Exhibit 1

and Investments Ombudsman (OTO) deals with cases in which foreign exporters, foreign governments, or a domestic importer complain about the enforcement of trade statutes.[7] They are considered in greater detail later.

1.3 The Constitution and the Freedom of Business Activities

A. GUARANTEE OF PRIVATE ENTERPRISES UNDER THE CONSTITUTION

The Japanese economy is basically a market economy in which private enterprises are mainly responsible for producing and distributing goods and services. As in other countries which adopt a market economy, in Japan the price mechanism is the most basic economic institution. As we will examine later, even though there is some government involvement in economic activities, it is generally accepted that the role of the government in the economy should be kept to a minimum so that private initiatives are not unduly hampered. In this sense, we can say that private enterprises are the most important factors in the Japanese economy.

However, there is no country in the world which adopts a market economy in which the philosophy of '*laissez-faire*' is maintained in its pure form. Every market economy is inevitably a mixture of the market and government involvement in the economy up to a certain point. In this sense, the Japanese economy is also a hybrid of the market and government involvement. This is a subject of great interest among economists and political scientists, and there are extensive writings on this subject.[8] Even though we must refrain from a detailed discussion of the economic advantages and disadvantages of this hybrid system in Japan, we will make an analysis of this hybrid system from a legal standpoint.

The most important dimension in such a legal analysis is the constitutional framework for private enterprises, that is, the question as to how much the government can control by laws the activities of enterprises under the Constitution, or conversely the extent to which private enterprises are guaranteed freedom of activity under the Constitution.

There are two constitutional provisions which guarantee the existence and activities of private enterprises. One is Article 22 and the other is Article 29 of the Constitution. Detailed discussions of the interpretations

[7] Matsushita and Schoenbaum, *Japanese International Trade and Investment Law* (Tokyo, 1987), 44–5.

[8] See e.g. Komiya *et al.* (eds.), *Nihonno Sangyo Seisaku* (*Japanese Industrial Policy*) (Tokyo,1984), and Johnson, *MITI and the Japanese Miracle* (Stanford, Calif., 1982).

of these provisions are given in the following sections. Here we will briefly look at the structure of these two constitutional provisions.

Article 22 of the Constitution declares that the freedom of occupation is guaranteed. It also states that the freedom of occupation can be restricted for the purpose of promoting public welfare. The activities of private enterprises are included within the scope of the freedom of occupation as provided for in Article 22 of the Constitution. Therefore, the freedom of activity of private enterprises is guaranteed and can be restricted by law only when necessary for promoting public welfare.

Article 29 of the Constitution declares that private property is guaranteed. Private property is the basis for private enterprises, without which no private enterprise can exist. Article 29 guarantees that no private property can be taken away or restricted unless to do so is necessary for promoting public welfare.

Both Articles 22 and 29 of the Constitution form the constitutional basis for the private enterprise system in Japan.

B. THE RULE OF LAW AND THE REGULATION OF BUSINESS ACTIVITIES

As explained above, the freedom of private enterprise business activities is guaranteed under Articles 22 and 29 of the Constitution. However, that freedom is not without limitation. It can be restricted if necessary for the purpose of promoting public welfare. An important question is the meaning of 'public welfare'. There are several aspects of the public welfare concept which need to be discussed, and they are considered in the following sections. Here we will discuss one aspect of it, that is, the rule of law and government regulation of business activities.

As a general principle, public welfare must be explicitly declared in the form of legislation. Since the freedom of business activities is a constitutional right expressed in the Constitution, in order to restrict it for the purpose of promoting public welfare, there must be a clear declaration of it by the legislature. A mere statement of policy by the Executive Branch is not sufficient. Legislation is an expression of the will of the people, and it can be regarded as a sufficient ground for restricting the freedom.

