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Restricting the Supply of Japanese Automobiles: Sovereign Compulsion or Sovereign Collusion?

by Mitsuo Matsushita* and
Lawrence Repeta†

I. INTRODUCTION

On May 1, 1981, the government of Japan announced that it would adopt measures to restrict the export of Japanese automobiles to the United States over a three-year period.¹

In a letter dated May 7, 1981, under the signature of its Ambassador to the United States, the Japanese Government described in detail the measures with which it would implement the restriction of exports and requested "that the Department of Justice, as the authority chiefly responsible for administering the U.S. laws, support the views of the Government of Japan."² In a letter of the same date, the Attorney General of the United States stated that "The Department of Justice is of the view that implementation of such an export restraint by the Government of Japan . . . would not give rise to violations of United States antitrust laws."³

For a government to explain its actions in relation to a dispute brought before a foreign court is not without precedent.⁴ What makes the automobile case unique is that the Japanese Government took the extraordinary step of explaining its actions in terms painstakingly designed for analysis under American law, even before a dispute had arisen.

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¹ Japanese morning and evening newspapers carried accounts of the announcement which was made at the residence of the prime minister. No less than four Cabinet ministers and the External Trade Representative were present. The text of the official announcement along with Japanese texts of the letters are reported in 9 KOKUSAI SHOJI HOMU 287 (No. 6, 1981) [All footnotes in Japanese are verified by author].

² This letter is reproduced in Appendix B.

³ This letter is reproduced in Appendix C.

⁴ See *infra*, Appendix A; see *infra*, Section on Statements by Foreign Governments at 59.

As indicated by this exchange of letters, the resolution of the automobile dispute was cast in terms sanitized by "antitrust preventive maintenance." The obvious reason for this extraordinary step was to ensure that those Japanese automakers who would restrict sales in the U.S. market in response to measures taken by the Japanese Government would not subsequently be exposed to liability for resulting violations of U.S. law.

Foreign governments are adopting various measures to protect local organizations from the spectre of antitrust litigation in the United States. The more aggressive have adopted legislation barring local enforcement by blocking the extension of the American discovery system into their territories and other measures.⁵ In this case, the Japanese Government, with guidance from its American counterpart, has adopted what may be termed a submissive attitude to the requirements of American antitrust.

Foreign governments whose citizens trade in the U.S. market have learned that they may not implement commercial policy in disregard of the principles of American antitrust law. Even if foreign governments are assured that U.S. enforcement authorities will take no action, there is no such assurance that private plaintiffs will also refrain.⁶ As a result, such private plaintiffs have come to be regarded as fearsome creatures. The array of weapons at the private plaintiff's disposal includes a highly developed system of discovery, aggressive judges endowed with the power to order a broad range of actions, an ever-increasing horde of American attorneys eager to file lawsuits and willing to proceed on a contingent-fee basis, and the devastating impact of an award three times the size of the demonstrated injury. Moreover, private litigants are typically unmoved by considerations such as the maintenance of sound relations with foreign governments; they are impervious to the havoc they may cause by attacking in American courts actions taken in foreign countries by organizations which may have substantial influence in those countries and which actions may have been taken with either the implicit or explicit approval of

⁵ See, e.g., Protection of Trading Interests Act, 1980, c. 11 (England); Foreign Antitrust Judgments Act (Restriction of Enforcement) Austl. Acts, 1979, no. 13 (Australia). See also Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980), and Rosen, *The Protection of Trading Interests Act*, 15 INT'L LAW. 213 (1981). The text of a French bill forbidding disclosure of "documents or information of an economic, commercial, industrial, financial or technical nature, which are intended for use as proof in a foreign judicial or administrative proceeding" unless otherwise provided by law or treaty is reproduced at *id.* 29-31 (French).

⁶ In the automobile case, the plaintiffs best able to satisfy antitrust requirements would appear to be Japanese automobile dealers. Their supply of goods has been restrained by the manufacturers' voluntary agreement to limit exports. For the majority standing rule in antitrust cases see *In Re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1973).

foreign government officials in what those officials view as administration of public policy.

The American plaintiff has gained the power to attack actions taken in foreign countries because American courts have developed a doctrine of application of law on the basis of effects felt within their home territories, rather than predicated on the locus of the activities.⁷ Thus, even though activities which take place in foreign countries may be scrutinized by the watchful eye of foreign governments, they may also be subjected to attack by American plaintiffs and examination by American courts.

In designing the measures to be taken to restrict automobile exports to the United States, the Japanese administrative authorities stepped outside their customary administrative routine and adopted a format more clearly suited to fulfill the requirement of protecting the exporters from subsequent U.S. litigation. This incident provides a stark example of sovereign respect for the American plaintiff.

II. INCIDENTS LEADING TO THE ESTABLISHMENT OF RESTRICTIONS

Footnote 13 illustrates the increasing share of imported vehicles, particularly vehicles of Japanese manufacture in the U.S. passenger car market. In the face of this increase, accompanied by heavy unemployment concentrated in the Northeastern United States and particularly heavily concentrated in the automobile and related industries, voices were raised in many quarters in the United States throughout 1980 demanding the establishment of restrictions on import of Japanese automobiles into the United States. Fear was rife that the domestic auto industry would be destroyed in free competition with superior Japanese producers; if this were the case, the ripple effect throughout the American economy would be of incalculable dimensions. The society that had been formed with the automobile as its symbol and most apparent tool of description could not survive the loss of the industry which produced it.

As the organization with most direct concern, the United Automobile Workers (UAW) filed a request for import relief under section 201 of the Trade Act of 1974,⁸ on June 12, 1980. Less than two months later, on August 4th, the Ford Motor Company filed a similar request.

The International Trade Commission (ITC) held public hearings in October, 1980, and, on December 3, 1980, the Commission announced its decision. By a vote of three to two, the ITC found that although the U.S. automobile industry had suffered severe injury, foreign automobile imports were not a substantial cause of this injury.⁹ As a result of this deci-

⁷ See *infra*, note 27.

⁸ Trade Act of 1974, § 201, 19 U.S.C. §§ 2101-2487 (1976).

⁹ Report to the President on Investigation T.A.-201-44 under Section 201 of the Trade

sion, the President of the United States was denied power under the Trade Act of 1974 to take measures to restrict imports.¹⁰ The question whether the President has power to negotiate an orderly marketing agreement independent of that Act (and despite a finding by the ITC of no injury due to imports) is unresolved.¹¹

Undaunted by what was perceived by many as a failure on the part of the ITC to make a reasonable assessment of the situation, movement for special congressional action to establish import restrictions gained momentum. Most notable attempts included the draft legislation, commonly known as the Danforth-Bentsen bill, which would have limited imports of Japanese automobiles to a fixed number over a period of three years (1.6 million per year), and a resolution to expressly empower the President to enter negotiations with foreign governments to persuade them to voluntarily limit their export of automobiles and trucks to the United States.¹² The latter was introduced to the Senate Finance Committee and narrowly defeated.

Fear of the growing protectionist movement in the United States (in particular, the Danforth-Bentsen bill) along with damage to the Japanese image in the United States (combined with active lobbying by the Reagan administration) persuaded the Japanese Government to consider and eventually adopt unilateral measures to restrict exports to the United States. A series of Cabinet level meetings that were held in Washington, D.C. and Tokyo in early 1981 were climaxed by Special Trade Representative Brock's visit to Japan at the end of April. Mr. Brock's visit culminated in an announcement, on May 1st, of an agreement on the specific terms of the Japanese export restriction. This resolution was produced just three days before the commencement of Prime Minister Suzuki's first visit to the United States and constituted a major foreign policy victory for the Reagan administration.¹³ By producing an accept-

Act of 1974, I.T.C. 1110 (1980) [verified by author]. See Birenbaum & Tellis, *Auto Imports: Choosing the Options*, Nat'l L.J., Mar. 23, 1981, at 26, col. 1.

¹⁰ Trade Act, *supra* note 7 at §§ 2251-53.

¹¹ *But see*, Consumer's Union of the United States v. Rogers, 352 F. Supp. 1319 (D.C. 1973) *modified and aff'd. sub. nom.* Consumer's Union of the United States v. Kissinger 506 F.2d 136 (D.C. Cir. 1974), *cert. denied* 421 U.S. 1004 (1975).

¹² H.J. RES. 598, 96th Cong., 2d Sess. (1980).

