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The Legal Framework of Japanese Industrial Policy*

*Mitsuo Matsushita***

I. An Overview of Japanese Industrial Policy

A. *The Role of Industrial Policy in the Context of a Market Economy*

As with most of the advanced industrial countries of the free world, Japan has basically a market economy. In a market economy, the most fundamental element is the market mechanism; enterprises are generally free to decide the prices they will charge, the quantity they will produce, and the other terms of their business. In a pure market economy, governmental regulation of business is kept minimal.[1] However, in any market economy, the market mechanism is not always sacrosanct; it sometimes needs supplementary governmental intervention to remedy imperfections.[2] These imperfections involve so-called market failures and include monopolies, externalities, the weak position of small enterprises, trade frictions, the existence of structurally depressed industries, and various other circumstances which tend to hinder normal operation of the market.

To deal with these imperfections, the governments of the free market countries have introduced various regulatory measures. Consequently, no country has a free market in the pure sense. A more accurate description of every existing free market economy is a mixture of the market mechanism and certain kinds of governmental involvement. Each country differs from others to the extent its government becomes involved in steering the economy. The relative role of the government in steering its economy and regulating private enterprise is determined by fac-

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1. G. Grossman, Economic Systems 42 (1967).
2. G. Grossman, *supra* note 1, at 49-55.

tors such as the nation's historical background, its basic politico-philosophical orientation, the state of economic development, and the comparative advantages and disadvantages of industries in the country relative to those in other countries. In free market countries, then, the extent of governmental involvement varies.

Although Japan is a country with a free economy, the government's role in controlling the market is greater than that in Western countries such as the United States. Several reasons exist for the relatively high degree of governmental involvement in Japan. First, Japan is a relative late-comer to the group of industrialized countries of the world, and the laissez-faire philosophy was not historically strong in Japan. In addition, the business/government relationship is more cooperative than adversarial. Furthermore, a great number of small enterprises play important roles in the economy. Finally, recently growing protectionism in her trade-partners has necessitated some regulation in foreign trade. Because of the extensive governmental involvement in the economy, Japan may be said to be a country of "industrial policy."[3]

There is today no generally accepted definition of "industrial policy" although the term appears often in newspapers, journals, and academic writings. "Industrial policy" was once defined as "those policies which were exercised by the Ministry of International Trade and Industry [MITI]."[4] This definition, however, is not precise. A recent book entitled *The Industrial Policies of Japan* (*Nihon no Sangyō Seisaku*)[5] defines industrial policies as "those policies designed to cope with the market failure in the allocation of resources,"[6] including measures to deal with externalities, to combat anti-competitive structures and conduct, to promote economies of scale, to foster infant industries, to provide for basic research and development, and to eliminate uncertainty in industrial development. An elaborate

3. Perhaps the most comprehensive work on the Japanese industrial policies is R. KOMIYA, M. OKUNO & K. SUZUMURA, NIHON NO SANGYŌ SEISAKU (THE INDUSTRIAL POLICIES OF JAPAN) (1984). *See also* U.S. INTERNATIONAL TRADE COMMISSION, PUB. NO. 1437, FOREIGN INDUSTRIAL TARGETING AND ITS EFFECTS ON U.S. INDUSTRIES (1943), USITC Pub. No. 1437 (October 1943); U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/ID-82-32, INDUSTRIAL POLICY: JAPAN'S FLEXIBLE APPROACH (1982).

4. K. KAIZUKA, KEIZAI SEISAKU NO KADAI (THE TASK OF ECONOMIC POLICIES) 147 (1973).

5. *See* R. KOMIYA, M. OKUNO & K. SUZUMURA, *supra* note 3.

6. *Id.* at 5.

definition of "industrial policy" is probably not necessary; a workable, albeit tentative, definition should suffice. Accordingly, "industrial policies" will be defined as those governmental policies which supplement the market in the face of failure and facilitate its performance in the long run.

B. *A Historical Overview of Japanese Industrial Policy*

Since the Meiji Restoration in 1868, the Japanese government has been actively engaged in promoting industry. After the Second World War, occupation forces brought into Japan the Economic Democratization Policy consisting of: (1) agrarian land reform, (2) labor reform, and (3) deconcentration of *Zaibatsu* (the huge industrial combines which had controlled major parts of the Japanese economy).[7] As part of the deconcentration reform, the Antimonopoly Law was enacted in 1947. This law was designed to establish free enterprise as the basic framework for Japanese industry.[8] However, in the 1950s the Antimonopoly Law became dormant, and the industrial policies exercised by MITI became the dominant force in the economy. MITI policy from 1950 until the mid-1960s had as its main emphasis the promotion of heavy industries like steel, aluminum, and petro-chemicals, and the building up of the international competitiveness of Japanese industry.[9] For this purpose, various incentives such as tax exemptions and subsidies in the form of preferential financing were provided for targeted industries. MITI also encouraged the merger of large companies. For example, three Mitsubishi industrial companies merged in 1963 to form Mitsubishi Heavy Industries, and in 1969, Yawata Steel Company and the Fuji Steel Company merged to create Japan Steel Corporation.

Since the late 1960s, however, the economic conditions affecting Japan have changed drastically, compelling a shift in industrial policy.[10] Due to the excessive emphasis placed on economic growth in the 1950s and 1960s, environmental problems

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7. *See* T. BISSON, ZAIBATSU DISSOLUTION IN JAPAN (1954).

8. There are several books in English on the Japanese Antimonopoly Law. *See, e.g.*, H. IYORI & A. UESUGI, THE ANTIMONOPOLY LAWS OF JAPAN (1983); 5 Z. KITAGAWA, DOING BUSINESS IN JAPAN pt. 9 (1981); M. NAKAGAWA, ANTIMONOPOLY LEGISLATION OF JAPAN (1984).

9. On the history of Japanese industrial policy, see R. KOMIYA, M. OKUNO & K. SUZUMURA, *supra* note 3, at 105.

10. *Id.* at 79.

became very serious. In addition, inflation intensified, partly in response to energy price hikes during the Oil Crisis of the early 1970s. Also, the heavy industries passed out of the heydays of their youth and grew less efficient with age. In foreign trade, the growing tensions between Japan and her major trade partners (notably the United States) became acute problems. Faced with these new developments, MITI, beginning around 1970, started to pursue industrial policies emphasizing orderly export, promoting technology and knowledge-intensive service industries, and acknowledging a vital need for environmental and consumer protection. This new trend marked a change only in the emphasis of the policies; traditional policy regarding conventional industries has continued. However, MITI's policies began to take a new shape. Today this trend continues.

To reflect this new emphasis, the Antimonopoly Law was revitalized during the mid-1960s to become an effective tool for combating inflation, protecting consumers, and protecting small enterprises.[11] More recently, deregulation has become increasingly important.

C. *The Effectiveness of Industrial Policy in Japan*

Industrial policies involve some type of governmental activity in business, whether promotional or regulatory. In order for such policies to be effectively enforced, it is necessary that there exists a close relationship between government and business. In Japan, it is generally agreed that industrial policy has been enforced rather effectively, although this opinion is far from unanimous. Some, including the Semiconductor Association of America,[12] maintain that the effective enforcement of Japanese industrial policies is responsible for the high degree of international competitiveness achieved by some Japanese industries; others, however, including some Japanese economists,[13] take the critical view that the industrial policies in Japan have, on the whole, been a failure. They cite such examples as the petroleum refining industry which continues to struggle despite MITI's

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11. THE FAIR TRADE COMMISSION OF JAPAN, DOKUSEN KINSHI SEISAKU NIJŪNENSHI (THE TWENTY-YEAR HISTORY OF THE ANTIMONOPOLY POLICY) 262 (1968) [hereinafter FAIR TRADE COMMISSION].