The decision handed down in the *COCOM* case[9] in 1969 by the Tokyo District Court is a good expression of this principle. In this case, an export ban applied on some electronic devices under the Foreign Exchange and Foreign Trade Control Law (hereafter referred to as 'the

[9] The 1969 Peking–Shanghai Nihon Kogyo Tenrankai Case, Decision of Tokyo District Court, 8 July 1969, *Gyōsai Reishū*, 20 (1969), 842 *et seq.*

Control Law') was held to be unconstitutional. A group of business persons in Japan wished to export electronic devices to the People's Republic of China and exhibit them in a trade show held there. At this time, the products in question were listed as controlled items under the Control Law since they were part of the products whose export to Communist countries was prohibited under the COCOM agreement and, in exporting such items, the exporter needed to file an application with the MITI and obtain an export approval.

When an application for approval of export was filed with the MITI, the MITI refused and the persons who wished to export filed a suit with the Tokyo District Court for an injunction restraining the MITI from refusing an approval of export. In the proceedings, the plaintiffs argued that the freedom to export was part of the freedom of business activities (the freedom of occupation) guaranteed by Article 22 of the Constitution and could be restricted only if such a restriction was necessary to promote public welfare, and that in this case the prohibition of export did not come into this catogory.

The Tokyo District Court held that the refusal by the MITI to grant an approval in this case was unconstitutional for the following reason. Whereas Article 22 of the Constitution permits the restriction of the freedom of business activities for the reason of promoting public welfare, the public welfare must be expressed in the form of legislation. The legislation in question here is the Control Law, and the basic nature of this law is expressed in Article 1 in which the objective of the law is declared as the maintenance of the balance of international payments and the promotion of sound development of international trade.

The court reasoned that, as expressed in Article 1, the objectives of the Control Law were of an economic nature but the refusal to grant an approval to export the products in the case in question was based on the COCOM agreement whose purpose was to prohibit and restrict the exportation of strategic products to Communist countries in order to slow down the military build-up in those countries. In the opinion of the court, this objective was of a political or strategic nature but not of an economic nature as envisaged in Article 1 of the Control Law.

Therefore, the court held that to refuse to grant an export approval for the purpose of implementing the COCOM agreement was not included in the scope of the Control Law and, consequently, the MITI was not authorized to prohibit the export of commodities under the Control Law if the purpose of such a prohibition was to carry out the mandate of the COCOM agreement. Therefore, the Tokyo District Court held that the MITI's refusal to grant approval in this case was *ultra vires* and so unconstitutional.

The court admitted that whether or not the export of some

commodities should be prohibited, the implementation of the COCOM agreement was a matter of policy decision and that there could be such a policy decision. However, the court stressed that there must be a clear indication to that effect in the form of legislation if such a policy was to involve the restriction of activities of private enterprises.

The defendant (the government) argued that if the prohibition of export in this case was held to be invalid and could not be enforced, it would be a great disappointment to the Allies, especially the United States. It maintained that if the implementation of the COCOM agreement was frustrated, then there would be repercussions in the United States by way of some retaliation against Japan such as import restrictions or some other economic measures and that, for this reason, the implementation of the COCOM agreement had a strong economic implication. In this way, the government tried to persuade the court that the prohibition of items covered by the COCOM list was within the objective of the Control Law.

However, the court refused to accept this argument by pointing out that the cause-and-result relationship between the non-enforcement of the COCOM agreement in Japan and a possible retaliation by the United States against Japan was too remote and was not sufficient to convince the court of the validity of such an argument.

During the proceedings of this trial, the trade show in China ended and, therefore, the issue of whether or not an injunction restraining the MITI from prohibiting the export of the items in question should be issued became hypothetical. Consequently, the plaintiffs modified their action and asked for the recovery of damages sustained by the prohibition of export under the State Redress law which authorized the recovery of damages sustained by private individuals caused by the wrongful conduct of government officials.

The court denied such redress to the plaitiffs. The ground relied upon by the court was that the State Redress Law required proof of malicious intent or negligent conduct on the part of a government official in order for the injured individual to recover damages. Under the circumstance of this case, the interpretation of the Control Law in this regard had not been an issue. There had been several possibilities for the interpretation of the Control Law. One such possibility being that the Control Law could be used to implement the COCOM agreement. The court reasoned that even if the MITI officials in charge of the enforcement of the Control Law had taken this interpretation and prohibited import, it could not be held that they had acted with malicious intent or through negligence. For this reason, relief was denied.