¹³ The volume of exports to the United States during the one year period from April 1, 1981, through May 30, 1982, is to be 1,680,000 vehicles, with an adjustment to that base figure reflecting any increase in overall projected sales in the U.S. market applicable in the second year (through March of 1983). In the third year market conditions will be examined to determine the need for and magnitude of any further restrictions. The base number of 1,680,000 is a reduction of approximately 140,000 vehicles from the 1980 figure. Statistics produced by the Japan Automobile Manufacturers Association (JAMA) will be used to measure compliance. According to JAMA statistics, the trend in export volumes has been as follows:

able restriction, the administration procured "breathing space" for American industry and destroyed the growing protectionist movement by securing the voluntary commitment of the Japanese Government to produce the very relief which the protectionists sought (in somewhat diluted form). Miraculously, because the restrictive measures were adopted solely by the Japanese Government without formal U.S. participation, the administration was able to claim that its image as a champion of free trade remained unblemished. Finally, the unilateral format of the restrictions enabled the administration to avoid the question whether the President had the authority to negotiate an orderly marketing agreement despite the ITC finding that imports were not a substantial cause of injury to the affected industry.¹⁴

Inevitably, the arrangement was criticized by disadvantaged quarters. Critics in the United States charged that the limitation would not result in an improved American product and that, due to the shrinkage in supply, prices would certainly increase, thus further straining the finances of the American consumer.¹⁵

A. Reaction by Japanese Automakers

According to one estimate, the average profit to the Japanese manufacturer on the sale of an automobile in the United States is from 300,000 to 400,000 yen (approximately U.S. \$1,300 - \$1,800).¹⁶ "The present condition in the Japanese market is such that the companies (automakers) are engaged in all out war and are losing money. They make profits on exports. Sales to the United States bring in especially big profits. . . ."¹⁷

Year	<i>No. of Passenger Cars Exported to the U.S.</i>
1970	323,671
1971	653,695
1972	590,150
1973	583,861
1974	683,580
1975	711,902
1976	1,050,685
1977	1,339,023
1978	1,408,669
1979	1,546,740
1980	1,819,092*

* verified by Japan Automobile Manufacturers Association, Inc., 1980 Exports by Destination. See also, Hearing Before the Subcommittee on Trade of the Committee on Ways and Means, 96th Cong., 2d Sess. 63-66 (1980).

¹⁴ See Birenbaum & Tellis, *supra* note 9.

¹⁵ *Id.*

¹⁶ Assuming an exchange rate of approximately 225 yen = 1 U.S. dollar.

¹⁷ See Mainichi Shinbun, June 25, 1981.

If this account is accurate, income lost by the companies due to the export restrictions may be staggering.¹⁸ Reaction by the automakers to the restrictions was swift and bitter (although one must assume that this reaction was orchestrated beforehand).¹⁹ The particularly ironic twist is that the Japanese manufacturers were subject to restrictions by their own Government after the U.S. International Trade Commission pronounced that their exports to the United States did not constitute a substantial

¹⁸ It is assumed that, as a result of the reduced supply, manufacturers and dealers of Japanese automobiles will be enabled to increase prices and substitute auto models with a higher rate of profit per vehicle. If we further assume that automobiles of Japanese manufacture constitute a separate market (presumably, due to perceptions of differences in quality), and make other assumptions concerning the ease of making price increases, we can construct a theoretical model in which total profits of such manufacturers and dealers are increased as a result of the restrictions.

According to standard cartel theory, profits of cartel members are maximized when they act together as a monopolist. Except under aberrant conditions, the monopolist reduces volume of production from that which would take place under free competition. Cartel members with a shared monopoly should act in the same way. However, there is strong incentive for members to cut prices below those agreed upon. According to Professor Stigler, "Fixing market shares is probably the most efficient of all methods of combatting secret price reductions." Stigler, *A Theory of Oligopoly* in *ECONOMIC ANALYSIS AND ANTITRUST LAW* 124 (Calvani & Siegfried eds. 1979). Thus, in administering volume restrictions to all Japanese automakers, MITI acts as the ideal enforcer of the cartel. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* 195-209 (2d ed. 1977).

However, Japanese automakers' ability to raise prices will be circumscribed by competition among themselves (within volumes allocated), by competition from other auto manufacturers, by concerns of long-term market position, and a host of other factors. In view of such factors, it would seem unlikely that prices can be raised sufficiently to enable reduced export volume to result in increased profit. Concerning any shift to export of larger, more profitable vehicles, Japanese automakers have always had the freedom to make this move. Assuming availability of sufficient production capacity, they would be free to challenge U.S. makers in the luxury vehicle market while maintaining their strong position in the sale of small cars. Volume restriction, however, entails a sacrifice in either sector or both.

Further, in evaluating the compulsory aspect of the restrictions, the possibility exists that the prime objective of the Japanese business organization may be expansion rather than profit maximization. If this is true it would mean that export restrictions have a greater impact on Japanese business than might be expected in the profit-oriented West. For a thorough presentation of the thesis that business expansion is the primary goal of the Japanese organization, see Drucker, *Economic Realities and Enterprise Strategy* in *MODERN JAPANESE ORGANIZATION AND DECISION-MAKING* 228-48 (E. Vogel ed. 1975).

¹⁹ See accounts in the Japanese press of May 2, 1981. See e.g., *Asahi Shinbun* which on May 2, 1981, published the statements of the irate presidents of Nissan and Toyota, Japan's two largest auto manufacturers. Aside from reduced sales and lost profits, major reasons for their objections included: 1) the ITC decision, 2) changes in the U.S. automobile market as General Motors began sales of its "J car," 3) the manufacturers' professed belief that restriction of Japanese sales would have no effect on the performance of U.S. industry and, 4) problems for the Japanese makers in maintaining dealership networks with reduced allotments of automobiles.

cause of injury to American industry.²⁰

B. *Enforcement of the Restrictions*

In view of the resulting loss of profits and market share, compliance with the restrictions can hardly be deemed to be a fully voluntary act.²¹ The letter addressed to the U.S. Attorney General states that the measures would be "put into practice through written directives setting the maximum number of exportable units."²² It has been reported that written directives which carefully track the language of Ambassador Okawara's letter have been issued to the automakers. However, there is no statutory provision in Japanese law explicitly authorizing the Japanese Government to issue such written directives.²³ As authority for its action, the Ministry of International Trade and Industry (MITI) cites Article 3 of the law establishing the Ministry²⁴ and Article 48 of the Foreign Exchange and Foreign Trade Control Law.²⁵ These provisions are drafted in very broad terms and do not mention written directives or punishment for disobedience. Therefore, the Japanese Government has not yet employed any statutory procedure which explicitly authorizes issuance of a binding order. The use of an informal request in place of the exercise of statutory authority is standard administrative practice in Japan. This practice is termed "administrative guidance."²⁶ Whether administrative guidance can constitute a binding order as a matter of Japanese law is unresolved.

The great difference between the typical case of administrative guidance and the automobile case is found in the text of the letter to the Attorney General and in the "written directives." These documents demonstrate a public commitment by the Japanese Government to enforce export controls in a manner expressly provided by statute in the

²⁰ See Birenbaum & Tellis, *supra* note 9.

²¹ Clearly, compliance is voluntary in the sense of a choice of the lesser evil. The danger of more restrictive protectionist legislation is an ever-present consideration.

²² See *infra*, Appendix B. Allotments to individual companies presented a knotty problem for MITI and gave rise to a second wave of criticism by the two largest producers. According to press accounts, 99 percent of the total number of vehicles available for export was allotted on the basis of a weighted average of exports during the years 1979 and 1980, with 1980 weighted at three to four times the 1979 volume. The remaining 1 percent was left for MITI to grant in its discretion. It is reported that this 1 percent (16,500 automobiles) was allotted to Isuzu to reflect a recent drop in sales due to a rearrangement of distribution in the United States. The single largest shareholder in Isuzu is the General Motors Company. See, e.g., Sankei Shinbun, June 24, 1981.

²³ See *infra* Section on Administrative Guidance at 68.

²⁴ See *infra* Appendix A at 74.

²⁵ See *infra* note 79.

²⁶ See *infra* Section on Administrative Guidance at 68.

event that its "directives" issued through administrative guidance are disobeyed. In the typical case, no such public commitment is made. The automobile case has seen the creation of a new procedure in Japanese administrative law to fulfill the perceived requirements of U.S. law.

III. EXTRATERRITORIAL APPLICATION OF U.S. LAW AND THE EXEMPTION FOR ACTS COMPELLED BY FOREIGN SOVEREIGNS

A. *In General*

Under the condition of a market freely open to import, the authorities charged with the enforcement of a competition policy are given the choice of imposing that policy upon actions of market participants, even though taken in foreign jurisdictions, or imposing the policy solely against domestic practices. The latter approach bears the potential result that domestic competitors will be placed at a competitive disadvantage in comparison with their foreign rivals.

American courts have emphatically chosen the first alternative. The best known theoretical expression of this attitude is styled the Effects Doctrine.²⁷ The core of the Doctrine has been expressed as follows: "[A]ny state may impose liabilities even upon persons not within its allegiance for conduct outside its borders that has consequences within its borders which the state reprehends."²⁸

In the commercial context, unimpeded application of this simple principle would permit American courts to investigate business activities taking place in any corner of the world, if such activity would have an impact on U.S. commerce. This is evenhanded administration of commercial justice in virginal form.