12. *See generally* SEMICONDUCTOR ASSOCIATION, THE EFFECT OF GOVERNMENT TARGETING ON WORLD SEMICONDUCTOR COMPETITION (1983).

13. *See, e.g.*, T. TSURUTA, SENGO NIHON NO SANGYŌ SEISAKU (THE INDUSTRIAL POLICIES IN JAPAN AFTER THE SECOND WORLD WAR) (1982).

promotional and regulatory efforts.[14] Although no final conclusion can be drawn as to the validity of either of these positions regarding the effectiveness of Japanese industrial policies, it should be admitted that at least in some industries such as computers, semi-conductors, and super LSIs (large-scale integrated circuits), MITI's policies has been effective to some degree.

There are at least two reasons why MITI's industrial policies have met with some success. First, there has been a historically close relationship between the government and the business community. Since the Meiji Restoration in 1868, the government has been instrumental in helping industry achieve international competitiveness. Through this process, a close cooperative relationship has developed—industry having acquired the habit of relying upon the leadership of the government. In addition, there are informal ties between government and business. An example of these informal ties is the practice known as *amakudari* ("descending from heaven") in which important, high-ranking government officials become executives in private enterprises upon leaving government.[15]

The second reason for the success of MITI policies in certain industries is that the role of the government has been designed to give incentives to industries with growth potential. On the other hand, industrial policies have failed when government tried to assist an industry which had little potential for growth, such as the petroleum industry.

Viewed as a whole, the post-war success of Japanese industry should be attributed primarily to the entrepreneurship of industry rather than the industrial policies of the government. Industrial policy, however, has played a significant, albeit peripheral, role in the industrial growth of the country.

II. Legal Considerations Concerning the Enforcement of Industrial Policy

A. *Constitutional and Legal Constraints*

The basic economic institution in Japan is the market mechanism, even though the role of the government in the economy is relatively great when compared with countries like the United States. Although there are some constitutional and legal

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14. *Id.* at 196.
15. *See* C. Johnson, MITI and the Japanese Miracle 71 (1982).

constraints imposed on the discretion of the government in regulating the activities of private enterprise, these restraints are not as rigorous as those in the United States.

The Constitution of Japan establishes the private enterprise system by guaranteeing in article 22 the freedom to choose an occupation, which has been interpreted to include freedom of business activities,[16] and by guaranteeing in article 29 the private ownership of property.[17] Although government may restrict these two constitutional rights for the "public welfare," the private enterprise system is essentially constitutionalized. Thus, governmental intervention in business activities is held unconstitutional unless justified as a measure for promoting the public welfare. In the Consultive Group Coordinating Committee (COCOM) Case,[18] the Tokyo District Court stated that a restriction of the freedom of business activities is justified only if it is for the purpose of promoting the public welfare and that the "public welfare" should be embodied in the form of law. Thus, only a law enacted by the National Diet (legislature) is qualified as a measure to promote public welfare.

The COCOM Case questioned the validity of a measure by MITI prohibiting the export of certain electronic items to Mainland China. The case involved this prohibition in light of a trade exhibition in China at which a Japanese association wished to display its products. When the organization applied for approval, MITI denied the application on the ground that the items in question were contraband. (The approval system involved in the COCOM case was established under the Foreign Exchange and Foreign Trade Control Law[19] which delegated to MITI the authority to regulate export and import when such a regulation is necessary to maintain the equilibrium of the international balance of payments and promote the sound development of foreign trade.)

The Tokyo District Court held that the constitutional guarantee in article 22 includes the freedom of export activities and

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16. Kenpō art. 22. On the Japanese constitution and article 22, see J. MAKI, COURT AND CONSTITUTION IN JAPAN 289-92 (1964).

17. Kenpō art. 29.

18. On the COCOM Case, Pekin-Shanhai Nihon Kōgyō Tenrankai v. Nihon, 20 Gyōsei Reishō 842 (Tokyo District Court, July 8, 1969), see Matsushita, *Export Control and Export Cartels in Japan*, 20 HARV. INT'L L.J. 103, 106-10 (1979) [hereinafter *Export Control*].

19. *Gaikoku Kawase oyobi Gaikoku Bōeki Kanri Hō* (Foreign Exchange and Foreigh Trade Control Law), Law No. 228 of 1949.

that exportation can be restricted only if necessary for the public welfare. The court held further that whether a restrictive measure promotes the public welfare is judged by whether the measure is embodied in the form of legislation and that such restrictive measures must be kept within the scope defined in the legislation.

In deciding the case, the court noted that the scope of regulation as defined in the Foreign Exchange and Foreign Trade Control Law was primarily economic since it was concerned with maintaining the international balance of payment and aiding the sound development of foreign trade, and that the prohibition of export based on the COCOM (which was an international agreement designed to achieve strategic and political objectives) was primarily political in nature. For this reason, the court held that the prohibition in question was outside the scope of the Law and was *ultra vires*.

This decision represents a judicial view on the freedom of business activities and governmental restriction of such activities which holds that governmental restrictions should be based on law and that such restrictions should be within the scope of the legislation authorizing them.

Industrial policies do not always include restrictions of business activities, and even if some restrictions are included, they may be carried out by informal means without utilizing legal restrictions. However, from the legal doctrine enunciated by the court in the COCOM Case, one can conclude that the rule of law should prevail ultimately and that administrative discretion is constrained by the rule of law.

B. *The Discretion of the National Diet in Enacting Legislation*

A related but different question is the extent to which the National Diet can enact a law which restrains freedom of business activities. The issue here is the constitutional constraints imposed on the National Diet in legislating a law which restricts freedom of business activities.

Under previous Supreme Court cases,[20] it is necessary to distinguish two types of restrictions on business activities. One

20. On these decisions and comments, see Haley, *The Freedom to Choose an Occupation and the Constitutional Limits of Legislative Discretion:* K.K. Dumiyoshi v. Governor of Hiroshima Prefecture, 8 LAW IN JAPAN 188 (1975).

type is legislation that restricts business activities for the purpose of providing for public safety and order. This includes such measures as setting up product safety and quality standards. This type of legislation is known as "police power" legislation.

The other type is legislation designed to achieve some socio-economic objective such as the protection of small enterprises, farmers, or specific industries. This type of legislation as well may involve a restriction on business activities. For example, in order to protect small enterprises, a law may require that new entry into a certain field of business be permitted only to small enterprises. In this kind of legislation, the restriction is based on the legislative judgment that the protection of certain socio-economic groups is necessary even if some restrictions on the business activities of other enterprises are involved.