Even though the relief sought by the plaintiffs in this case was denied and the result was somewhat anti-climactic, the implication of the case is

quite important. It established the legal precedent that there must be clear statutary wording in legislation which authorizes the restriction of private enterprise activities by the government, if such restriction is to be interpreted as within the scope of the public welfare under Article 22 of the Constitution. The above conclusion is nothing but an expression of the principle that the excercise of government powers in restricting activities of private enterprises must be done under the rule of law.

Despite this decision, however, the Control Law was not amended for a long time. The MITI stated that it would object to the interpretation of the Control Law by the Tokyo District Court and continued to use this law to implement the COCOM agreement. In 1979, there were major revisions of the Control Law, and, on this occasion, a new wording was incorporated in the provisions dealing with international capital transactions and trade in services to the effect that they could be restricted for the purpose of 'preserving international peace'. The incorporation of this new wording was designed to expand the scope of the Control Law to include in its jurisdiction restrictions based on international-political and strategic considerations.

Curiously, however, no amendment was made on this occasion to Article 48 of the Control Law which authorized the MITI to impose export restrictions and was used to implement the COCOM agreement. Finally, in 1987, when the *Toshiba Machinery* case occurred and a bill was introduced into the United States Congress[10] which would have imposed sanctions on not only the Toshiba Machinery Company but also its parent the Toshiba Company, the Japanese government moved to amend the Control Law and incorporated a phrase in Article 48 which stated that this law could be used to preserve international peace as well as increasing the penalty for violations of the Law.

The decision of the Tokyo District Court in the *COCOM* case stressed that the objective and character of the Control law should be determined by Article 1 of this law which stated the objective of it. One may argue that, as long as Article 1 has not been changed, the basic objective of the Control Law is unchanged and the constitutional doubt has not been completely wiped out. However, now that there are provisions in the Control Law with regard to international capital transactions, trade in services, and also trade in goods which state that control can be imposed on them when it is necessary to do so to maintain international peace, the authority of the MITI, or the MOF as the case may be, is established to implement export control policies of a non-economic nature such as the COCOM agreement or the United Nations decision.

[10] See, on this subject, US Congress, House of Representatives, Report 100–576, *Omnibus Trade and Competitiveness Act of 1988*, Conference Report to Accompany HR. 3 (1988), 830–7.

C. THE FREEDOM OF BUSINESS ACTIVITIES AND THEIR RESTRICTIONS

An Overview

As mentioned before, Article 22 of the Constitution permits restrictions of business activities if it is necessary for the purpose of promoting public welfare. It has been mentioned already that, under the doctrine enunciated in the decision in the *COCOM* case, such a restriction should be based on legislation. Is there any constitutional constraint imposed on the legislature to enact a law which defines the extent to which legislation can restrict business activities? There are several important Supreme Court cases on this issue, and we will examine the major ones. However, before that, it is useful to review the legal propositions.

There are a variety of laws which restrict business activities. There is diversity in the purpose of such restrictions. Some of them are aimed at controlling business activities for the purpose of maintaining public order and good morals. Prohibitions on the manufacture and sale of narcotics, weapons, obscene literature, and strict licensing requirements for some amusement businesses (such as bars and cabaret) are some examples.

Others are designed to accomplish socio-economic policies, such as the protection of agriculture, small enterprises, or declining industries. As discussed in a later section, there are many laws which promote and protect specific agricultural and industrial sectors.

Again there are some laws which regulate public utilities such as those supplying electric power, gas, telecommunications services, and transportation.[11] Generally there are licensing requirements in such industries and enterprises intending to enter into such areas must obtain a licence from the relevant ministry to begin business. In some laws which regulate such industries, there are provisions stating that, in deciding whether to give a licence to a newcomer, the ministry in charge should consider the supply and demand conditions existing in the industry with the view of not creating over-supply.[12] In considering the constitutional issue, the nature of the law in question must be carefully studied and evaluated.

