possible explanation for the attitude of the Supreme Court is that the Supreme Court did not want to take up this issue and wished to avoid answering the question as to whether the provisions in the Silk Price Stabilization Law were in violation of the GATT and, if the provisions were in violation of the GATT, the domestic law effects of such provisions.

D. TREATIES AND THE CONSTITUTION

An Overview (Two Schools of Thought)

The question here is whether the Constitution is superior to treaties or the other way round. This question may look absurd. However, there have been some controversies with regard to this issue. In short, there are two schools of thought. One school, which may be termed 'the treaties supremacy school', holds that treaties are superior to provisions of the Constitution. The school which may be termed 'the Constitution supremacy school' maintains that the Constitution is superior to treaties.³¹

The treaties supremacy school was quite popular shortly after the Second World War and it brings up the following grounds for its validity. Article 98(1) of the Constitution states the supremacy of the Constitution over 'law, ordinance, imperial decree or other acts of the government' and that 'treaties' are not included in this wording. Article 98(2) of the Constitution declares that treaties should be faithfully observed, and so if those two constitutional provisions are read together it would follow that treaties are superior to the provisions in the Constitution. Article 81 of the Constitution empowers the Supreme Court to review the constitutionality of 'law, order, regulation or official act', but here again

³¹ Sato, n. 23, above, pp. 467-9.

treaties are not included. This school points out that the basic tenets of the Constitution are 'internationalism' and that treaties which incorporate agreements and consensus should be regarded more highly than the Constitution which incorporates only the consensus in one country.

On the other hand, the Constitution supremacy school bases its beliefs on the following grounds. Article 81 of the Constitution, which provides for the power of the Supreme Court to exercise judicial review on law, order, regulation, or official act, does not explicitly exclude treaties from its scope, and therefore there is reason to infer that treaties are included. Article 98(2) of the Constitution, which declares the obligation faithfully to observe treaties, refers to the domestic legal order only. This may be taken to mean that treaties are supreme over domestic laws but it does not refer to the relationship between treaties and the Constitution. Therefore, this provision does not necessarily exclude treaties from the scope of a judicial review to be exercised by the Supreme Court.

The treaty-making process is similar to the legislative process and, in this sense, treaties are equated with domestic laws. It follows, therefore, that treaties are subject to judicial review as much as regular domestic laws.

Also the amendment process of the Constitution is much more stringent than the treaty-making process. In amending a provision of the Constitution, there must be a National Diet initiative, approval by two-thirds or more votes of all members of the House of Representatives and the House of Councillors, and a referendum. On the other hand, a treaty can be made if the Cabinet concludes it with a foreign nation and the National Diet gives prior or subsequent approval to it—a much lighter requirement compared with the constitutional amendment.

If a treaty is given supremacy over the provisions of the Constitution, then the requirement of a provision in the Constitution can be *de facto* amended easily by concluding a treaty whose content is inconsistent with that of the constitutional provision without resorting to the constitutional amendment process provided for in the Constitution. Important provisions in the Constitution such as the basic human rights provisions could then be changed simply by making a treaty which denies them: an absurd proposition. The above is an outline of the arguments brought up by the school of thought which advocates the supremacy of the Constitution over treaties.

The Sunagawa Case

There is no court decision yet in which a treaty was held void due to its conflict with the Constitution. Nor is there any case in which a court exercised the power of judicial review over a treaty in light of the constitutional principles. However, the decision of the Supreme Court in

the *Sunagawa* case³² is relevant here, and an account is made of this case below.

Based on the Security Treaty between the United States and Japan, the governments of both countries entered into the Administrative Agreement (the Status of Forces Agreement). To implement this agreement, the Japanese government enacted a law entitled the Criminal Special Measures Law which made it a criminal offence to trespass on the properties used by the United States Forces in Japan. There was an anti-American demonstration organized by a political group near the Sunagawa Air Base used by the United States Air Force, and some members of the demonstrating group broke into property used by the United States Air Force. They were arrested, tried under the Criminal Special Measures Law, and found guilty. An appeal was made by the defendants and the case was tried in the Supreme Court.

An argument was put forward by the defendants that the Security Treaty, which was the basis of the Administrative Agreement and the Criminal Special Measures Law, was contrary to Article 9 of the Constitution, which renunciated war as a means of settling international disputes, and was void.