According to these previous Supreme Court decisions, the Court will scrutinize legislation designed to provide for the public safety and order to determine whether the law is more restrictive than necessary to achieve its purpose. With this sort of legislation, the restriction on business activities should be kept to the absolute minimum, and whenever the law is regarded as overstepping the necessary boundary, it is held unconstitutional. However, when legislation is intended to achieve some socio-economic objective such as the protection of farmers, small enterprises or other disadvantaged groups, the courts generally will not scrutinize the wisdom of the legislation since they are not equipped to decide whether or not a certain economic policy should be adopted. This task is entrusted to the legislature. Consequently, the validity of legislation dealing with socio-economic policy matters is generally left to the judgment of the legislature, and such a law is held unconstitutional only when it clearly oversteps the boundary of reasonableness and attempts to exert excessive control.

This judicial passivity regarding laws dealing with socio-economic matters is rather striking and may create an anomalous situation. Under this doctrine, a law whose purpose is to protect one group (for example, a particular industry) will be treated more leniently under the constitution even though such a law benefits only a small portion of society. On the other hand, a law which tries to protect public safety and order and in so doing benefits the general public rather than one group will be more critically examined under the constitution and may be struck down as unconstitutional even in situations in which socio-eco-

nomic legislation would be approved. This anomaly is a result of the concept entertained by courts that the compatibility of a public safety law and the constitution is a question with which courts feel more comfortable and that judicial intervention in such cases is more justifiable under the constitution, while a law dealing with socio-economic policy objectives is somewhat less familiar and should be left to the legislative branch of government.

A Supreme Court decision in the Retail Business Market Case[21] is a case in point. The case involved a law entitled the Retail Business Adjustment Special Measures Law which authorized local government to license the establishment of a retail market. Under this law, local government could attach conditions to a license to open a retail market. The Municipality of Ohsaka decided to condition these licenses upon an agreement by newcomers that the distance between the new retail store and existing stores be at least 700 meters. A developer who opened a retail store within 700 meters of an existing store without first obtaining a license was indicted for violating this law. The developer argued that this law was an undue encroachment upon his freedom of business activities and was, therefore, null and void under article 22 of the constitution. The challenged law was obviously designed to protect small shops from excessive competition by providing for territorial allocation. In resolving the case, the Supreme Court decided that whether small shops should be protected from excessive competition was an economic policy question which the Court is not equipped to examine, and in such matters the judgment of the legislature should be respected. For this reason, the validity of this legislation was upheld.

The Kyoto District Court reached a similar conclusion in a case[22] in which a law giving the government exclusive importation rights for raw silk and establishing a price stabilization program was challenged. Under this law, the importation of raw silk could be made only by a government agency. This import restriction forced the price of raw silk in Japan to a much higher level than the international silk price. Some manufacturers of fabric for ties challenged the law, alleging that the law protected

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21. *See id.* at 192-93.

22. For an account of this case, see Matsushita, *The Legal Framework for Import Trade and Investment in Japan*, DYNAMICS OF JAPANESE-UNITED STATES TRADE RELATIONS 3, 13 (1986) [hereinafter *The Legal Framework*].

only raw silk producing farmers and that manufacturers who used silk were disadvantaged by the high price of raw silk in Japan because they had to compete with the many inexpensive silk ties sold in Japan but imported from Europe where there are no import restrictions on silk. Nevertheless, the court upheld the law on the ground that this law embodied a type of economic policy, the wisdom of which the court was not prepared to examine. On appeal the Ohsaka High Court upheld the decision of the Kyoto District Court, and at the time of writing, the case is pending in the Supreme Court.

Industrial policies are designed to promote or protect certain industries or guide them to shift to other directions. To achieve these objectives, most of the legal measures undertaken belong to the second type of legislation, the type designed to accomplish socio-economic goals. Therefore, under constitutional doctrine as enunciated by the Japanese courts, the legislature is accorded a wide scope of discretion in enacting laws for these purposes.

C. *The Role of the Antimonopoly Law*

Although the Antimonopoly Law has experienced sporadic popularity in the past 40 years,[23] it has nevertheless established itself as Japan's major economic legislation. When one considers that the Japanese economy is basically market oriented, it is quite natural that the Antimonopoly Law occupies the central position in economic regulation—since it is absolutely necessary to ensure that the basic functions of the market not be distorted by anticompetitive conduct of enterprises, some sort of antitrust law is essential. The Antimonopoly Law prohibits private monopolization, unreasonable restraint of trade, and unfair business practices. It is the central legal instrument to ensure the operation of the market mechanism in Japan.

Ideally, there should be no conflict between the Antimonopoly Law and various measures implementing industrial policies. If the basic objective of the industrial policies is to supplement the market mechanism when it cannot achieve optimum economic performance due to an imperfect market structure, there should be no inconsistency between the Antimonopoly Law and the industrial policies. However, in practice, there are always deviations from the ideal, and accordingly, the industrial policies

23. *See* FAIR TRADE COMMISSION, *supra* note 11.

sometime involve anticompetitive measures. Perhaps the most prominent examples of a clash between the Antimonopoly law and the industrial policies are the Oil Cartel Cases.[24] In the Oil Cartel Cases, the petroleum refining companies engaged in a program to cutback the production of refined petroleum so as to avoid overproduction, and the method used was a decision of the Petroleum Association to set up the amount of production and allocate the amount to be produced each year. Even though MITI was not the progenitor of the cartel arrangement, it had had the policy of limiting the amount of production of the petroleum products, and, for this policy objective, it utilized the cartel arrangement established by the petroleum industry. In this sense, the governmental policy and the intention of the industry to cutback the production coincided and reinforced each other. This cartel was challenged by the Fair Trade Commission (FTC). The FTC brought a criminal charge against the cartel to the Prosecutor's Office, and the Petroleum Association and a number of individuals were indicted. The defendants argued that they acted in accordance with the directive of MITI and, therefore, should be excused.

The Tokyo High Court held that the similarity that may have existed between the governmental petroleum policy and the objectives of the cartel was only a coincidence, and although MITI had utilized the cartel as its policy instrument, the cartel was originally planned by the private companies and should be regarded as a private instrument rather than a governmental policy. For this reason, the claim that the cartel in question was nothing but a cooperative measure for the governmental policy was rejected.[25] The reasoning of the court with regard to the relationship between the industrial policies and the Antimonopoly Law is not entirely clear. However, we can say that a private measure to implement an industrial policy is not justified in the light of the Antimonopoly Law simply because it was aimed at the same goal as that of the governmental policy. This decision has had considerable impact on the enforcement of the industrial policies, and MITI is now much more cautious in imple-

24. These cases have been translated and published in English in the following literature: Repeta, *The Limits of Administrative Authority in Japan: The Oil Cartel Cases and the Reaction of MITI and the FTC*, 15 LAW IN JAPAN 24, 46-56 (1982); Ramseyer, *The Oil Cartel Criminal Cases: Translation and Postscript*, 15 LAW IN JAPAN 57 (1982).

25. Repeta, *supra* note 24, at 48-53.

menting the policies and in avoiding the antitrust implications that the enforcement of its policy may involve.