[11] See e.g. Denki Jigyo Hō (Electric Power Business Law), Law 170, 1964; Gasu Jigyō Hō (Gas Business Law), Law 51, 1954; Denki Tsūshin Jigyō Hō (Telecommunications Business Law), Law 86, 1986; and Dōro Unsō Hō (Road Transportation Law), Law 183, 1951.

[12] e.g. Art. 5(1) of the Electric Power Business Law states that the Minister of the MITI shall not grant a licence to operate an electric power business unless the initiation of such business is suitable in relation to the general demand for electricity.

Major Constitutional Cases Dealing with the Freedom of Business Activities

The *Public Bathhouse* case[13] is one of the important cases in which the Supreme Court dealt with the relationship between a regulatory law which restricted the activities of private enterprises and the freedom of business activities. Involved in this case was the Public Bathhouse Law which required a person who intended to operate a bathhouse to obtain a licence from the prefectural government. It provided that a person who operated a public bathhouse without a licence should suffer a criminal penalty. It provided further that when giving a licence to a new person intending to operate a public bathhouse, the prefectural government could take into consideration the geographical distribution of public bathhouses and that when it was asked to grant a licence to a newcomer in a location in which a new bathhouse would create 'excessive competition' among public bathhouses, the prefectural government could decide not to grant a licence. A person who operated a public bathhouse without a licence was indicted and put on criminal trial.

The defendant argued that the provision incorporated in the Public Bathhouse Law which authorized the prefectural government to regulate the bathhouse business and to attach consideration of the geographical distribution of public bathhouses in a certain area as a condition to a licence contravened Article 22 of the Constitution.

The Supreme Court, however, refused to accept this argument and held that to allow new operators to open new public bathhouses without any control might lead to maldistribution of public bathhouses and excessive competition among them. It argued that this would deprive citizens living in remote places of access to public bathhouses since operators would open new bathhouses only in areas where the population was heavily concentrated and that excessive competition among bathhouses would lower the profit of public bathhouses. It argued further that the lowered profit would mean deterioration of sanitary conditions of public bathhouses, a situation highly undesirable from the public hygiene standpoint. For these reasons, the Supreme Court rejected the argument of the defendant and upheld the constitutionality of the provision of the Public Bathhouse Law in question which required a licence to operate public bathhouses and authorized the prefectural government to attach conditions when granting a licence such as making the licence contingent upon the proper geographical distribution of public bathhouses.

The *Retail Market* case[14] is a case in which the licensing system for building a retail market and leasing space to tenants under the Retail

[13] Decision of the Supreme Court, 26 Jan. 1955, *Keishū*, 9/91 (1959), 89 *et seq.*
[14] Decision of the Supreme Court, 11 Nov. 1972, *Keishū*, 26/9 (1972), 586 *et seq.*

Business Adjustment Special Measures Law (hereafter referred to as 'the Special Measures Law') was challenged as incompatible with Article 22 of the Constitution. Under the Special Measures Law, a person who intends to build a retail market complex and lease it to tenants who operate retail stores must obtain a licence from the prefectural government. A retail market complex under the Special Measures Law is not a large-scale retail market such as a supermarket. It is a building or buildings built adjacent to each other in which small shops (mostly 'Mom and Pop stores'—stores operated by wife and husband without employees) are located.

The pronounced purpose of the Special Measures Law is to prevent 'excessive competition' among small stores and to protect the interests of small storekeepers. For this purpose, the prefectural government is given the discretion to attach conditions to a licence to build a shopping complex. In this sense, the Special Measures Law is a piece of legislation specifically designed to protect the interest of small enterprises.

When the *Retail Market* case arose, the Prefecture of Osaka ruled that a licence to build a new retail market complex would be given on condition that the distance between the existing retail market complex and the newly built complex was at least 700 metres. A complex was built inside the 700-metre range from an existing complex without a licence and store units were leased to tenants. The Osaka Prefecture brought a criminal claim to the prosecutor's office against the person responsible. The defendant was tried for a violation of the Special Measures law, lost in the lower courts, and brought an appeal to the Supreme Court.