The Effects Doctrine has been subject to heavy criticism.²⁹ The crux of the attack has been that effects on the U.S. marketplace constitute only one consideration to be weighed in the decision whether to subject actions taking place in foreign jurisdictions to the requirements of U.S. law. The result of the theoretical controversy is that it is unclear what general standard should apply to determine when a U.S. court should ex-

²⁷ The United States is not the sole proponent of the extraterritorial application of competition law based on effects in the national market. *See, e.g.*, 1 *WORLD LAW OF COMPETITION, WESTERN EUROPE*, (J. Von Kalinowski gen. ed. 1979) [verified by author]; Deringer, *Extraterritorial Application of Antitrust Law—Modern Trends*, 6 *THE INT'L CONTRACT—LAW & FIN. REV.* 323 (1980) [verified by author]. However, the American system is by far the most aggressive in application. The topic of extraterritorial application of competition laws was considered at length by representatives of the International Chamber of Commerce held in Paris in March 1981. For a short report on this conference, *see* 2 *BUS. L. REV.* 201 (1981).

²⁸ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

²⁹ *See Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1977).

ercise jurisdiction in this international context.

Whatever the general standard may be, the courts have developed a relatively settled exception to its application which exempts the acts of sovereign States from scrutiny under U.S. law and further exempts acts of private parties that may be compelled by sovereign States. A short summary of the leading case propounding a broader test than the general standard announced by the pure Effects Doctrine will be given, followed by a discussion of the exception. The exception is itself conventionally expressed as two subdivisions termed the "Act of State" and "Sovereign Compulsion" Doctrines. It is the latter which has the most direct bearing on the automobile case.

B. *Beyond Effects*

The decision of the Ninth Circuit Court of Appeals in *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*³⁰ leads the attack on the pure Effects Doctrine. The plaintiffs in *Timberlane* attacked a conspiracy alleged to have taken place in Honduras which had both the purpose and effect of restricting exports of lumber to the United States. The action was based on sections 1 and 2 of the Sherman Act, and on the Wilson Tariff Act.³¹ In addition to other factual allegations, the plaintiffs alleged that an officer appointed pursuant to Honduran law to oversee certain assets in dispute along with other employees of the Honduran Government were parties to the conspiracy.³²

The impact of the Honduran actions on the U.S. market was manifest. In addition the participation of a foreign government was asserted. Thus the court was faced with the need to reexamine both the Effects Doctrine and the Act of State Doctrine. The court emphatically rejected the Effects Doctrine and proposed its own three-step standard in its place:

We conclude, then, that the problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a mat-

³⁰ *Id.*

³¹ Sherman Antitrust Act, 15 U.S.C. §§ 1-7. Wilson Tariff Act, 15 U.S.C. §§ 8-11.

³² Acting through the interventor, [a Honduran judicial mentioned above] since accused of being on the payroll of the Bank, guards and troops were used to cripple and, for a time, completely shut down Timberlane's milling operation. The harassment took other forms as well: the conspirators caused the manager of Timberland's Honduras operations, Gordon Sloan Smith, to be falsely arrested and imprisoned and were responsible for the publication of several defamatory articles about Timberlane in the Honduran press.

ter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?³³

Under the *Timberlane* standard, the element of effect, whether actual or intended, becomes a threshold consideration. This initial concern may be subdivided into two parts: is the effect sufficient to provide subject matter jurisdiction?; and, is the effect "sufficiently large to present a cognizable injury to the plaintiffs?"³⁴ The last part of the test presents the issues of international comity and fairness, and allows the greatest room for the subjective input of the decisionmakers. The court regarded this as a balancing-test resolution to a conflict of laws problem. To describe its rule, the court cited Kingman Brewster's term, "jurisdictional rule of reason,"³⁵ and found direct support along with a list of factors to be examined in the *Restatement Second of Foreign Relations*.³⁶ The essence of the third part of the test is an evaluation of the relative involvement and concern of each State which has an interest in regulating the activity; this results in an identification of "the potential degree of conflict if American authority is asserted Having assessed the conflict, the court should then determine whether in the face of such conflict the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction."³⁷

³³ *Id.* at 615. The *Timberlane* court reversed a lower court's dismissal of the case "under the act of state doctrine and for lack of subject matter jurisdiction." *Id.* at 601. The test applied by the trial court was uncertain. See the appellate court's statements *id.* at 607-08 and 614-15 for indications of its receptivity toward trying the case in the United States.

³⁴ *Id.* at 613.

³⁵ Factors to be evaluated in applying Professor Brewster's rule include the following: (a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunities; (c) the relative seriousness of effects on the United States compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies, and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 446 (1958).

³⁶ The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the relative importance to the violation charged of conduct within the United States as compared with conduct abroad.

Timberlane, 549 F.2d at 614.

³⁷ *Id.*

The opinion clearly indicates that the potential conflict of greatest concern to the *Timberlane* court is a conflict between governments. In its discussion of the Act of State Doctrine, the court cites *Banco Nacional de Cuba*³⁸ and affixes the source of that Doctrine to "the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of government."³⁹ The court quoted a balancing test provided by *Sabbatino*: "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."⁴⁰ The court then extended this concept to the treatment of "the general problems of extraterritoriality."⁴¹

The Japanese automobile export restrictions were created through an exercise of diplomacy.⁴² The Japanese Government requested and received a written statement from the U.S. Department of Justice giving its opinion that Japanese automakers acting in compliance would not violate U.S. law.⁴³ If we assume that the negotiations undertaken by the U.S. Government to persuade the Japanese Government to adopt such restrictions were themselves lawful,⁴⁴ then the standard and rationale of *Timberlane* would appear to bar any subsequent examination of those restrictions by courts of the United States. The "degree of conflict with foreign law or policy"⁴⁵ would be extreme.

C. The Act of State and Sovereign Compulsion Doctrines

1. Acts of Foreign Governments

The closely related issues of international comity, fairness to private parties who may be subject to the conflicting demands of different governments, and limits of judicial power become critical when the actions of foreign governments are called into question under U.S. law or are entwined with the actions of private parties involved in litigation in the United States. Any court of law must recognize a practical limitation when confronting the actions of sovereign authorities. American courts

³⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

³⁹ *Timberlane*, 549 F.2d at 607.

⁴⁰ *Id.*

⁴¹ *Id.* at 613.

⁴² See *supra*, text surrounding note 13.

⁴³ The legal effect of such a letter considered in the abstract is a matter of speculation. The Department has established a regular "Business Review Letter" procedure to deal with less extraordinary situations. Such business review letters carry the Department's opinion on the legality of proposed business operations, but are not binding. See Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6 (1980).

⁴⁴ See Trade Act, *supra* note 8, at §§ 2251-53. See also *Consumers Union*, 506 F.2d at 143, and *supra* text surrounding notes 10 and 11.

⁴⁵ See *Timberlane*, 549 F.2d at 516.

have developed a theory to describe this practical limitation under which the acts of foreign sovereigns are not subject to scrutiny under U.S. law, even if they produce effects in the United States.⁴⁶ The natural corollary to the rule is that the acts of private parties taken within a foreign jurisdiction, and compelled by the sovereign authority in that jurisdiction, are also exempt from attack under American law. This corollary is generally referred to as the Doctrine of Sovereign Compulsion. It is expressed by one commentator through use of this comparison:

There are three possible situations in relation to the defense that the acts complained of are those of a foreign sovereign: (1) foreign law or executive authority requires or directs the acts or contracts in question; (2) foreign law or executive authority acquiesces in such acts or contracts; or (3) foreign law does not prohibit such acts or contracts.⁴⁷

This commentator goes on to state that a rule has evolved from case law to the effect that "a defense based upon acts of a foreign sovereign cannot be supported by anything less than (1) *supra*. . . ."⁴⁸

⁴⁶ See *id.* at 605-6.

⁴⁷ W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 76 (2d ed. 1973).

⁴⁸ *Id.* The *Mannington Mills* court, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, (3d Cir. 1979) stated,

Where the governmental action rises no higher than mere approval, the compulsion defense will not be recognized. It is necessary that foreign law must have coerced the defendant into violating American antitrust law. The defense is not available if the defendant could have legally refused to accede to the foreign power's wishes.

Id.

The U.S. Department of Justice guide, states the following in a discussion of a sovereign compulsion hypothetical: "Offshore may have a sovereign compulsion defense if C (a foreign government), acting in conformity with its own law, requires Offshore to observe the terms of the cartel for its acts solely within C's territory." The Department lists the following requirements to the defense:

A major limitation is territorial. Although the U.S. courts will recognize an anti-trust defense for actions taken or compelled by a foreign sovereign within its territory, such recognition will not be afforded with respect to an act inside the United States. The situation in third countries is less clear. A second limitation is that the action upon which the defense is based must be the act of a truly sovereign entity within the scope of its powers under the law of its nationality. The valid decree of a foreign government usually meets this requirement; the action of a nongovernmental agent of a foreign government does not, at least when it is not proved that such an agent clearly was authorized to perform the alleged acts of state as a delegated sovereign function. Third, the act of state defense does not apply to the commercial actions of a foreign government or instrumentality, but only to its public, political actions. And underlying the foreign compulsion defense is a balancing of the comity interests of Restatement § 40 as well as the question whether the company is being reasonable in doing what it felt it had to do.

ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS at 54-5 (rev. Mar. 1, 1977). In the automobile case, the action was taken in Japan and clearly involved the government acting in its

This theory appears to balance the dictates of U.S. law with the need to recognize the authority of the foreign sovereign and therefore to protect private parties from being penalized for acts carried out without freedom of choice under the direction of sovereign authority. Application of the theory turns on interpretation of the terms "requires or directs." Determining whether or not an action has been directed may at times be a difficult task. No two governments apply identical means of implementing policy. The form of "direction" issued by foreign governments to their citizens may not be easily recognized in documentary form. In addition, at times officials of foreign governments may compel action in a manner not clearly authorized by any statute. The interest of fairness commands that "compulsion" be defined to include a broader category of circumstances than merely the issuance of written orders provided for by law. However, if the exemption is so broadened, the inquiry may become lost in a tangle of considerations including the structure of law in the country involved, the status accorded its officials, the power (*de facto* and *de jure*) those officials possess to punish the uncooperative, the form of expression used by the officials involved, and other factors that combine to create the environment in which the acts complained of took place. To sort out this tangle and arrive at a fair evaluation of the circumstances may require an immense expenditure of judicial energy in a court unfamiliar with the law and established practices governing the actions examined.

Conversely, to limit the rule to formal situations in which foreign governments have issued express orders backed by sanctions for noncompliance is to ignore the *de facto* power of sovereignty (including its power to adopt extra legal means of expressing its will) and to potentially cause great injustice to individual defendants. If U.S. law is to be applied to foreign persons acting under the supervision of foreign authorities, a method must be found by which judicial efforts are efficiently employed in the examination of such circumstances without sacrificing policy objectives. Two such methods which are readily apparent are inquiry directly to the foreign government concerned and evaluation of the defendant's actions in light of its own commercial interests.

2. Statements by Foreign Governments*

The most economical method of determining whether a foreign government compelled the action of a private party is to address the question directly to the government involved. In fact, foreign governments are

official capacity. The only apparent question under the foregoing requirements is whether the government "required" the action.

* This section of the paper was prepared entirely by Mr. Repeta and does not necessarily reflect the views of Professor Matsushita.

capable of entering these deliberations with a great deal of enthusiasm. Leading examples are found in the *Swiss Watchmakers* case,⁴⁹ in which the Swiss Confederation submitted a brief as *amicus curiae*,⁵⁰ and the color television litigation,⁵¹ in which the Japanese Government submitted a statement⁵² through diplomatic channels to a U.S. district court.⁵³

The *amicus* brief in the *Swiss Watchmaker* case indicated that action was taken "at the behest and with the encouragement of the Swiss Confederation"⁵⁴ and that application of U.S. antitrust law "would infringe Swiss sovereignty."⁵⁵

The statement involved in the latter case describes the participation of MITI in the establishment of a cartel governing the export of Japanese televisions. In this document one finds the statements that MITI "directed" establishment of the export cartel and that "the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction."⁵⁶

These examples, as well as the legislative reactions cited above,⁵⁷ illustrate that foreign governments give little sympathy to the efforts of American courts to enforce U.S. law against the activities of nationals of those States when the activities are carried out within the borders of the affected States. As a result, one can readily conclude that foreign governments should be disqualified as arbiters of whether they "directed or required" the activities of the defendants on both objective and subjective grounds.

If "direct or require" is to be a standard in U.S. law, then it requires application by a U.S. tribunal. To delegate the task to foreign governments is to request a multiplicity of interpretations. Such statements cannot be given preclusive effect because foreign governments are not equipped to apply the standard. Furthermore, it is submitted that in

⁴⁹ *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 134 F. Supp. 710 (S.D.N.Y. 1955).

⁵⁰ We have relied on a quotation from this brief reproduced in H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS*, 957-58 (1st ed. 1968).

⁵¹ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). [hereinafter cited as *Zenith*].

⁵² *Infra*, Appendix A at 74.

⁵³ The *Zenith* court did not reach the issues presented by the statement, granting summary judgment to defendants. *Zenith*, 513 F. Supp. 1100. The purpose of discussion of the statement in the opinion is to serve as reference for the Appeals court. Aside from its significance in the color television case, *id.* this policy statement may be thought of as a full dress rehearsal for the Ministry's preparation of the statement dispatched to the U.S. Attorney General in the automobile case. *Id.* at 1194 n.123.

⁵⁴ See STEINER & VAGTS, *supra* note 50, at 957.

⁵⁵ *Id.*

⁵⁶ See *infra*, Appendix A at 76, 77.

⁵⁷ See *supra* note 5 and surrounding text.

most cases such statements should be subject to close scrutiny and perhaps should have no greater weight than the statement of an interested party.

Foreign governments are generally incapable of objectivity in these cases for several reasons. The first is the delicate issue of sovereignty. Most States have adopted a concept of jurisdiction based on territoriality rather than effect. Such States are naturally affronted by any attempt to extend foreign authority to actions taken within their territories. This affront becomes more serious when the foreign government itself was involved in the actions attacked, either through its "direction" or through acquiescence. Secondly, if it is known that the foreign government was involved in some fashion, then it is implicated in the action under scrutiny. Another significant factor is domestic pressure to support home industry which may be penalized under a foreign law that is vague and confusing, and which may have the undesirable effect of restricting exports. Lastly, it should be noted that the statement is likely to be made by the executive or administrative branch of the foreign government and will be descriptive of the actions of some office of that government.

Such statements are of uncertain value when considering the compelling nature of the action when taken. However, they do have value as an indication of the current interest in the case shown by the foreign government and therefore aid in the application of the third part of the *Timberlane* standard to identify "the potential degree of conflict if American authority is asserted."⁵⁸ A strong statement by a foreign government coupled with other factors which would undermine the propriety of hearing the case in the United States might lead a court to conclude that it should decline jurisdiction.⁵⁹

3. The Commercial Interests of the Defendant

In many cases, whether the request or order is in harmony with the commercial interests of the defendant will be readily apparent. If the content of the request or order of a foreign government is contrary to the commercial interests of the defendant, his compliance therewith is strong evidence of its compelling nature. This appears to have been the guiding rationale in the *Interamerican Refining* case.⁶⁰

In *Interamerican*, the defendants were charged with conspiring to destroy a potentially profitable oil refining business by refusing to sell

⁵⁸ *Timberlane*, 549 F.2d at 614.

⁵⁹ Under the current practice, prior to examining any such statement, the court must identify and confirm the authority of the issuing body in order to represent the government concerned. See *Zenith*, 513 F.Supp. at 1194 n.123.

⁶⁰ *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

crude oil to the plaintiff. The defendants did not deny either the refusals or the injury.⁶¹ They sought to escape liability on the ground that the Venezuelan Government forbade them from dealing with the plaintiff. The court held that the defendants were compelled by Venezuelan regulatory authorities to boycott the plaintiff and that this amounted to a complete defense.⁶²

The court found that all foreign firms selling Venezuelan petroleum were required to be licensed by a government ministry and that the ministry had established a commission to supervise this activity. Violation of the rules of the commission could result in suspension of the right to conduct business.⁶³

The commission verbally "instructed" the defendants to refrain from selling to the plaintiff. Unfortunately, the details of the discussion are not clear from the opinion. The primary (perhaps sole) reason for suspension appears to have been that the principal shareholders in the plaintiff corporation were political opponents of the Venezuelan administration then in power.

The plaintiff submitted as evidence the affidavit of a Venezuelan attorney indicating that the ministry had no authority to issue binding orders without reducing them to writing and publishing them in the *Gazeta Oficial*.⁶⁴ The court decided that the issue of the legality of the orders was irrelevant. Furthermore, the court neither defined "order," nor did it explain exactly why the "orders" were compulsory.⁶⁵ The court showed no concern for the legal requirements for the issuance of orders and the opinion does not disclose the wording by which this "order" was expressed. A reading of the opinion suggests that the key to the court's decision is that no evidence was offered tending to show that a termination of business with the plaintiff was in the interest of the defendant. In summary, the court stated:

The relationship among supplier, trader, and refiner was essentially symbiotic, profitable to all, and nothing supports any other theory. What the uncontradicted evidence does show is that the defendants were eager to sell to plaintiff, and that they acted in good faith before and after the ban, and that all refusals to deal were based on compliance with authority which was in the words of Professor Brewster, "in fact, a *sine qua non* of doing business."⁶⁶

⁶¹ *Id.* at 1294.

⁶² *Id.* at 1296.

⁶³ *Id.* at 1295.

⁶⁴ *Id.* at 1298.

⁶⁵ ". . . the factual inquiry is limited to the existence of the officer and the order. Once governmental action is shown, further examination is neither necessary nor proper." *Id.* at 1304.