D. *Administrative Guidance as an Instrument of Industrial Policy*

As mentioned, industrial policies must find ultimate authorization in legislation. However, the legislative process is sometimes slow, and too much reliance on a law to enforce an industrial policy may deprive MITI or another agency of the necessary flexibility in dealing with changing circumstances. Therefore, a more informal approach is taken when implementing the industrial policies, namely administrative guidance.[26] Administrative guidance is hard to define, but a definition given by the Chief of the Legislation Bureau of the Cabinet in a hearing before the Committee on Commerce and Industry of the House of Representatives is generally accepted:

> Administrative guidance is not a legal compulsion restricting the rights of individuals and imposing obligations on citizens. It is a request or a guidance on the part of the government within the limit of the task and administrative responsibility of each agency as provided for in the establishment laws, asking a specific performance or forebearance for the purpose of achieving some administrative objective by the cooperation on the part of the parties who are the object of administration.[27]

Administrative guidance is often used to achieve the goals of industrial policies. Some prominent examples of this use include the cases of orderly marketing for the purpose of establishing a voluntary export restraint program, measures taken to combat price-hikes provoked by the Oil Crisis, and measures used to cut back production in the face of depression.[28] There are several kinds of administrative guidance: (1) promotional administrative guidance, (2) regulatory administrative guidance,

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26. There are many materials on administrative guidance written in English. *See, e.g.*, Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45 (1968); Smith, *Prices and Petroleum in Japan: 1973-1974—A Study of Administrative Guidance*, 10 LAW IN JAPAN 81 (1977); Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN 22 (1974).

27. For another translation of this statement, see Repeta *supra* note 24, at 31.

28. *See generally* K. YAMANOUCHI, GYOSEISHIDO (ADMINISTRATIVE GUIDANCE) (1979); Matsushita, *Nichibei niokeru Yūshutsu Jishu Kisei nitsuite* (*Voluntary Export Restraint Agreements in Japanese-United States Trade Relations*), BEIKOKU NO TAINICHI TSŪSHŌSEIGEN NIKANSURU HŌTEKI SHOMONODAI (U.S. TRADE LAW PROBLEMS) (1985).

and (3) conciliatory administrative guidance. The first includes governmental measures to promote certain business activities such as instructions given by a government agency to improve the management of small enterprises, agricultural production, and other measures to aid enterprises.[29]

The second form of administrative guidance, regulatory guidance, is a substitute for law. The government may sometimes issue guidance to enterprises to act or refrain from acting in certain ways.[30] For example, in the Oil Crisis, the Cabinet required each Ministry to install a price approval system mandating that each enterprise under its jurisdiction file a report with the Ministry and obtain its approval before raising prices.[31] This was done without any explicit legislative approval. The governmental justification was the establishment law which establishes each Ministry and entrusts to it the general power to supervise the industries under its jurisdiction.

Conciliatory guidance, the third type of administrative guidance, involves such governmental measures as the conciliatory device in the Large Scale Retail Stores Law[32] which provides that whenever there is a conflict between a large scale retail store and small shops, MITI or a local government may intervene to iron out some conciliatory settlement of disputes.[33]

Some critics argue that administrative guidance without specific authorization in law is contrary to the rule of law and should be prohibited. However, as stated in the Supreme Court's decision in the Oil Cartel Case, administrative guidance should be approved even without explicit legislative authorization, as long as it is kept within the ambit of reasonableness and oppressive methods are not used.

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29. Often the government issues a master plan under which industries make more elaborate programs for improving their business. *See* M. MATSUSHITA, KEIZAIHŌ GAISETSU (A GENERAL ACCOUNT OF THE ECONOMIC REGULATION) 235 (1986) [hereinafter GENERAL ACCOUNT].

30. Administrative guidance issues in voluntary export restraints are usually of this type. For concrete examples, see the cases explained in Matsushita, *supra* note 28.

31. *See* K. YAMANOUCHI, *supra* note 28, at 37-47.

32. *Daikibo kouri Tenpo Niokeru Kourigyō no Jigyō Katsudō no Chyōsei nikansuru Hōritsu* (Large Scale Retail Stores Law), Law No. 109 of 1973 (as amended).

33. The industrial policies cover comprehensive fields; therefore, all of the mentioned types of administrative guidance are relevant in achieving their objectives.

E. Private Agreements as Instruments of the Industrial Policies

Perhaps one of the most salient features of the Japanese industrial policies is the utilization of private agreements for governmental policy purposes. In most of the important areas of industrial policy (to which some reference will be made later), private agreements are often used to achieve the government's goal. For example, in the small business area, a law authorizes small enterprises to form a cooperative association authorized to cut back production, sales amounts and sales channels, and to act as the sole agent for purchase and selling. Price-fixing is also allowed under some circumstances.[34] We can find similar legislative authorization in many other areas such as foreign trade and depressed industries.[35]

Formally, these agreements are voluntary, and may be used only under certain conditions. If these conditions are met, the authorization laws exempt the agreements from the Antimonopoly Law. In practice, however, far more than this is involved. Often the agreements are backed up by governmental measures. For example, in the Export and Import Transactions Law, which authorizes export and import agreements, there are provisions entrusting MITI with power to issue an order if the private agreement is rendered ineffective due to the activities of outsiders.[36] Thus, under this law, MITI can issue an order, binding on all enterprises in the field, restricting price, quantity, channels, and other terms of business in export and import when it is found that the private agreement has been made ineffective. This is known as an "outsider regulation," although technically such an order binds not only outsiders but insiders as well.

Sometimes the formation of private agreements is encouraged by governmental subsidy. In the Medium and Small

34. *Chūshokigyō Dantai no Soshiki ni Kansuru Hōritsu* (Medium and Small Business Enterprise Organization Law), Law No. 185 of 1957 (as amended).

35. In the foreign trade area, *Yūsyutunu Tjorihiki Hō* (Export and Import Transactions Law), Law No. 229 of 1952 (as amended) authorizes export and import agreements under the influence of the Japanese government. On this aspect, see *Export Control*, *supra* note 18, at 110-16. For the depressed industries, *Tokutei Sangyō Kōzō Kaizen Rinji Sochi Hō* (Specific Industries Structure Improvement Temporary Measures Law), Law No. 44, 1978 (as amended) provides for depression cartels to be entered into by enterprises belonging to structurally depressed industries.

36. *See* articles 28, 28-2, 29-31 of the Export and Import Transactions Law, *supra* note 35.

Business Modernization Law,[37] for example, the Small Business Agency (a part of MITI) issues a master plan for modernizing certain areas. Small enterprises then form an association and develop a more concrete and detailed program. On the basis of this detailed program, low-interest governmental financing is provided along with other devices such as governmental loan guarantees. In this situation, private agreements, governmental financing, and incentives are combined to form an instrument for promoting governmental policy. In some cases, private agreements are "directed" by the government. In the Specific Industries Structure Improvement Temporary Measures Law,[38] the law dealing with structurally depressed industries, MITI is authorized to "direct" enterprises to enter into an agreement to cut back excess capacity. Even though the term "direct" (*shiji*) is used, there is no sanction for disobedience; therefore, this directive should be regarded as a formalized administrative guidance.

As we have seen above, private agreements are used quite often to achieve industrial policy goals. Since, however, these private agreements often involve some restriction on competition, some antitrust risk is involved. For this reason, most laws authorizing private agreements contain a provision authorizing antitrust exemptions.

III. Sector-By-Sector Review of the Legal Aspects of the Industrial Policies

A. *An Overview*

As indicated earlier, the term "industrial policy" has diverse meanings, and due to the limitation of space, it is impossible to discuss each one. Instead, only some of the important areas will be discussed: (1) basic research and development, (2) depressed industries, (3) small enterprises, (4) price control, and (5) international trade. This is by no means an exhaustive list of the areas in which the industrial policies operate. Such areas as telecommunication, public utilities, and financial markets are also important. However, the above mentioned areas are so impor-

37. *Chūshō Kindaika Sokushin Hō* (Medium and Small Business Modernization Law), Law No. 64 of 1963 (as amended).