The defendant argued before the Supreme Court that the control by the Special Measures Law on the distribution of retail markets was an undue interference with the freedom of business activities protected by Article 22 of the Constitution. The Supreme Court rejected this argument and held the defendant guilty of a violation of the Special Measures Law. The Supreme Court stated that the Special Measures Law was designed to protect small shops from cutthroat competition and, in this sense, it was a piece of law based on socio-economic policy to protect small enterprises. In the view of the Court, the National Diet (the legislature) had the power and ability to investigate socio-economic problems and formulate a policy to deal with them, whereas courts had no comparable capabilities in such matters. Therefore, courts should in principle adhere to the judgment of the National Diet as regards the policy dealing with socio-economic matters and should not lightly pass judgment on the wisdom of a law which incorporated such a policy unless the law in question clearly overstepped the limit of the discretion given to the National Diet or the methods of enforcement used were unreasonable. The Court went on to say that, in the Special Measures Law, there was

nothing which indicated that the National Diet overstepped its discretionary power or the methods of enforcement were unreasonable.

In the *Pharmaceutical Affairs Law* case,[15] the power given to the prefectural government under the Pharmaceutical Affairs Law (hereafter referred to as 'the Pharmaceutical Law') to restrict the distance between existing pharmaceutical stores and a new store was nullified by its unconstitutionality. The Pharmaceutical Law was originally designed to authorize the Minister of Public Welfare to license new pharmaceutical products and related matters. Under the Law, a person who intended to operate a pharmaceutical store had to obtain a licence from the prefectural government, and, under an amendment of the law, the prefectural government was authorized to attach conditions to licensing a new pharmaceutical store.

The Governor of Hiroshima Prefecture enacted a rule to the effect that a new pharmaceutical store must be located at least 200 metres away from any existing pharmaceutical store. This restriction was designed to protect pharmaceutical stores from cutthroat competition.

A person who wished to open a new pharmaceutical store within 200 metres of an existing store applied for a licence but his application was rejected on the ground that the intended establishment was within the restricted distance. The applicant brought a suit against the Governor of the Prefecture of Hiroshima and argued that the said restriction unduly limited the freedom to open a new store and violated Article 22 of the Constitution.

The Supreme Court upheld the argument of the plaintiff for the following reasons. The Pharmaceutical Law is designed to protect and promote public health and safety, and it is not designed to promote a particular socio-economic policy to protect the interests of one group or industry. In this respect, the Pharmaceutical Law is different from the Special Measures Law which is specifically designed to protect the interests of small storekeepers. If the Pharmaceutical Law is characterized in the above way, for the purpose of achieving its legislative objective it is not necessary to impose a geographical restriction on the distribution of pharmaceutical stores.

Today pharmaceutical products are manufactured in large factories, packed there, and distributed to consumers through pharmaceutical stores. In this way, the role of pharmaceutical stores is to pass on pharmaceutical products from manufacturers to the consumers. Generally pharmaceutical products are not mixed or processed at pharmaceutical stores. Therefore, no matter how hard competition among pharmacetucial stores may be, and how low the profit rate of stores is, that does not

[15] Decision of the Supreme Court, 30 Apr. 1975, *Minshū*, 29/4 (1975), 572 *et seq.*

affect the quality of pharmaceutical products since the role of pharmaceutical stores is merely to distribute the products without processing the contents of the products. Therefore, as long as the purpose of the Pharmaceutical Law is to protect public health and safety, the provision in the Law in question which authorizes the prefectural government to attach a condition to a licence for the purpose of protecting pharmaceutical stores should be held as excessive intervention into the freedom of business activities, contrary to Article 22 of the Constitution.

Under the above reasoning, the Supreme Court stated that the provision in question in the Pharmaceutical Law was null and void due to its unconstitutionality. As a consequence, the Japanese government amended the Pharmaceutical Law (as well as some related laws) and deleted the provision which authorized the prefectural government to attach such a condition.