The Supreme Court held that it would not exercise its power of judicial review over the Security Treaty since this treaty was highly political in nature. Therefore, as far as the solution of this particular case was concerned, the Supreme Court relied on 'the political questions doctrine' and stated that the Supreme Court was barred from reviewing the treaty in light of its constitutionality. However, there is an important phrase in its decision which implied that the Supreme Court *would* in certain circumstances exercise its power of judicial review over the constitutionality of a treaty. It stated: 'The Security Treaty . . . must be regarded as having a highly political nature. . . . Consequently, the legal decision concerning its constitutionality has a character unsuitable in principle for review by the Supreme Court, *unless its unconstitutionality or invalidity is obvious*' (emphasis added).

It is generally understood that, in this decision, the Supreme Court admitted in the form of a *dicta* the possibility that a treaty could be reviewed regarding its unconstitutionality if its unconstitutionality or invalidity was obvious. What the circumstance is under which such a review can be made is not clear yet. This question is still open to future determination. However, this statement of the Supreme Court seems to reinforce the position of the Constitution supremacy school as opposed to the Treaties supremacy school.

³² Decision of the Supreme Court, 16 Dec. 1959, *Keishū*, 13/13 (1959), 3225 *et seq.*

E. JUDICIAL REVIEW OF TREATIES

According to the preceding discussions, the Supreme Court and lower courts can exercise judicial review on treaties on certain occasions. Since, in the judicial review process, treaties are equated with laws, the grounds for judicial review would be similar to those which are used in reviewing regular domestic laws. Generally speaking, therefore, courts examine whether provisions in a treaty violate constitutional principles. In the realm of economic regulation, the relevant constitutional principles include, *inter alia*, the freedom of business activities (Art. 22(1)) and the guarantee of private property (Art. 29). The same principles apply here as those which are applied when examining the relationship between the constitutional principles and domestic laws.

As we have already examined, there are two principles which have developed from previous Supreme Court decisions on this matter: when the domestic law in question is 'policy law type', then courts examine closely whether the law in question does not exceed the necessary minimum regulation and, if it does, courts do not hesitate to hold it as unconstitutional. On the other hand, if a law is 'policy law type', then courts in principle refrain from passing a judgment on the wisdom of the legislation and from holding it as unconstitutional, unless the law in question clearly provides an excessive control or the methods employed are unreasonable.

In treaties concerning international trade, it is possible to identify those two types of agreements. One of them is that type of international trade agreement in which measures based on socio-economic policies are incorporated and the other is where measures for public order, safety, maintenance of health, and related matters are included. If a treaty belongs to the former type, then the scope for judicial review is rather limited, whereas courts can exercise wider powers on a treaty which incorporates measures of 'policy law type'.

1.5 Different Regulatory Methods

A. THE LEGAL FRAMEWORK FOR ECONOMIC PLANNING

Programme Laws

Although the Japanese economy is basically a market economy, there are various governmental acts which affect business activities. What legal methods are used to achieve government policy objectives? In this section, we will briefly survey such legal forms and methods. Of course, the forms of government involvement in today's economy are many and

[Exhibit 2-1]

I. Public International Law*

Tax and Customs Evasion — Direct Applicability of WTO Agreement — Validity of Domestic Act Conflicting with International Treaty — Article 98(2) of the Constitution — Discretion of Legislative and Administrative Powers

Tokyo High Court, Judgment, November 27, 2013;
66 Kosai Keishu (4) 1 [2014]**

Prosecutor *v.* X

The defendants are a company and its representative director, whose business is the sale of processed meat products. The representative director (hereinafter, X1) was indicted under the Corporation Tax Act (Act No. 34 of 1965) and the Customs Act (Act No. 61 of 1954) on charges of (1) concealing the income of the company (hereinafter, X2) by means of exclusion of sales volume and inflation of purchase amounts, and consequently evading corporation tax for two business years, (2) in conspiracy with a co-defendant in the first instance (hereinafter, A) who is the representative director of the co-defendant company in the first instance (hereinafter, B), concealing the income of B by means of exclusion of sales volume, and consequently evading corporation tax for one business year, and (3) in importing pork from the United States in the name of another company, evading customs by making false import declarations.

The Court of first instance, Chiba District Court, sentenced X1 to two years and four months imprisonment and imposed a fine of 100,000,000 yen. X appealed on the grounds that the original judgment made erroneous findings of fact and an incorrect application of law, and that the sentence was unreasonable.

Held: 'All claims of the appellants shall be dismissed.'

Upon the grounds stated below:

I. On the Alleged Erroneous Findings of Fact

While the original judgment found X1 guilty of violating the Corporation Tax Act on the grounds that X1 evaded the corporation tax of B in conspiracy with A,

* Edited by Masahiko Asada, Shotaro Hamamoto, and Yumi Nishimura.