⁶⁶ *Id.*

The court found that the defendants had terminated a business that had been profitable. The reason for termination was deemed to be secondary to the fact that the defendants chose to submit despite the loss entailed. Certainly, such a choice by a defendant in a U.S. court should not preclude that court's independent inquiry into the compulsory nature of the order. It is clear though that the defendant's decision to act in a manner contrary to its monetary interests should be accorded great weight in determination whether that act was compelled.

IV. JAPANESE STATUTORY AUTHORITY FOR RESTRICTION OF EXPORTS

Regulation of Japanese exports is provided under Japanese law through two major statutes, the Foreign Exchange and Foreign Trade Control Law (Control Law)⁶⁷ and the Export and Import Transactions Law (Transactions Law),⁶⁸ along with the regulations promulgated thereunder. Both statutes are administered by MITI, although action under either may require an order of the Cabinet. Implementation of the statutes is subject to scrutiny under Article 22 of the Constitution which establishes the general principle of freedom to choose one's occupation.⁶⁹

A. Requirement of Approval for Export

Article 48 of the Control Law states that persons who would export designated goods or who would export to a designated destination may be required to obtain the approval of MITI, as provided by Cabinet Order.⁷⁰

In order to establish an approval requirement under this statute, certain conditions must be fulfilled: the requirement must be established by

⁶⁷ Gaikoku kawase oyobi gaikoku boeki no kanri ni kansuru horitsu (Foreign Exchange and Foreign Trade Control Law) Law No. 228 of 1949, translated in 5 EIBUN-HOREI SHA LAW BULL. SERIES AA and in JAPAN, LAWS, ORDINANCES AND OTHER REGULATIONS CONCERNING FOREIGN EXCHANGE AND FOREIGN TRADE, Chuo Shappan Kikaku, pp. A-1-A-41 [hereinafter cited as Control Law]. Major amendments to the Control Law with the purpose of liberalizing control of foreign transactions came into effect in December of 1980, however, the amendments did not affect procedures discussed herein. For an overview of the amendments see Kaname Seki, *The Amendment of the Foreign Exchange and Foreign Trade Thereof* 2 JAPAN BUS. L.J. 29 (1980) [verified by author].

⁶⁸ Yushutsunyū torihiki hō (Export and Import Transactions Law), Law No. 290 of 1952, amended in 1965, translated in 1974 JAPAN FOREIGN TRADE NEWS at 348-73 (spec. ed.) [verified by author] [hereinafter cited as Transactions Law].

⁶⁹ See Haley, *The Freedom to Choose an Occupation and the Constitutional Limits of Legislative Discretion*, 8 LAW IN JAPAN: AN ANNUAL 188 (1975).

⁷⁰ Control Law, *supra* note 67, at art. 48(1), reads as follows:

Any person desiring to export goods from Japan may be required to obtain the approval of the Ministry of International Trade and Industry for those types or areas of destination of export goods and/or method of transactions or payments as provided by Cabinet Order.

a published Cabinet Order, it must be issued to serve the purposes for such an approval requirement expressed by the statute, and it must be cast in terms that cause no greater restriction on free export than is necessary to serve the purposes for such requirements expressed by the statute.

The effect of the first condition is that the decision to require an approval must be made or approved by the Cabinet in writing. The Cabinet Order should specify the subject goods or destinations. Once the Cabinet has so ordered, the authority of MITI extends to decisions whether to issue approvals in specific cases.

The second and third requirements derive from the adoption of the principle of free export, expressed in Article 47 of the Control Law and from provisions of the Control Law and the Export Trade Control Order related specifically to establishment of an approval requirement.

Article 47 of the Control Law provides that the "export of goods from Japan shall be permitted with the minimum restrictions thereon consistent with the objective of this Law."⁷¹ In cases where the establishment of an approval requirement is authorized, Article 48(2) of the Control Law requires that such a requirement be framed "within the limit of necessity for the maintenance of the balance of international payments and the sound development of international trade or national economy."⁷²

Once established by a Cabinet Order, the license requirement is to be administered by the Minister of MITI. The Minister is empowered by Article 1 of the Export Trade Control Order to deny export licenses or to attach conditions to their approval.⁷³ Denial and attachment of conditions to licenses are authorized only in cases where the Minister has determined that the requirements of purpose and minimal restriction described above are served by such denials or conditions.⁷⁴ Neither the Control Law nor the Export Trade Control Order specifies the nature of conditions that may be attached to approvals by the Minister.

⁷¹ *Id.* at art. 47. The MITI denial of an export license has been declared unlawful in one decision by the Tokyo District Court on the ground that its denial (to prevent export of items subject to strategic control under the Consultative Group Coordinating Committee Agreement (COCOM), to which Japan is a party) was outside the scope of the purposes of the Control Law and Export Trade Control Order. The COCOM decision is discussed in Matsushita, *Export Control and Export Cartels in Japan*, 20 HARVARD INT'L L. J. 103, 106-08 (1979).

⁷² *Id.* at art. 48(2).

⁷³ Export Trade Control Order (*Yushutsu hōeki kanrirei*) 5 EIBUN HOREISHA L. BULL. SERIES AJ-2 and at Chuo Shuppan Kikkaku, *supra* note 67, at C-1-C-62. Such decisions are appealable under the Administrative Cases Litigation Law. For a discussion of the issue of administrative discretion and a translation of a recent decision of the Supreme Court of Japan on the issue, see Miyazaki, *The Political Rights of Aliens in Japan and Compulsory Deportation*, 12 LAW IN JAPAN 82 (1979).

⁷⁴ *Id.* at art. 1(6).

Price and quantity restrictions have been the most common forms of export restriction employed by MITI.⁷⁶ The former has come to be referred to as the "check price." Its major purpose is to set a minimum export price in order to prevent dumping. Quantitative restrictions take the form of an allocation among exporters ordinarily determined on the basis of past export volume adjusted to reflect other factors. This type of format is employed in the quantity restrictions in the automobile case.⁷⁶

The letter of Ambassador Okawara to the Attorney General of May 7, 1981, states that if:

it becomes clear that any company threatens to exceed the limits set forth by MITI, the Government of Japan will promptly make car exports to the U.S. subject to export approvals, by amending the Export Trade Control Order (Cabinet Order No. 378 of 1949) in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law. MITI would then enforce the export maximums it had established for each company by refusing to license exports in excess of those maximums.⁷⁷

Under the circumstances, it appears certain that such restrictions are "within the limits of necessity for . . . the sound development of international trade." Therefore the restrictions are within the purposes of the Control Law and the Japanese Government is legally empowered to proceed. What may be curious to the non-Japanese observer is that MITI has chosen not to employ these measures at the present stage. Rather, the Ministry has decided to achieve the same result informally, through administrative guidance with the statutory measures available in the event that the informal guidance is not followed.

B. *Export Cartels*

The purposes of the Transactions Law are to prevent unfair export transactions⁷⁸ and to ensure order in export and import transactions. In relation to exports, the statute is designed to achieve these purposes

⁷⁶ Other restrictions include transaction alignment by requiring a set route of export; safety and sanitation rules based on certain safety and sanitation standards; design regulations to prevent possible infringement of intangible property rights in the destination countries; and payment terms and recovery of credit by imposing an obligation to comply with certain conditions in order to secure smooth recovery of credit or prevent worsening of payment terms of cases if plant exportation under deferred payment.

⁷⁶ See *infra*, Appendix B at 78-79.

⁷⁷ *Id.* at 78.

⁷⁸ Unfair practices designated in the statute include infringements of intangible property rights (in the country of import), false indications of origin, export in violation of an export agreement, and other practices contrary to "Fair commercial practice in international transactions" and designated by Cabinet Order. Transactions Law, *supra* note 68, at art. 2.

through the use of export cartels. There are two types of cartels: agreements among exporters or manufacturers of goods to be exported ("Cartel Agreements"), and terms stipulated by export associations to be followed by their members ("Export Associations").

1. Cartel Agreements

Article 5 of the Transactions Law authorizes conclusion of cartel agreements by exporters to govern prices, quantities, quality, designs, and other terms of sale of specified goods in specified designations. The same provision requires notification to the Minister of MITI 10 days prior to conclusion of the agreement.⁷⁹ The statute requires the Minister to prohibit or order amendments in agreements that come within any six categories of objections set forth in the statute.⁸⁰ The statute does not grant the Minister the authority to prohibit or order amendment if the agreement does not come within the scope of any of these objections, nor does the statute grant the Minister the power to order formation or participation in such agreements.

Thus, in the automobile case, if the Japanese Government had wanted the automakers to enter a cartel agreement restricting export guaranties, it would have had to persuade the companies to do so either voluntarily or under threat of action under the Control Law if they failed to cooperate. The Government would not have had authority to directly order such action.