38. Article 5(1) of Specific Industries Structure Improvement Temporary Measures Law, *supra* note 35.

tant that they deserve independent examination. In this article, the main focus is on MITI's industrial policies.

B. *Basic Research and Development*

Even though Japan is a country of high technology, her research has been concentrated mainly in areas of development. Research and development will be divided into three categories: (1) basic research, (2) applied research, and (3) development research. In basic research, there is no immediate link between the research and the development of a particular product. Research is conducted only for the purpose of proving a hypothesis. In development research, the direct objective is to embody a technology in the form of a product. Applied research is the intermediary stage between the two.

According to a report published by the government in 1983, about two percent of Japan's gross national product was spent in research and development.[39] However, more than seventy percent of the total amount was spent by private enterprises.[40] Since basic research and development involves large amounts of money and high risk, private enterprises are unlikely to engage in such research unless incentives are given. Because developmental research, which produces products, is ultimately derived from basic research, ignoring basic research will weaken the basis of technology. There has been a growing awareness of this possibility, and as a result, some measures for promoting basic research and development have been provided. For example, the Research Association Law[41] provides for the establishment of a research association. Basic research involves huge amounts of money and is difficult for a single company to undertake, but if several companies pool their money and resources, much can be accomplished. Under this law, private enterprises can form an association for the purpose of carrying out a specific technological task. An association created under this law can apply for a patent on the technology resulting from the joint research. Along with this system of combining resources, tax exemptions of vari-

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39. MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, THE POLICY PLAN FOR THE DEVELOPMENT OF TECHNOLOGY AND THE BASIC TECHNOLOGY RESEARCH FACILITATION LAW (SANGYŌ GIJUTSU KAIHATSU SEISAKU TO KIBANI GIJUTSU KENKYŪ ENKATSUKA HŌ) 7 (1985).

40. *Id.*

41. *Kokogyō Gijutsu Kenkyū Kumiai Hō* (Research Association Law), Law No. 85 of 1961.

ous kinds and governmental subsidies are provided. In addition, the government sometimes commissions a research association to carry out research for the government. In such areas as super LSI and computers, the device of forming a research association was actively used to accomplish the objective.[42]

Another important piece of legislation is the Basic Technology Research Facilitation Law enacted in 1985.[43] Under this law, private enterprises, when they engage in basic research and development, can use government facilities for very little rent. This law also establishes the Basic Technology Research Facilitation Center, which provides funds to private enterprises doing research, engages in research itself, arranges joint research projects among private enterprises and governmental research agencies, and collects technological information. Governmental involvement in the area of basic research and development should probably not be regarded as a counter-market measure as long as it is not exercised excessively, since it is applied in areas in which there would be little research and development if left to private initiative alone. However, in the areas of applied and developmental research, there is much greater incentive for private enterprise to undertake research without governmental aids or cooperative affiliation with competing enterprises. In these areas, therefore, governmental assistance should probably be limited to the cases in which it is absolutely necessary. There also should be more stringent antitrust scrutiny into concerted activities of competing companies in applied and developmental research and development.

C. Depressed Industries

There are two kinds of depressed industries, and each needs different treatment. One type includes those industries affected by cyclical depressions. It is well-known that there is a business cycle which goes from boom to recession to depression to recovery to boom. In the stages of recession and depression, business activity is slowed down and enterprises have a difficult time. According to market principles, nothing should be done to ease a cyclical depression because it is an opportunity to eliminate the

42. ROKUHARA, KENKYŪ KAIHATSU TO DOKUSENKINSHI SEISAKU (Research and Development and the Antimonopoly Policy) 47 (1985).

43. *Kiban Gijutsu Kenkyū Kumiai Hō* (Basic Technology Research Facilitation Law), Law No. 65 of 1985.

inefficient enterprises, and thereby strengthen the whole economy. However, even in a cyclical depression, the blow is sometimes so severe that enterprises which possess vitality and potential may be eliminated. Under these unusual circumstances, it may benefit the national economy to extend some governmental aid to ailing enterprises to help them weather the storm, thereby preserving competitive units which would otherwise go out of business. For this reason, a depression cartel is allowed under article 24-3 of the Antimonopoly Law.

Under this article, when depression lowers price below the average cost of production, thereby causing the majority of enterprises in the affected industry to have difficulty continuing their operations, and when this depression cannot be overcome by rationalization of enterprises, members of the depressed industry may enter into an agreement to cut back production, utilization of capacity or sales quantity. In some cases, even price-fixing is permitted—under extreme circumstances, the FTC can approve price-fixing agreements for a limited time, and the approved agreement enjoys exemption from the cartel prohibition under article 3 of the Antimonopoly Law. A depression cartel is usually allowed a duration period of approximately four months.[44] It should be noted that depression cartels are limited to producers and are allowed under more lenient requirements for small business under other laws.

The second type of depression is a structural depression. This type of depression poses more problems than a cyclical depression. Unlike a cyclical depression, which originates from the ups and downs of the business cycle, a structural depression stems from the inherent frailty of an industry. An industry may have lost its comparative advantage vis-a-vis its counterparts in other countries due to factors such as rising labor and material costs, or an industry may be faced with a competition from a new product which is higher in quality, less costly and more convenient. Such an industry is in a state of depression regardless of business ups and downs across the whole economy.

A difficult policy question is whether or not such an industry should be given any relief. According to market theory, such an industry should find its exit from the market and be replaced

44. There is some difference of opinion between the FTC and MITI as to the proper duration period for a depression cartel. The FTC maintains that the duration period should be limited to the time the depression actually exists, whereas MITI argues that it should be extended to include a certain phase in the recovery process.

by a more efficient one. It is certainly wrong to say that such an industry should be protected regardless of its inefficiency, for the industry has lost its economic reason for existence.

However, to leave such an industry to perish is not always wise or feasible. There may be national security reasons for that industry to survive regardless of inefficiency.[45] Such an industry may be able to overcome its difficulty if some aid is given. Also, even if such an industry should be allowed to die, the transition period may cause hardship and social disturbance such as sudden bankruptcy, unemployment and displacement. Therefore, even if an industry must be phased out, the transition period should be made smooth; some measures should be provided for a "soft landing" or "comfortable death." Also in some industries, the capital may be in "captivity." For example, a high ratio of debtor companies in the industry to financial institutions may prevent them from retreating from the industry. Similarly, the immobility of labor may make it more difficult for the companies in the industry to shift to another industry. In addition, the traditional value system of the society may inhibit owners of enterprises from discarding the industry and moving to other sectors.

There is no completely satisfactory answer to the question of whether a sunset industry should be given protection. In Japan, however, the legislative policy is to extend some forms of governmental aid to structurally depressed industries, provided that they possess sufficient viability to be restored to competitiveness. The Specific Industries Structure Improvement Temporary Measures Law[46] is the major institutional tool for this policy. Basically there are two measures provided for in this law. One is a type of depression cartel, and the other is a business cooperative arrangement. One cause of the economic difficulty is a surplus of production capacity in relation to effective demand. However, a company operating in the depressed area cannot unilaterally cut back production, since to do so would cause its market share to shrink if others did not cut back their production as well. Under this law, MITI issues a directive to the companies in a designated industry to cut back total production, and in accordance with this directive, the companies enter into an agreement

45. For example, in the United States, the Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1351 (1982), authorizes the President to impose restrictions on imports which threaten to impair national security.