The cases examined above are ones in which the freedom of business activities guaranteed under Article 22 of the Constitution was at issue. The *Forestry Law* case,[16] which will be touched upon in this part, is a case in which the guarantee of private property under Article 29 of the Constitution was at issue. A brief account has been given of Article 29 of the Constitution. This provision guarantees that private property shall not be taken away nor its use restricted by the government unless to do so is necessary to promote public welfare. Therefore, there are similar interpretational problems with regard to Article 29 as there are with regard to Article 22.

The Forestry Law whose constitutionality was challenged was enacted to conserve forest from devastation. For this purpose, a provision in the law provided that when a piece of woodland was owned by a plural number of persons, none of them could ask for his share of the land unless the requesting party owned at least a half of the total land in question. The purpose of this provision was to prevent a piece of land from being segmented out into small pieces owned by a number of individuals and to maintain woodland in large units. The rationale of this legislation was that if a piece of land was parcelled into smaller units owned by different individuals, it would be more difficult to conserve the forest.

A piece of land was owned by several brothers and one of them requested the partitioning of his share. When his request was denied, he brought a suit against the brother who refused. The brother argued that the request could not be granted since the Forestry Law prohibited the partition of a piece of jointly owned woodland unless the party requesting partition owned at least a half of the whole land, and, in this case,

[16] Decision of the Supreme Court, 22 Apr. 1987, *Minshū*, 41/3 (1987), 408 *et seq.*

the requesting brother did not own that much land. The requesting brother argued that the provision of the Forestry Law in question was unconstitutional as it unreasonably interfered with the use of private property guaranteed by Article 29 of the Constitution.

The Supreme Court agreed with the argument raised by the brother seeking the partition of the land and held that the provision in the Forestry Law which provided a restriction on partition of a jointly owned piece of land did not serve the promotion of public welfare and was contrary to the guarantee of private property under Article 29 of the Constitution.

The Forestry Law was a piece of legislation designed to conserve forestry and, therefore, was a law based on a specific economic policy. Nevertheless, the Supreme Court stated that the law could not be justified by legislative discretion. The Court reasoned that if a piece of jointly owned woodland could not be parcelled out to individual owners, then it would deprive the owners of the incentive to exert efforts to conserve the forest. If none of the owners wanted to take care of the forest, then the woodland would deteriorate through lack of care. This would produce the opposite result from what had been intended when the Forestry Law was enacted, and, in this sense, could not be held as promoting public welfare.

The Supreme Court held that there was no reasonable linkage between the objective of the Forestry Law and the provision in question. It also noted that the Forestry Law allowed segmentation of a piece of woodland in different ways and to prohibit segmentation only in cases where joint ownership was involved should be regarded as an unreasonable restriction.

A review of the Supreme Court decisions on the freedom of business activities under Article 22 of the Constitution reveals that there are two doctrines as regards this issue. One is that courts will in principle refrain from passing a judgment on the wisdom and validity of a law which incorporates a socio-economic policy. Included in this category are, *inter alia*, laws whose objectives are to protect and promote small businesses, agriculture, consumers, and any other specific groups in society. This type of legislation may be termed 'policy law' since it is based on policy.

In the view of the Supreme Court, it is the task of the National Diet (the legislature) to decide upon policy and to enact a law which incorporates it, and the National Diet is invested with the powers to investigate, hold debates, and come to a policy decision on the matter. Courts are not a suitable agency to deal with policy matters. Therefore, in the view of the Supreme Court, courts should in principle refrain from examining the validity of a policy adopted by the National Diet and incorporated in a law. Under this doctrine, the judicial review by courts of a piece of legislation is limited to examining whether the law in

question involves a clearly excessive control and the methods used to implement the law are unreasonable. We may call this interpretational doctrine 'the judicial passivity doctrine'.