The statute does not mandate positive conditions for the establishment of a cartel, but limits itself to stating negative conditions. This format is consistent with the statutory theme of leaving the initiative for the commencement of cartels with its members and allotting to MITI a supervisory role. If the agreement fails to meet any of the following criteria, MITI must issue an order amending or prohibiting the agreement before it is concluded:

- (1) there must be no likelihood that the agreement will violate any treaties or other arrangements concluded with a foreign government or international organization;
- (2) there must be no likelihood that the agreement will harm the interests of importers or related dealers in the place of destination, nor markedly harm the international reliability of Japanese exporters;
- (3) there must be no likelihood that the agreement will hamper the sound development of export trade;
- (4) the agreement must not be unreasonably discriminatory in content;
- (5) there must be no unreasonable restrictions on participation in or withdrawal from the agreement; and
- (6) there must be no likelihood that the agreement will unrea-

⁷⁹ *Id.* at art. 5(1).

⁸⁰ *Id.* at art. 5(2).

sonably harm the interests of domestic competitors of the participants or the interests of enterprises engaged in protected domestic industries such as agriculture, forestry or fishing, or the interests of the general consumer.⁸¹

2. Export Associations

Export associations organized under the Transactions Law are non-profit⁸² juristic persons.⁸³ Freedom to join or leave the association must be provided for in its articles of incorporation, and members must have equal rights of decisionmaking and voting.⁸⁴ Members must be either exporters or other export associations⁸⁵ and must meet the requirements, in addition to those specified by law, that the articles of incorporation of export associations may stipulate.⁸⁶ In addition to determining whether a member is engaged in "unfair export transactions,"⁸⁷ export associations may decide to limit competition among their members by filing a notification with MITI at least 10 days before establishing an export agreement that restricts the price, quality, or design of goods exported by members to certain destinations.⁸⁸ Export associations come into existence upon the issuance of a license by MITI, and are subject to the same negative conditions as Cartel Agreements.⁸⁹ As in the case of the Cartel Agreement, the government has no power to order their formation. Rather, it uses administrative guidance to persuade companies to form such associations.

3. Administrative Orders in Enforcement of Cartels

In those cases where an export cartel has been formed under the Transactions Law, the Minister of MITI may, by ministerial order issued pursuant to Cabinet Order, enforce the terms of the cartel against non-members, or establish and enforce the terms of export independently of those set by the cartel agreement.⁹⁰ In either case, the MITI directive would apply to all exporters of the affected goods being shipped to the

⁸¹ *Id.*

⁸² *Id.* at art. 9.

⁸³ *Id.* at art. 8.

⁸⁴ *Id.* at art. 9.

⁸⁵ *Id.* at art. 12(1).

⁸⁶ *Id.* at art. 12(2).

⁸⁷ *Id.* at art. 11(1).

⁸⁸ *Id.* at art. 11(2).

⁸⁹ *Id.* at art. 14. MITI is also authorized to order dissolution of an association. *Id.* art. 18.

⁹⁰ *Id.* at art. 28(1)-(2).

affected destinations.⁹¹

As conditions precedent to this authority, the statute requires that (a) exporters have given MITI notice of and have concluded an export agreement; (b) members of the cartel occupy a substantial percentage in cash value of transactions in the designated goods and destinations; and (c) that the Minister of MITI is of the opinion that the export agreement itself is insufficient to avoid serious difficulties obstructing the "maintenance of order in export transactions" or the "sound development of export trade."⁹²

The authority may be exercised in either of two formats. The Minister may simply issue an order specifying terms of export, or he may require that approval be obtained prior to export of the affected good. The advantage to the latter is that no public announcement is made concerning the conditions for approval. MITI is thus enabled to operate on a case by case basis and maintain the confidentiality of the terms of trade of parties acting under approvals. The sole statutory guideline is that the requirement be imposed "within the minimum scope necessary to eliminate" the obstructions to order and the sound development of exports.

The Minister is further authorized to ban exports in the affected category for a period of up to one year by persons who violated the ministerial order which sets export terms or establishes the approval requirement.⁹³

Due to the informal nature of Japanese administrative practice, it is not always clear where the initiative to form a cartel arises. The statute leaves this with the private parties concerned, but in actual practice one suspects that the formation of cartels is often originally suggested by administrative authorities in an attempt to avoid trade friction⁹⁴ (in particular, minimum prices may be set to avoid dumping charges).⁹⁵ MITI's statement in relation to the color television case so describes the practice.⁹⁶ In order to form an opinion whether such is the practice and whether it is generally accepted, it is necessary to have a basic understanding of Japanese administrative practice and the concept of "administrative guidance."

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at art. 28(4).

⁹⁴ Even when exporters agree upon the need for a cartel, they may be unable to agree on its terms and therefore may rely on MITI to devise terms acceptable to everyone (or to persuade the unenthusiastic to join).

⁹⁵ This was the rationale offered for use of the check price system in the *Zenith* case.

⁹⁶ See *infra* the portion of the MITI statement at 69-70.

C. *Administrative Guidance in the Implementation of the Control Law and Transaction Law*

Having described the statutory apparatus provided by the Control Law and Transactions Law, we must now attempt to describe the actual administrative practice which is not provided by statute. Although both the Control Law and the Transactions Law grant MITI the power to issue binding orders in specified situations, such orders are rarely issued. Japanese administrators generally prefer to engage in an informal process of persuasion, rather than to publicly issue binding orders. This practice is commonly termed "administrative guidance."⁹⁷ Because the practice avoids employment of binding orders, its success depends on the cooperation of the persons who are subjected to the guidance and, more fundamentally, upon their perception that it is in their interest to comply.

The statement provided by MITI in relation to the color television case⁹⁸ is illustrative. In that case, a federal district court examined an export association established under the Transactions Law. Attorneys for the defendants argued that MITI had directed both the establishment and the operation of the association and therefore the defendant members of the association were subject to sovereign compulsion forcing compliance with association rules.⁹⁹ In support of this argument, they offered the statement of MITI addressed to the court. According to this statement:

[w]ith respect to the export of television sets to the United States, in 1962 MITI accurately recognized, in view of the importance of televisions

⁹⁷ The body of commentary on administrative guidance is immense, even in English. See, e.g. Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45 (1968), Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN 22 (1974), Sanekata, *Administrative Guidance and the Antimonopoly Law*, 10 LAW IN JAPAN 65 (1977), Smith, *Prices and Petroleum in Japan: 1973-1974—A Study of Administrative Guidance*, 10 LAW IN JAPAN 81 (1977), Matsushita, *Administrative Guidance and Economic Regulation in Japan*, 1 JAPAN BUS. L.J. 209 (1980) [verified by author]. The oft-cited definition of administrative guidance was made in a 1970 statement by the Japanese Government before the House of Councilors Commerce and Industry Committee and is translated in Sanekata, *supra* at 68 as follows:

Administrative guidance does not involve legal authority for enforcement, as would the case of a restriction of civil rights or the imposition of a duty on the public. Administrative guidance refers to the function of an administrative agency—acting within the scope of a duty under the laws establishing the agency or within the scope of its jurisdiction—to persuade and guide a party to conduct its business in a certain way, in order to realize an administrative goal through the party's cooperation.

⁹⁸ See *Zenith*, 513 F. Supp. 1100, and *infra* Appendix A.

⁹⁹ See *Zenith*, 513 F. Supp. at 1192. Plaintiffs emphasized the lack of MITI authority to issue binding orders and the voluntary nature of the arrangements to argue that MITI intervention did not amount to compulsion. See *id.* at 1192-93. As stated at note 53 *supra*, the court did not decide the issue.

as one of Japan's export products, the need for assuring their orderly exportation to avoid the possibility of trade conflicts. Thus, MITI directed Japanese television manufacturers including the present Japanese defendants to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States, and further, directed the exporters to establish a new regulation to be observed by the members of the export association with respect to filing of export prices and other related matters, pursuant to the association's functions under Article 11, Subparagraph 2 of the same law regarding the same exports. MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected.¹⁰⁰

As discussed above, the Transactions Law does not expressly provide for the issuance of a directive to form an export cartel. Failure to follow such a directive does not amount to a violation of law. However, the MITI statement goes on to say:

[h]ad the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy.¹⁰¹

According to this description, the Ministry achieved the same result through administrative guidance as it was empowered to order under the Control Law. However, by acting informally, the Ministry retained its flexibility by avoiding the creation of a public record of its action or a need to demonstrate that its action fulfilled the requirements of any statute (note the COCOM case). None of the recipients were in a position to formally complain about the guidance because it did not amount to a public act subject to judicial review.¹⁰²

The Ministry, nevertheless, describes its action as a directive and, in such cases, recipients of administrative guidance may sometimes get a taste of compulsory flavor. Resistance to the informal directive may do no more than provoke the Ministry into the establishment of a requirement of Ministry approval. If an approval requirement were imposed, the uncooperative could hardly expect favorable treatment at the hands of the Ministry upon application for the required license. The possibility exists

¹⁰⁰ See *infra*, Appendix A at 76.