46. *See supra* note 35.

to limit total capacity in the industry and to allocate a certain portion to each company. When this is done, the government extends a loan guarantee to the companies, making it easier for them to borrow money from banks. This type of cartel enjoys exemption from the cartel prohibition of the Antimonopoly Law.[47]

The other device for dealing with structurally depressed industry is a business cooperative arrangement.[48] To implement this device, MITI announces a master plan for reorganization of a designated industry, and the companies in the industry then develop a more elaborate program including provisions for measures such as: merger and acquisition, the establishment of a joint buying or selling agency, and technological cooperation. These arrangements must be approved by MITI, and even though the approved arrangement does not technically enjoy exemption from the Antimonopoly Law, a negotiation between MITI and the FTC which precedes the execution of the program provides assurance that the FTC will not take action.

The Specific Industries Structure Improvement Temporary Measures Law expires in 1988, and it is expected that no similar law which permits cartels to cut back production will be adopted to take its place.

D. *Protection of Medium and Small Business*

"Small business enterprise" is generally defined as an enterprise whose employees number three hundred or fewer with capital totaling one hundred million yen or less.[49] The majority of Japanese enterprises are small enterprises under this definition. Even so, small enterprises are often involved in transactional relationships with large enterprises. Generally, however, they are at a disadvantage in dealing with large enterprises. For example, small enterprises often operate as large enterprises' subcontractors, supplying parts or related products. In transactions between powerful manufacturers and smaller subcontractors, the smaller subcontractors are generally disadvantaged due to the disparity in bargaining power. In other instances, small enterprises compete directly with large enterprises. Due to their rela-

47. *See id.* at art. 11.

48. *See id.* at art. 8-2(1).

49. *See* article 2 of *Chūshō Kigyō Kihon Hō* (Medium and Small Business Enterprises Basic Law), Law No. 154 of 1963 (as amended).

tive lack of efficiency and competitiveness, small enterprises are again at a disadvantage.

Small business protection presents a troublesome problem in a market economy. One may argue that even small enterprises should not be immunized from competition in a market economy, and that if small enterprises are eliminated in the course of competition, it serves to promote efficiency in the economy. On the other hand, one may argue that the existence of many small enterprises is the basis of a diverse and pluralistic society. In considering whether the government should protect small enterprises, one may have to consider social values other than economic efficiency. For example, artistic products produced by small enterprise in one locality may be worth protecting because of their artistic value, even at the cost of some economic efficiency.[50]

Another factor is that, due to the sheer number of small enterprises, small enterprise employment makes up a very substantial portion of a country's total employment. This great number of employees creates the political influence of small enterprises as a whole. Obviously, any trouble in the small business area is likely to become a political problem.

There is no clear-cut theory for dealing with the small business problem. Reflecting the conflict and complexity of the value systems involved in small business protection, any practical policy toward small business is bound to be a compromise, a mixture of ambivalent ideologies and requirements. Japanese industrial policy toward small business is typical of this conflict and confusion.

Laws enacted to promote and protect small enterprises are many, but they may be divided into laws designed to: (1) promote modernization of small enterprises, (2) organize small enterprises into a large group, (3) protect small subcontractors subject to large manufacturers, (4) facilitate technological development among small enterprises, (5) aid small enterprises in adjusting to the changing economic environment and shifting their business to other areas, and (6) secure some industrial sectors or territories for small enterprises.[51] The first, second, and sixth categories are most relevant for our discussion of economic legis-

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50. General Account, *supra* note 29, at 270-71.
51. *Id.* at 250.

lation in light of the market mechanism and will therefore be briefly touched upon.

In order to facilitate modernization of small enterprises, the Small Business Modernization Facilitation Law[52] provides for subsidies and preferential financial assistance in connection with mergers and the establishment of joint ventures. Often the Small Business Administration gives guidance to the small enterprises as to the possibility of merger and related matters. Under this law, the establishment of a joint purchasing or selling agency is recommended.

Policy concerning the organization of small businesses involves several major laws designed to form a kind of association or cooperative of small enterprises. These major laws are (1) the Medium and Small Business Organization Law,[53] (2) the Medium and Small Business Cooperatives Law,[54] and (3) the Environmental Sanitation Law.[55] The Medium and Small Business Organization Law permits small enterprises to organize a commerce and industry association which is in essence a depression cartel. However, it differs from a depression cartel under article 24-3 of the Antimonopoly Law (to which reference has been already made) in the sense that a commerce and industry association under the Small Business Organization Law is allowed under more lenient requirements. Under this law, small enterprises may form a commerce and industry association and engage in the cut back of production and other related joint restrictions of competition whenever there exists "excessive competition" and "instability of management" among the member enterprises. In contrast, article 24-4 of the Antimonopoly Law allows a depression cartel only when price drops below average cost of production and the majority of enterprises in the industry are faced with the difficulty of continuing their operations.

This law also authorizes MITI to issue an outsider regulation if it is proven that the operation of a commerce and industry association is made ineffective due to the activities of outsid-

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52. *Chūshō Kigyō Kindaika Sokushin Hō* (Small Business Modernization Facilitation Law), Law No. 64 of 1963 (as amended).

53. *See supra* note 34.

54. *Chūshō Kigyōto kyōdōkumiai Hō* (Medium and Small Business Cooperatives Law), Law No. 181 of 1949 (as amended).

55. *Kankyō Eisei Kankei Eigyō no Unei no Tekiseika nikansuru Hō* (Environmental Sanitation Law), Law No. 164 of 1957 (as amended).

ers.[56] Complicated and elaborate procedures make sure that such an order is not easily invoked, for to allow easy invocation would be too suppressive of competition. Finally, a commerce and industry association is exempted from the Antimonopoly Law.[57]

One criticism raised against this law is that it has been used as a seedbed of cartels among large and small enterprises, since the law on commerce and industry associations requires that only two-thirds of the members be small enterprises, and that, therefore, large enterprises can join the commercial and industry association.[58]

The Medium and Small Business Cooperatives Law authorizes small enterprises to establish a cooperative. The function of such a cooperative is somewhat different from that of a commerce and industry association, although there is some overlap between the two types of organizations. A small business cooperative is an organization formed to allow members to engage in joint selling, joint purchasing, joint manufacturing, or other joint activities for the benefit of the member enterprises. The purposes of such a cooperative are to gain the benefits of the combined selling and buying powers of the member enterprises, to act as a countervailing force to large enterprises when small and large enterprises are in a transactional relationship, to jointly improve the business of the member enterprises through development of technology or rationalization of management, and to act as a representative of the member enterprises in voicing their views on certain political issues.

The activities of a small business cooperative receive exemption from the Antimonopoly Law under article 24[59] because the activities of a small business cooperative are designed to strengthen the member small enterprises vis-a-vis large enterprises and to convert them into a stronger competitive unit. However, this combined power may be used against consumers by raising the price or against weaker enterprises. Therefore, the exemption is not given when a cooperative raises prices unreasonably through substantial restraint of competition or utilizes

56. Articles 55 and 56 of the Medium and Small Business Enterprises Organization Law, *supra* note 34, provide for outsider regulation orders and related governmental regulations.