On the other hand, under the Supreme Court decisions as examined above, courts may (and should) examine the validity of a law when the law in question is based on the need to protect public order and safety. Laws for such purposes include, *inter alia*, those providing a licensing system for products in order to maintain product safety, the level of sanitary conditions, good morals, and any other conditions necessary for the maintenance of a good society. Laws prohibiting the manufacture of weapons, drugs, and other dangerous objects belong to this category also. Such laws are not based on a socio-economic policy to promote a specific group or individuals. They are aimed at maintaining the conditions necessary for the maintenance of a sound and healthy society. The essence of regulation under such laws is to supervise and control the activities of enterprises and individuals for police purposes and, therefore, such laws may be called 'police law'.

The Supreme Court has enunciated the doctrine that if the law in question is police law rather than policy law, then courts should examine the validity of it to see if it contains control above the necessary minimum for the purpose of achieving the objective of the law and that if, as the result of such review, it is clear to the court that the law exerts an excessive control, then the court should hold that law as unreasonably intervening into the freedom of business activities as declared in Article 22 of the Constitution, and unconstitutional. This doctrine may be called 'the judicial activity doctrine'.

This dualism as expressed in Supreme Court decisions seems to have resulted from the Supreme Court's interpretation of the separation of powers. The Supreme Court interprets the separation of powers as the principle dividing and allocating powers of the government into different branches and requiring that each branch respects decisions made by other branches in their own jurisdiction.

It may be observed also that this dualism to some extent reflects the fact that courts in Japan, including the Supreme Court, are not comfortable in handling socio-economic policy matters. The Supreme Court mentions in one of its decisions that it is not equipped with the necessary powers and capacities to decide whether a socio-economic policy is wise or not.[17] This applies especially to economic policy matters.

Although this dualism is, to a degree an inevitable result of the doctrine of separation of powers, we must also state that it causes a paradoxical result. Policy laws are often the result of active lobbying by specific

[17] See the decision cited in n. 14, above.

interest groups. They protect specific groups whose interests may be (and often are) adverse to other groups and to the public in general. Under the judicial passivity doctrine, however, courts should refrain from passing judgment upon the validity of them unless they are clearly unreasonable in their content and methods of enforcement.

On the other hand, police laws are generally those designed to protect and promote the interest of the general public rather than specific groups or sectors in society. In the above constitutional doctrine, police laws are closely scrutinized by the courts and if they are found to have transgressed the necessary minimum limit, they are held as unconstitutional and struck down. This means that police laws whose purpose is to protect the general public are more closely reviewed by courts and held unconstitutional than policy laws whose objective is often to protect specific interests.

The Supreme Court tried to correct this paradoxical situation in the *Pharmaceutical Law* case. As noted before, the Pharmaceutical Law was originally a piece of legislation designed to protect the general public and, under the classification mentioned above, was a police law. Later an amendment was made to this law and a new provision was added which authorized the prefectural government to attach conditions when it granted a licence to operate a pharmaceutical store. This provision for the geographical distribution of pharmaceutical stores was a policy law regulation in substance. However, formally the provision was declared to be a police law regulation, and therefore there was a contradiction between the substance and the form in this amendment. In a way, the National Diet introduced the provision for the protection of specific interests under the subterfuge of protecting the general public and the provision for the geographical distribution of pharmaceutical stores in the Pharmaceutical Law was a policy law type regulation under the disguise of police law.

The Supreme Court recognized this contradiction and held the provision in the Pharmaceutical Law unconstitutional as long as it was a police law regulation. If the legislative intent of the provision in question had made clear that it was planned as a regulation to protect small pharmaceutical stores from cutthroat competition, then the Supreme Court would have had to state that it was compatible with Article 22 of the Constitution since it would have been at the legislative discretion of the National Diet to enact a law protecting small enterprises from cutthroat competition. The hidden purpose of the Supreme Court may have been to remedy the anomaly resulting from the doctrine that a policy law should be generally outside the scope of a close judicial review by utilizing the contradiction involved in the Pharmaceutical Law.

In the *Forestry Law* case, the Supreme Court went one step closer to modifying this paradoxical result. This case was not concerned with

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