¹⁰¹ *Id.*

¹⁰² Lastly, it should be noted that the public was denied the opportunity to participate in or even to be apprised of this public policy. MITI openly disclosed its activity after the fact only because it was necessitated by the American litigation.

that the Ministry may inconvenience such persons in other ways as well.¹⁰³

Administrative guidance is a much discussed topic in Japanese administrative law.¹⁰⁴ It is agreed among the commentators that administrative guidance is a form of government regulation, but it is also agreed that compliance is not legally required. Although highly important as a matter of practice, its flexibility necessarily causes difficulty in the attempt to fit the concept into a rigid analytical framework. The result is that each incident of administrative guidance must be examined within its own particular context in order to determine its legal effect.

How administrative guidance should be evaluated from the standpoint of the American law concept of sovereign compulsion is unclear. It appears safe to say that the persons who formulated that doctrine were not acquainted with a standard administrative practice in which neither the administrator nor the administrated are legally bound by their actions.

There is little to offer for "guidance" from legal commentary in Japan. Scholars agree that compliance with administrative guidance is legally voluntary, but until now they have been concerned mainly with the domestic context in which the aspect of coercive nature has not been very significant.¹⁰⁵ The leading case concerning its effect under Japanese law is the 1980 decision of the Tokyo High Court in the *Petroleum Cartel* case.¹⁰⁶ The decision has not yet been fully digested and incorporated into the generally accepted body of Japanese administrative law,¹⁰⁷ but it will certainly shape thinking on the subject for the foreseeable future. Certain language in the opinion suggests that if the Ministry concerned had issued administrative guidance as a standard practice in order to achieve

¹⁰³ Concerning informal restrictive measures see Yamanouchi, *supra* note 97, at 25. For a discussion of the celebrated Sumitomo Metal Mining Company Case, see Narita, *supra* note 97, at 57-9. See also HENDERSON, FOREIGN ENTERPRISE IN JAPAN 203 (1973).

¹⁰⁴ See note 97 *supra* citations to English language commentary.

¹⁰⁵ Whether the actions of a person following administrative guidance are immune from attack under the Antimonopoly Law is largely a question of statutory interpretation (whether the provisions of the Antimonopoly Law or those of the regulatory statute should take precedence) and not whether such actions were compelled. See *infra*, note 109.

¹⁰⁶ Japan v. Petroleum Association, et al, Tokyo High Court, Special Division No. 3, Sept. 26, 1980, reported at No. 983 HANREI JINO 22, and Japan v. Idemitsu Kosan, K.K. et al, Tokyo High Court, Special Division No. 3, Sept. 26, 1980, reported at No. 985 HANREI JINO 3.

¹⁰⁷ The Petroleum Cartel decisions spawned an extensive re-examination of administrative guidance by Japanese scholars. A convenient listing of commentary by well-known scholars in the field is provided by Mr. Tokuhiko Ohata of the Fair Trade Commission at 364 KOSEI TORIHKI 22, (Feb. 1981). See also "Administrative Guidance Questioned" (*Towareru Gyōsei Shidō*), 741 JURISTO, (1981). English language commentary on the case appears in 14 LAW IN JAPAN (1981, forthcoming).

the purposes of a regulatory law (the Petroleum Affairs Law),¹⁰⁸ parties acting pursuant to that guidance would have been immune from attack under the antimonopoly law of Japan.¹⁰⁹ It may be argued that this provides an oblique precedent for the position that persons in similar circumstances should be immune from attack under American antitrust law. Needless to say, the standards for the U.S. concept of "compulsion" and the Japanese law concept of immunity from antimonopoly law differ,¹¹⁰ as do the circumstances in which they appear.¹¹¹

V. CONCLUSION

All Japanese exporters of automobiles to the United States have agreed to limit the volume of those exports for a period of three years. It is apparent that no single Japanese producer would have cut back exports without the assurance that its competitors would do the same. The inevitable result will be some degree of scarcity and a likely rise in prices of Japanese cars in the United States. The program was established by a ministry of the Government of Japan, after lengthy negotiations with the U.S. Government. The program is administered without the issuance of statutory orders to comply and is not described in any law.

Nevertheless, it is unimaginable that any U.S. court would fail to grant immunity to such a program if attacked under U.S. law. The program comports generally with standard Japanese administrative practice and gives effect to a policy decision of the Japanese Government which was made under persuasion of the U.S. Government; the amount of the cutback in exports for each individual producer was decided by the Japanese Government rather than by the exporters. The lost profits and market shares along with potential harm to dealership networks are eloquent testimony to the involuntary nature of the exporters' compliance. Any failure to grant such immunity would likely lead to an international incident and would cast serious doubt on the perceived authority of the President to negotiate matters concerning international trade problems.

¹⁰⁸ *Sekyugyōhō (Petroleum Industry Law), Law No. 128 of 1962.*

¹⁰⁹ In the Petroleum Cartel case, the court did not specifically address the question whether private parties were compelled to follow administrative guidance. Rather the private parties involved proposed plans for production cutbacks and the ministry merely approved such plans. Further, the Petroleum Affairs Law did not provide MITI with any means to compel compliance. In the automobile and color television cases, however, the ministry possessed power under the Control Law to take measures to compel compliance in the event that it is dissatisfied with industry response to informal communications.

¹¹⁰ *See supra* text of note 105.

¹¹¹ *E.g.*, Administrative guidance which may become subject to examination in U.S. courts will ordinarily be related to the Control Law and Transactions Law. *See supra* notes 67-8. Actions under these statutes is generally exempt from application of the Antimonopoly Law. *See Matsushita, supra* note 71, at 116-120.

When applying a *Timberlane*-style standard of extraterritoriality, a court should acknowledge that exercising jurisdiction in a case such as this would violate international comity and fairness, and would constitute an undesirable judicial intrusion into the conduct of foreign affairs. Even if it chose to exercise jurisdiction, an examination of the heavy involvement of the Japanese Government and the manifest loss resulting to the exporters as a result of compliance can only lead to a determination that the restrictions were compelled by a foreign sovereign.

Extraordinary circumstances such as those that surrounded the automobile controversy are unlikely to be duplicated on a regular basis. One hopes that cases involving the participation of the U.S. Government in the creation of export restrictions to the United States will be rare. Also, the conclusion that in this case actions were compelled by the Japanese Government does not necessarily lead to the conclusion that actions have been or will be compelled by that Government every time measures are taken under the Foreign Exchange and Foreign Trade Control Law and the Export-Import Transactions Law (or with those statutes "in the background"). To determine whether compulsion is present in any individual case requires a close examination of both the manner and the factual environment in which the administration was implemented.

Appendix A

April 25, 1975

E-21

The Embassy of Japan presents its compliments to the Department of State and has the honor to ask the latter to transfer to the United States District Court for Eastern District of Pennsylvania the attached statement concerning the two lawsuits between National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd. et al. (Civil Action No. 74-3247); and Zenith Radio Corporation v. Matsushita Electric Co., Ltd. et al. (Civil Action No. 74-2451).

Attachment

The Ministry of International Trade and Industry of the Japanese Government ("MITI") has become aware that a number of Japanese television manufacturers and exporters are being sued by National Union Electric Corporation and Zenith Radio Corporation in the United States District Court for the Eastern District of Pennsylvania for alleged violations of various United States antitrust and antidumping laws in connection with their sales of television sets for export to the United States (National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd., et al., Civil Action No. 74-3247 and Zenith Radio Corporation v. Matsushita Electric Co., Ltd., et al., Civil Action No. 74-2451.) In these lawsuits, questions have been raised concerning certain agreements entered into among the Japanese defendants, as well as certain regulations of the Japan Machinery Exporters Association, both such agreements and regulations have come into existence pursuant to the direction of MITI.

MITI has the honor to express its deep interest and serious concern regarding these lawsuits which involve issues related to its foreign trade policy and to call your attention to the following:

1. In order that Japanese exports do not cause unnecessary disruptions in the national economies of Japan's trading partners, one of the basic trade policies is to assure that Japanese exporting is carried on in as orderly a manner as possible. MITI is the government organ empowered and responsible for the detailed implementation of the said basic trade policy. Thus, Article 3 of the Law Concerning the Establishment of MITI (Law No. 275, 1952) sets forth the following administrative activities as being under the responsibility of MITI:

- (1) Promotion and adjustment of international trade and control of foreign exchange relating to international trade (Article 3, Paragraph 1);
- (2) Promotion of international cooperation in international trade and economic relations (Article 3, Paragraph 1-2).

Further, Article 4 of the Establishment Law defines the role of MITI as follows:

- (1) Planning and programming of basic policies concerning production, distribution, consumption, trading, etc. of goods (included is electric power) under its jurisdiction (Article 4, Sub-section 1, Paragraph 13);
- (2) To export and import (Article 4, Sub-section 1, Paragraph 16);
- (3) To restrict or prohibit export or import (Article 4, Sub-section 1, Paragraph 17);
- (4) To take the steps necessary to execute agreements and arrangements concerning international trade (Article 4, Sub-section 1, Paragraph 18);
- (5) To prohibit or restrict transactions, etc. in foreign exchange relating to international trade (Article 4, Sub-section 1, Paragraph 20);
- (6) To sanction exporters' agreements, importers' agreements and agreements of either manufacturers or distributors concerning export products, to sanction matters to be complied with members of export associations or import associations (hereinafter referred to as "Association Regulations"), to sanction collective agreements among the said members and matters to be complied with members of export-import associations, and to supervise designated agencies. (Article 4, Sub-section 1, Paragraph 24);
- (7) To exercise such powers, other than those mentioned in the above items, as are placed under the jurisdiction of MITI by law (including orders issued thereunder) (Article 4, Sub-section 1, Paragraph 51).