57. *Id.* at art. 89(1).

58. Suzuki, *Chūshō Kigyō Rippō to Kokkin Seisaku,* JURIST No. 623 (1976).

59. Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, Law No. 54 of 1947 (as amended).

unfair business practices.[60] Also, when a large enterprise joins a cooperative, the FTC can order the large enterprise to withdraw.[61] There are thousands of such cooperatives operating as well as federations of such cooperatives.

The Environmental Sanitation Law[62] is unusual legislation in that its alleged purpose is to promote environmental sanitation through the restraint of competition among enterprises engaged in areas closely related to environmental sanitation; in fact, however, its hidden purpose is to protect small enterprises. Environmental sanitation business is defined in the law as including such businesses as hotels, inns, restaurants, public bathhouses, amusement facilities, shops in which fresh foods are sold, and the like. The rationale for this legislation is that excessive competition among these enterprises (many of which are very small enterprises) reduces profit, making it hard for them to provide for better environmental sanitation facilities. If, however, restraint of competition including price-fixing is allowed among these small enterprises, the larger profits earned as a result will provide a fund to furnish better environmental facilities. For this reason, enterprises in the designated areas can fix prices and other terms of business through an environmental sanitation cooperative.

This legislation apparently has not succeeded in achieving its objective due to its inherent contradiction. There is no guarantee that enterprises will use the extra profit earned through a cartel to improve their environmental sanitation. In fact, there are instances in which the greater profit rate earned through cartels attracted more new entries, thereby pushing the profit rate down again. This, in turn, results in a higher price fixed by the cartel, and a vicious circle begins. It is probably fair to say that this legislation has produced more harm than gain in the long run.[63] Since, however, the number of enterprises in the designated environmental sanitation business is so large, the political power wielded by them as a whole has prevented any change in the law, despite much criticism raised against the law and its enforcement.

Another area in the protection of small business which

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60. *See id.* at art. 29.

61. *See* article 107 of the Medium and Small Business Cooperatives Law, *supra* note 54.

62. *See supra* note 55.

63. *See* SHODA, KARUTERU TO HŌRITSU (CARTELS AND LAW) 194 (1968).

needs some attention is the policy of securing business sectors or areas for small business. Three main laws should be mentioned: (1) the Medium and Small Business Opportunities Adjustment Law,[64] (2) the Large Scale Retail Stores Law,[65] and (3) the Retail Business Adjustment Special Measures Law.[66] These three are based on essentially the same objective, the preservation of some business sectors or geographical territories for the exclusive use of small enterprises. The first one deals with the manufacturing and wholesale business, and the second with retail business. The third is a variety of the second one and will not be discussed in this article.

The Medium and Small Business Opportunities Adjustment Law gives small business organizations (which may be an organization under the organization laws already discussed) power to petition MITI to regulate new entry of a large-scale enterprise into a field of business in which small business enterprises have been traditionally engaged. The Large Scale Retail Stores Law likewise authorizes small shopkeepers in a locality to petition MITI or the local government when a large-scale retail store like a supermarket or department store begins business in the area. If the enforcement agency decides that area small enterprises would be unduly disturbed or suppressed by the entry of a large-scale enterprise, it can recommend that the large enterprise intending to enter the market stop entry or reduce the scale of intended business. This recommendation is ultimately enforced by an order in the event of disobedience.

Regulation under these laws is usually enforced through administrative guidance rather than a formal recommendation or order.

E. Price Control

The price mechanism is the most central institution of a market economy in which enterprises are free to choose the level of prices they will charge or accept. In Japan, this principle applies generally, although there are limited instances of govern-

64. *Chūshō Kigyō no Jigyōkatsudō no Kikai no Kakuho notame Daikigyōsha no Jigyōkatsudō no Chōsei Nikansuru Hō* (Medium and Small Business Opportunities Adjustment Law), Law No. 74 of 1977 (as amended).

65. *Daikibo Kōri Tenpo nickeru Kōrigyo no Jigyōkatsudō no Chūsei nikansuru Hō* (Large Scale Retail Stores Law), Law No. 109 of 1973 (as amended).

66. *Kōri Shōgyō Chōsei Tokubetsu Sochi Ho* (Retail Business Adjustment Special Measures Law), Law No. 155 of 1959 (as amended).

mental intervention to control prices. The following discussion will examine some legal mechanisms for governmental price control applicable in exceptional circumstances.

Laws providing for price control are divided into two groups: (1) those applied only in an emergency like the Oil Crisis and (2) those designed to stabilize prices in some specific sectors such as agriculture.[67]

Occasionally, due to circumstances beyond the control of government and private enterprise, prices may rise suddenly, and the whole economy may be thrown into panic. During the Oil Crisis, prices soared as soon as it was learned that the oil supply would be reduced. The panic psychology drove people to scramble to buy more and induced merchants to hoard. The result was catastrophic. To cope with such situations, Japan has enacted laws authorizing the government to control prices. There are four such laws. One is the Price Control Order,[68] the second is the National Life Stabilization Emergency Measures Laws,[69] the third is the Petroleum Products Demand and Supply Stabilization Law,[70] and the last is the Law Against Speculation and Hoarding.[71]

In each of these laws, there are provisions stating that the government can intervene during emergencies to influence prices charged by private enterprise. The type of intervention varies from law to law. The Price Control Order, for example, provides for a price-freeze, the most direct form of governmental intervention in the activities of enterprises. In the National Life Stabilization Law and the Petroleum Products Law, the government is authorized to set the standard price for designated products in times of emergency. The standard price is only a guideline issued by the government, and disobedience of it does not incur criminal liability. If the standard price is ignored, the name of a violating enterprise is published, and, under special circumstances, the government can order a violating enterprise to pay the government the difference between the standard price

67. For details, see M. MATSUSHITA, GENERAL ACCOUNT, *supra* note 29.

68. *Bukka Tōsei Rei* Imperial Decree 118 of 1946 (as amended).

69. *Kokumim Seikatsu Antei Kinkyū Sochi Hō* (National Life Stabilization Emergency Measures Law), Law No. 121 of 1973 (as amended).

70. *Seikyū Jukyu Tekiseika Hō* (Petroleum Products Demand and Supply Stabilization Law), Law No. 122 of 1973 (as amended).

71. *Seikatsu Kanren Busshi no Kaishime oyobi urioshimi nitsisuru Kinkyūsochi nikansuru Hō* (Law Against Speculation and Hoarding), Law No. 48 of 1973 (as amended).

and the actual price charged by the enterprise. In the Law Against Speculation and Hoarding, the government can order a hoarding enterprise to discharge its stockpile when the emergency conditions require such an extraordinary measure. Except for the Price Control Order, all of those laws were enacted at the time of the Oil Crisis in response to the disturbances it created. These laws contain "emergency requirements" which prevent them from being invoked in normal times.[72]

Beside those emergency measures described above, there are some laws which exert permanent price control in some fields. The majority of such laws operate in the areas related to agriculture. The most notable one is the Foods Control Law,[73] under which the purchase and sale of rice is concentrated in the hands of the government. Under this law, the government purchases rice from the farmers and sells it to distributors. The purchase price is determined by the government to guarantee farmers the estimated cost of production and a reasonable income. The sales price, on the other hand, is determined to guarantee to consumers a price that is not unduly burdensome.[74] Thus, the purchase price and sales price are determined by two different principles, and as one can easily see, the purchase price is usually determined by political pressure. Yet it is impossible to tie the sales price to the rise of the purchase price, because the rise in purchase price has been very rapid. The result is a huge difference between purchase and sales prices and a huge deficit in the government rice account. This difference is made up with taxes.