** Translated by Shota Yamano.

X1 argues that it made erroneous findings of fact because there was no such conspiracy. X1 had, however, enough motive to evade tax, and actively participated in the exclusion of sales volume and concealment of the income of B. Accordingly, the Court decides that a criminal conspiracy existed between X1 and A, and that X1 is one of the co-principals.

II. On the Alleged Incorrect Application of Law

The defendants argue that the original judgment, convicting them of violating the Customs Act [...] and the Corporation Tax Act [...], made a violation of law that apparently affects the judgment on the grounds that: (1) [...] since the Gate Price System for pork is void in violation of Article 4(2) of the Agreement on Agriculture (hereinafter, WTO Agriculture Agreement) under the umbrella Marrakesh Agreement Establishing the World Trade Organization (Treaty No. 15 of 1994; hereinafter, WTO Agreement), they did not evade customs and are not guilty; (2) even if the Gate Price System is valid, [...] 2,106,000,000 yen in customs that they allegedly evaded is to be included in deductible expenses as "cost of sales" according to Article 22(3)(i) of the Corporation Tax Act in calculating the amount of actual income for the fiscal year ended May 31, 2009, which makes the total amount of income negative and reduces the corporation tax to zero. Accordingly, two defendants are not guilty.

However, the original judgment did not make an incorrect application of law as the defendants argue, because the judgment was appropriate in the following two points. First, as the WTO Agriculture Agreement is not directly applicable as domestic norms of adjudication, the Gate Price System for pork will not be void immediately. Second, the customs that they evaded cannot be included in deductible expenses as "cost of sales" according to Article 22(3)(i) of the Corporation Tax Act. [...]

1. Is the Gate Price System Void in Violation of Article 4(2) of the WTO Agriculture Agreement?

According to the defendants, in Japan promulgated treaties automatically have internal validity without specific legislative measures, and whether an internally valid treaty is directly applicable or not depends on the intentions of those who have the right to conclude treaties and legislator (subjective criterion) and the clarity of provisions (objective criterion). The defendants moreover presuppose that, although the Japanese government has not stated its official views on the direct applicability of the WTO Agreement, the Agreement is directly applicable in Japan because its provisions are detailed and clear as is evident from the fact that the Agreement is treated as directly applicable in the Republic of Korea and in Costa Rica. Accordingly, they conclude that the Gate Price System is void in violation of Article 4(2) of the WTO Agriculture Agreement, which explicitly prohibits

“variable import levies,” “minimum import prices,” or “similar border measures other than ordinary customs duties.”

According to Article 98(2) of the Constitution of Japan,¹ as the defendants argue, treaties are domestically valid when approved by the Diet and promulgated. It is, however, another issue whether such treaties incorporated in the domestic legal system are directly applicable and whether they nullify provisions of a legislated act in the case of conflict between them. In this case, since the WTO Agreement does not state whether it is directly applicable or not, it is considered that the measures of domestic implementation of the agreement are left to be determined by each country, including judgment on its direct applicability. Since the Japanese government has not stated its official views on the direct applicability of the WTO Agreement, whether it is directly applicable or not is judged based on domestic law. Concerning this case, it is to be judged comprehensively from the content and nature of Article 4(2) of the WTO Agriculture Agreement, taking into account the separation of the powers in our country, relevant national laws, and the form of request and claim in this suit. First, although the content of the WTO Agreement is more detailed and clearer than that of GATT, it does not exclude the possibility of flexible dispute resolution through negotiation. Thus, there remains certain flexibility in its regulation. Second, considering the fact that the United States and the EC (dissolved into the EU by the Treaty of Lisbon in 2009, succeeding the legal status of EC as a member of WTO) explicitly denies the direct applicability of the WTO Agreement by their implementing acts, and that there is active trade among Japan, the United States, and the EU, if Japan alone affirmed the direct applicability of the WTO Agreement, gross imbalances in the fulfillment of obligations under the WTO Agreement might occur among those countries, possibly leading to disadvantages for Japan. This would mean that the exercise of legislative and administrative discretionary power would be restricted by the judicial review concerning the WTO Agreement. It is, however, undesirable from the point of view of separation of powers, which is adopted by the Constitution. Therefore, it is difficult to find grounds to confirm the direct applicability of the WTO Agreement in this case, whose issue is the legality or validity of the Gate Price System in relation to the WTO Agriculture Agreement. The argument of the defendants lacks a premise and cannot be adopted.¹