2. Endowed with the said responsibilities and powers, MITI has developed under the law two basic procedures to achieve the aims of trade policy of the Government of Japan. The first procedure relates to MITI's regulatory powers provided for under the Export and Import Trading Law (Law No. 299, 1952) and the second relates to regulatory powers under the Foreign Exchange and Foreign Trade Control Law (Law No. 228, 1949). The purpose of the Export and Import Trading Law is to promote the sound development of foreign trade by preventing unfair export trading and by establishing an orderly system for export and import trading. The purpose of the Foreign Exchange and Foreign Trade Control Law is to promote the proper development of foreign trade by providing for the control of foreign exchange, foreign trade and other foreign transactions.

In order to promote the sound development of foreign trade MITI

applies both laws as follows: If some measures are deemed necessary to achieve the purposes mentioned above, MITI will generally first direct the relevant Japanese industry or trade association to enter into Arrangements (which include both manufacturers' agreements and association regulations) pursuant to the Export and Import Trading Law.

Where this procedure is deemed to be insufficient for the purpose of achieving these trade policy objectives (for example, where there is insufficient time to complete the contemplated arrangements), MITI will exercise its powers provided for in the Export Trade Control Order (Cabinet Order No. 378, 1949) under the Foreign Exchange and Foreign Trade Control Law, without prior direction to the industry or trade associations to enter into such Arrangements.

As stated above, such Arrangements concluded under the Export and Import Trade Law and carried out under the direction of the Minister of International Trade and Industry in order to assure orderly Japanese exportation activities are the actual implementation of MITI's trade policy itself. And since such direction by MITI, if disregarded, can be enforced by the power pursuant to the said Cabinet Order, it has in fact a compulsory power equivalent to law.

Once MITI has decided upon the trade policy measures to be taken and has directed the establishment of appropriate Arrangements under the Export and Import Trading Law for this purpose, the Japanese industries involved have in fact no alternative but to establish them. Therefore the Arrangements entered into under the Export and Import Trading Law in compliance with the direction of MITI are not private agreements in effect and are no less than the implementation of the foreign trade policy of MITI, despite their form as agreements made among private parties.

3. With respect to the export of television sets to the United States, in 1962 MITI accurately recognized, in view of the importance of televisions as one of Japan's export products, the need for assuring their orderly exportation to avoid the possibility of trade conflicts.

Thus, MITI directed Japanese television manufacturers including the present Japanese defendants to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States, and further, directed the exporters to establish a new regulation to be observed by the members of the export association with respect to filing of export prices and other related matters, pursuant to the association's functions under Article 11, Sub-paragraph 2 of the same law regarding the same exports. MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected. Such direction and supervision concerning minimum prices at

which televisions could be sold for exportation to the United States and other matters were exercised continuously from 1963 until February 28, 1973 when such exporting arrangements were terminated.

4. Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy.

Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the Export and Import Trade Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction.

Appendix B

May 7, 1981

Dear Mr. Attorney General:

I have the honor to inform you that the Government of Japan, through explanations by the United States Government fully understands the difficult situation of the U.S. auto industry.

Based upon the above understanding, the Government of Japan will unilaterally restrain the volume of cars to be exported from Japan to the U.S., according to the scheme explained hereinafter, in order to cooperate with efforts to be taken for the recovery of the automobile industry in the U.S.

The Government of Japan considers the orderly export of Japanese products to be one of its basic trade policies so as not to create disruption in the national economies of other countries. On May 1, 1981, the Cabinet members concerned met, considered the attached scheme, and approved it.

It is the Ministry of International Trade and Industry (MITI) that has authority and responsibility for administering concretely Japan's basic trade policies.

The above-mentioned measures concerning Japanese car exports to the U.S. will be put into practice through written directives setting the maximum number of exportable units of passenger cars to the U.S. for each Japanese automobile company, to be given by MITI in accordance with its authority for bringing into action trade policies set forth in Article Three (3) of the establishment law of MITI, as well as Article Forty-eight (48) of The Foreign Exchange and Foreign Trade Control Law (Law No. 228 of 1949).

Adherence to these directives will be secured by reports on car exports to the U.S. which are to be collected separately from each company under the competent authority and responsibility of MITI.

Further, if any firm should fail to make a report or should make a false report in violation of the provisions of Article Sixty-seven (67) of the Foreign Exchange and Foreign Trade Control Law, that firm will be proceeded against for punishment under Articles Seventy-two (72) and Seventy-three (73) of the Law.

If on the basis of the above reports it becomes clear that any company threatens to exceed the limits set forth by MITI, the Government of Japan will promptly make car exports to the U.S. subject to export licensing, by amending the Export Trade Control Order (Cabinet Order No. 378 of 1949) in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law. MITI would then enforce the export maximums it had established for each company by refusing to license exports in excess of those maximums. The Government of Japan

has the authority under Japanese law to impose this requirement. It would be a violation of Japanese law to export cars without an export license in that situation, and any company engaging in such violation would be proceeded against for imposition of fines, penalties or other sanctions as provided by Article Seventy (70) of the Foreign Exchange and Foreign Trade Control Law.

As the above-mentioned directives setting limits for exportable cars and collecting reports from each company come as a result of the administrative authority inherent in the Government of Japan in accordance with the laws of Japan, each company must obey the orders of the Government of Japan.

The Government of Japan considers that implementation of such an export restraint by the Government of Japan, including the division of the maximum number of exportable units among the companies by MITI, and compliance with the restraints by Japanese automobile companies, would not give rise to violations of American antitrust laws. However, the Government of Japan requests that the Department of Justice, as the authority chiefly responsible for administering the U.S. laws, support the views of the Government of Japan.

Further, as to the export of passenger cars to Puerto Rico and the export of automobiles which are classified under "commercial vehicles" in JAMA statistics, but classified under "passenger cars" in the U.S., to the U.S. and Puerto Rico, we would like to know that the views of the Department of Justice are the same regarding the above should the Government of Japan restrain exports through the same measures mentioned above.

Sincerely yours,
Yoshio Ikawara
Ambassador of Japan

Appendix C

May 7, 1981

WS3441-2

His Excellency
Yoshio Okawara
Ambassador of Japan
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Mr. Ambassador:

This letter is in response to the request of the Government of Japan, set forth in its letter of May 7, and the two enclosures thereto, for the views of the Department of Justice on antitrust questions regarding measures now being considered by the Government of Japan to unilaterally restrain the export of passenger cars to the U.S. so as to cooperate with the U.S. Government's domestic automobile industry recovery program.

The Government of Japan has advised us that the Ministry of International Trade and Industry (MITI), which it represents has legal authority and responsibility in the Government of Japan for carrying out basic trade policy, including authority to take the measures described in your letter and its two enclosures, and has authority to maintain orderly exports, will establish at its discretion the maximum number of passenger cars which may be exported to the U.S. by individual Japanese companies. MITI will issue a written directive to each company stating the maximum number of cars that company may export to the U.S. in a specified period.

Further, MITI will direct individual companies to submit accurate monthly reports on passenger car exports to the U.S. so as to assure the implementation of the export limitation directive. It is understood, and the directive will state that, in any case in which it becomes clear that any company threatens to exceed the limits set forth by MITI, the Government of Japan will promptly make the export of cars to the U.S. subject to export licensing, in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law, (Law No. 228 of 1949), and Article One (1) of the Export Trade Control Order (Cabinet Order No. 378 of 1949 as amended), by amending the Export Trade Control Order. MITI will then enforce the export maximums it established for each company by refusing to license exports in excess of those maximums. The Government of Japan has advised us that MITI has the authority to impose this requirement, that it would be a violation of Japanese law to export cars without an export license in that situation, and that such violation would be punished pursuant to Japanese law by fines, penalties or other sanctions.

In these circumstances, we believe that the Japanese automobile companies' compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers. The Department of Justice is of the view that implementation of such an export restraint by the Government of Japan, including the division among the companies by MITI of the maximum exportable number of units, and compliance with the program by Japanese automobile companies, would not give rise to violations of United States antitrust laws. We believe that American courts interpreting the antitrust laws in such a situation would likely so hold.

Further, in response to your inquiry regarding exports of passenger cars to Puerto Rico and the exports of automobiles which are classified under "commercial vehicles" in JAMA statistics but classified under "passenger cars" in the U.S., we would like to state that if export limitations are achieved through the same measures and authorities previously described, the sovereign compulsion defense to any antitrust action that might be brought under United States laws would be equally available.

Sincerely,
William French Smith
Attorney General