In other agricultural areas such as meat and dairy, sugar and raw silk production, the price stabilization program operates together with the import control.[75] This article will only review the raw silk area as an example. In this area, the Silk Price Stabilization Law[76] established the price stabilization program whereby the Ministry of Agriculture sets the upper and lower limits of the silk price in Japan. When the silk price goes below the lower limit, the Silk Business Agency, a governmental organization, purchases silk to bring it above the lower limit, and,

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72. *See, e.g.*, article 3(1) of the National Life Stabilization Emergency Measures Law, *supra* note 69; article 2(1) of the Law Against Speculation and Hoarding, *supra* note 71.

73. *Shokuryō Kanri Hō* (Foods Control Law), Law No. 40 of 1942 (as amended).

74. *Id.* at art. 4(3).

75. *See* M. MATSUSHITA, GENERAL ACCOUNT, *supra* note 29, at 287.

76. On this subject, see Matsushita, *The Legal Framework*, *supra* note 22, at 13-21.

when the price goes above the upper limit, then the Agency discharges silk in the market to bring it down. Since, however, the problem of the silk producers in Japan is lack of productivity, the usual function of this Agency is to purchase silk to control the price. Import control is also used, since to let in inexpensive imports from abroad would disrupt this price stabilization program.[77]

Price control if applied only in emergency is probably justified as long as it is enforced as a minimum measure and the duration period is limited. The actual effect of such legislation is probably more psychological than economic, having the effect of cooling down panic and calming the impulse to buy. However, measures used to stabilize the price of agricultural products and control imports are hard to justify from the market viewpoint. One justification might be the national security in foods. One commentator argues that the rice price policy and a huge stockpile in government hands served its purpose during the Oil Crisis when prices in general skyrocketed but the price of rice and foods remained stable.[78] However, we must think of the cost of maintaining such protection and the chances of a similar crisis happening again. Admitting that some security measure in foods is necessary, the cost of maintaining the present protection of agriculture, which encompasses not only rice but various other products, is perhaps disproportionately large in relation to the benefit it may bring about.

F. International Trade

In international trade, which includes both export and import, there are some laws regulating business activities. Some basic laws are: (1) the Foreign Exchange and Foreign Trade Control Law,[79] (2) the Export and Import Transactions Law,[80] (3) the Customs and Tariff Law,[81] and (4) decrees and regulations issued thereunder.[82] In export trade, the Foreign Exchange

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77. *Id.*

78. Kajii, *Shoduryō Kanri Seidō no Konnichiteki Igi to Kadai* (*The Contemporary Significance and Role of the Food Control System*), JURIST 735 (1981).

79. *Gaikoku Kawase oyobi Gaikoku Bōkei no Kanri nikansuru Hō* (Foreign Exchange and Foreign Trade Control Law), Law No. 228 of 1949 (as amended).

80. *Yushutsunyū Torihiki Hō* (Export and Import Transactions Law), Law No. 299 of 1952.

81. *Kanzei Teiritsu Hō* (Customs and Tariff Law), Law No. 54 of 1910 (as amended).

82. *Yushutsu Bōkei Kanri Rei* (The Export Control Order), Cabinet Decree 378 of

and Foreign Trade Control Law authorizes MITI to control export prices by designating certain products as items whose export requires a license. In the Export and Import Transactions Law, exporters can enter into an agreement fixing prices, quantity or other terms of export. This agreement must be filed with MITI, and in some cases, approved by MITI.[83] When, however, such an agreement has been filed with MITI or approved by it, as the case may be, the agreement is exempted from the application of the Antimonopoly Law.[84]

In the past, these two laws have been used by MITI interchangeably to achieve the purpose of orderly export. When an import restriction on Japanese products abroad is imminent, or an action for such an import restriction is filed with a foreign government, MITI usually advises the exporters to limit the price, quantity, or other terms of business with respect to the product destined for that country by entering into an agreement under the Export and Import Transactions Law. Whenever the exporters cannot enter into such an agreement or disrespect MITI's directive, MITI issues an order to designate the product involved as an item for which export approval is necessary and attaches conditions to approval such as a minimum price, maximum quantity or other terms of business.[85] In fact, most of the major trade cases between Japan and the United States have been handled in this way. Even though the export control exerted under these laws has some negative impact on the market, it is usually in response to import restrictions or threats thereof in a foreign country. In fact, export control is invoked to prevent a foreign government from invoking its own import relief laws against Japan. In this sense, it may be doubtful that this type of import control has a truly restrictive effect on foreign trade since Japan might well have faced a more stringent import restriction from a foreign country. This control, then, should not be examined only in the context of the Japanese trade regulation but also in that of international trade.

In import areas, the Foreign Exchange and Foreign Trade

1949 (as amended); *Yunyū Bōeki Kanri Rei* (The Import Control Order), Cabinet Decree 414 of 1949 (as amended). For an overview of the Japanese export and import control system, see Matsushita, *The Legal Framework*, *supra* note 22.

83. Articles 5-2 and 5-3 of the Export and Import Transactions Law, *supra* note 80, provide that export agreements involving restrictions on domestic transactions must be approved by the Minister of International Trade and Industry.

84. *Id.* at art. 33(1).

85. *See* Matsushita, *Export Control*, *supra* note 18, at 120.

Control Law authorizes an import quota system,[86] and the Export and Import Transactions Law authorizes importers to enter into an import agreement.[87] The latter law, however, has seldom been used. Import quotas mostly involve agricultural products. There are several problems with regard to those quotas. One is the compatibility with GATT which prohibits import restriction in principle and allows them only when specifically permitted under a provision of GATT. Under article 19 of GATT, a member country may put into effect the quota when the import from abroad suddenly increases, and, by that increase, a domestic industry is seriously injured. However, there is no such requirement in the Foreign Exchange and Foreign Trade Control Law, and therefore, legally the compatibility with GATT is doubtful.[88]

This article briefly touched upon the question of national security in food supply, and noted that the justification for restricting imports applies only in limited cases. As in other countries, agriculture is an area in which political force is stronger than the market, and consequently, the solution must be found in a place other than law and economics.

Lastly, a few words are necessary for the Customs and Tariff Law, which provides for such matters as the customs valuation, tariff classification, tariff quota, antidumping, and countervailing duties.[89] Among those, antidumping and countervailing duties will be important in the future. So far there are only three cases in which Japanese industries brought antidumping and countervailing claims against imports from abroad, and each of these three cases was settled.[90] However, in view of the fact that some Japanese industries have lost their comparative advantages over newly industrialized countries, Japanese antidumping and countervailing duties will be utilized more frequently in the future.

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86. *See* Matsushita, *The Legal Framework, supra* note 22, at 10.
87. *Id.* at 21.
88. On the relationship between GATT and a Japanese domestic law, see *id.* at 18.
89. *See id.* at 24.
90. *See id.* at 27-28.