2. Can the Evaded Customs Be Treated as Cost of Sales and Included in Deductible Expenses?

The defendants argue that, if the Gate Price System is valid, the approximately 2,106,000,000 yen of customs that they evaded is to be included in de-

¹ Article 98(2) provides: “The treaties concluded by Japan and established laws of nations shall be faithfully observed.”

ductible expenses as “cost of sales” in Article 22(3)(i) of the Corporation Tax Act in calculating the amount of actual income for the fiscal year ending May 31, 2009, which makes the total amount of income negative and reduces the corporation tax to zero. If so, the two defendants argue that they are not guilty. However, as the customs of approximately 2,106,000,000 yen has still not been paid and no information indicates the possibility of payment, it is inappropriate to accept the inclusion of evaded customs in deductible expenses as cost of sales. Moreover, although the inclusion will be possible if they pay the evaded customs, the crime of customs evasion will not be unpunishable retroactively nor will the amount of evaded customs be reduced.

III. On the Alleged Unreasonableness of the Sentence

Although the defendants argue that the original sentence of two years and four months of imprisonment and fine 100,000,000 yen is overly heavy and unreasonable, there can be no extenuating circumstances for motive, details, and manner of the crimes in this case, because they have severely infringed on the right of the State to collect taxes. The original sentence is neither overly heavy nor unreasonable.

Judge Masanori Tsunoda (presiding)
 Judge Toshitaka Ito
 Judge Masakazu Kamakura

Conformity of the Act on Punishment of Piracy to the Constitution of Japan — Articles 100 and 105 of the UNCLOS and the Universal Jurisdiction — Exercise of Jurisdiction over the Pirates by a State Other Than the Seizing State — Surrender of the Accused and Alleged Infringement of Article 6(1) of the ICCPR — Normative Value of the View Taken by the Human Rights Committee

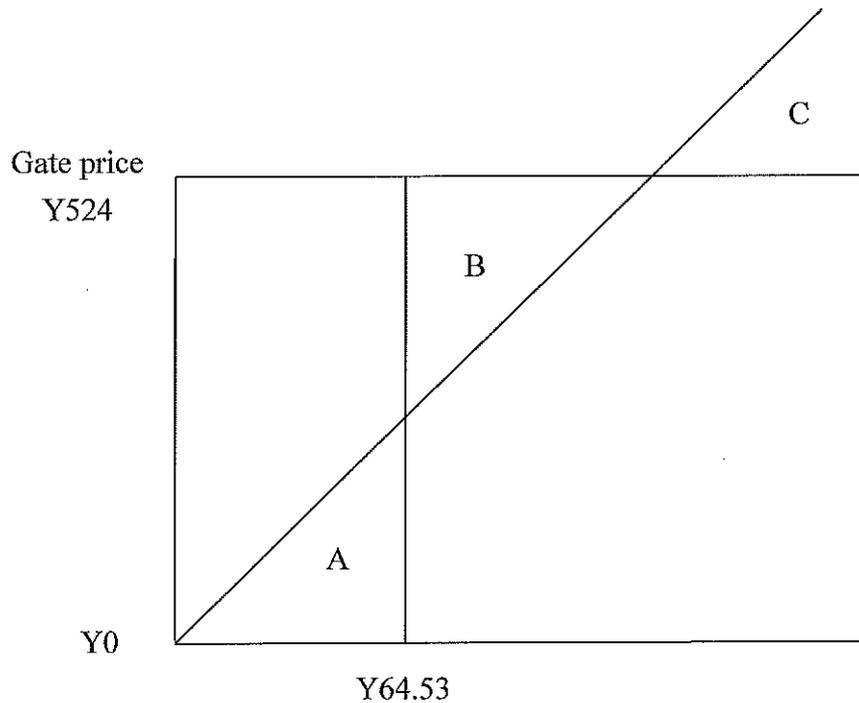
Tokyo High Court, Judgment, December 18, 2013;
 66 Kosai Keishu (4) 6 [2014], H.T. (1407) 234 [2015]*

Prosecutor *v.* X

The two defendants, X1 and X2, are both self-claimed Somalians of uncertain nationalities, addresses, and ages. On March 5, 2011, on the high seas of the Arabian Sea, both, in conspiracy with two other persons

* Translated by Keiichiro Niikura.

Pork Tariff in Japan



- A Currently if import price is Y64.53 or less, specific tariff is Y485/KG. This is lowered to Y125/KG and, after 10 years, abolished.
- B The difference between the import price and the gate price is imposed as difference tariff.
- C Currently if import price is above Y524, ad valorem tariff of 4.3% is imposed. This is lessened to 2.2%.