

Chicago-Kent Law Review

Volume 72
Issue 2 *Symposium on Global Competition and
Public Policy in an Era of Technological
Integration*

Article 10

December 1996

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Mitsuo Matsushita

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Recommended Citation

Mitsuo Matsushita, *The Intersection of Industrial Policy and Competition: The Japanese Experience - The Implications of the New Regime for Global Competition Policy*, 72 Chi.-Kent L. Rev. 477 (1996).

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THE INTERSECTION OF INDUSTRIAL POLICY AND COMPETITION: THE JAPANESE EXPERIENCE

MITSUO MATSUSHITA*

I. WHAT IS INDUSTRIAL POLICY?

A. *Definition of Industrial Policy*

Even in a market economy in which the market mechanism operates and government intervention should be kept minimal, there is need for supplemental measures to deal with market imperfections. Such market imperfections are sometimes called “market failures” and include monopolies, externalities, the weak position of small enterprises, trade frictions, the existence of structurally depressed industries, and some other circumstances which necessitate some degree of government assistance and intervention.

The governments of free-market-economy countries have introduced various measures to assist some sectors of industry, to regulate conduct of enterprises in other sectors, and sometimes to engage in business through activities of government corporations. In this sense, every existing free-market economy is a mixture of the market mechanism and some kinds of governmental involvement. Each country differs from others in the extent to which its government is involved in steering the economy. The relative role of the government in assisting and regulating private enterprise is determined by the nation’s historical background, its basic political and philosophical orientation, the stage of economic development, the comparative advantages and disadvantages of industries in the country, and many other factors.

Among advanced industrial countries, Japan is a country in which the role of government in controlling the market is greater than that in the United States and some other Western countries. The relatively high degree of governmental involvement in the economy can be attributed to several factors. Japan was a relatively late comer to the group of industrialized countries, and the philosophy of “laissez-faire” was not historically strong. The government/business relationship is

* Professor of Law at Seikei University, Tokyo, Japan, and member of the World Trade Organization Appellate Body.

more cooperative than adversarial as compared with, for example, that in the United States.

Although the term "industrial policy" appears in newspapers, journals, and academic writings, it has never been officially defined. Krugman and Obstfeld define it as "an attempt by a government to shift the allocation of resources to promote economic growth."¹ Buigues and Sapir state that it is "the set of measures applied by governments to deal with the process of structural adjustment associated with changes in comparative advantage."² This definition includes measures aimed at declining sectors as well as policies oriented towards the future. A book on industrial policy published in Japan, entitled *The Industrial Policies of Japan (Nihon no Sangyō Seisaku)*, defines industrial policies as "those policies designed to cope with the market failure in the allocation of resources"³ and includes measures to deal with externalities, anticompetitive structures and conducts, promotion of economy of scale, infant industries, basic research and development ("R&D"), and elimination of uncertainty in industrial development.

An elaborate definition of industrial policy is probably not necessary. A tentative and yet workable definition of industrial policy should suffice. In light of this, we may state that the industrial policy is a governmental policy to supplement the market in the face of market failure and facilitate its performance in the long run and that it is a set of measures to deal with specific sectors of the economy. This statement roughly corresponds to a definition of industrial policy given by another economist which suggests that industrial policy is

the totality of governmental policies undertaken to change the allocation of resources among industries from what it would be otherwise, or to intervene in the industrial organization within a certain individual industry, with an intention to enhance the country's economic welfare if and when unrestricted functioning of the competitive market mechanism is found to fail in achieving to that end.⁴

In this respect, industrial policy is distinguished from governmental measures such as fiscal and monetary policy which may be characterized as "global steering." When exercised properly, therefore, indus-

1. PAUL KRUGMAN & M. OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 281 (1991).

2. Pierre Buigues & Andre Sapir, *Community Industrial Policies, in INDUSTRIAL POLICY IN THE EUROPEAN COMMUNITY: A NECESSARY RESPONSE TO ECONOMIC INTEGRATION?* 21 (Pehndon Nicolaidis ed., 1995).

3. RYUTARO KOMIYA ET AL., *NIHON NO SANGYŌ SEISAKU* 40 (Industrial Policy in Japan) (1984).

4. *Id.*

trial policy does not go against the market mechanism but supplements its imperfections and facilitates its operations.

B. A Brief History of Japanese Industrial Policy

Since the Meiji Restoration in 1868, the Japanese government has been actively engaged in promoting industry. For the purpose of our study, however, it suffices if we confine our observation to the period after World War II. The period of several years after the end of the World War II was a period during which the Japanese economic structure was fundamentally reformed. The Occupation Forces brought into Japan the Economic Democratization Policy which consisted of: (1) agrarian land reform; (2) labor reform; and (3) deconcentration of *zaibatsu* (the large industrial combines which had controlled major parts of the Japanese economy). Also, the Antimonopoly Law (the "AML") was enacted in 1947, and this law was designed to be the basic framework for Japanese industry. Through the 1940s and 1950s, industrial policy exercised by Ministry of International Trade and Industry ("MITI") was the dominant force in the economy.

In an early stage of industrial policy, measures taken by the government were interventionistic as exemplified by "the priority production system" (1946-1948) in which resources such as funds, foreign exchanges, and imported raw materials were allocated to chosen industries, that is, the coal and steel industries. Since the mid-1950s, however, the emphasis of industrial policy gradually shifted from a direct intervention to measures that provide incentive and information to industries, such as giving tax exemptions and subsidies.

From 1950 to the mid-1960s, heavy industries such as steel, automobiles, aluminum, and petrochemical industries were the main objects of industrial promotion; the primary objective of industrial policy at that time was to build up the international competitiveness of Japanese industries. For this purpose, various incentives such as tax exemptions and subsidies in the form of preferential financing by organizations such as the Japan Development Bank were provided for targeted industries. MITI also encouraged merger of large companies. For example, three Mitsubishi industrial companies were merged into Mitsubishi Heavy Industries in 1963, and Yawata Steel Company and Fuji Steel Company merged into Japan Steel Corporation in 1969.

Since about the late 1960s, however, there have been changes in economic conditions that have necessitated a shift of emphasis of industrial policy. Partly because of a heavy emphasis on the growth of

the economy in the 1950s and 1960s, environmental problems became serious. Around 1960, an increase of consumer prices became an acute problem and, in the early 1970s, the oil crisis hit the Japanese economy. Also, the heyday of the traditional heavy industries passed and high-technology-intensive industries such as computers and semiconductors became important. Faced with these new developments, the role of industrial policy, especially that exercised by MITI, began to change. There was a new emphasis on promotion of high-technology, service, and knowledge industries and an acknowledgment of a vital need for environmental protection and consumer protection. It is to be noted that this change is only a change in emphasis. Traditional policy regarding conventional industries has continued. It may be more accurate to state that industrial policy by MITI has become more diversified than before. This new trend still continues today. In addition to the above, since the oil crisis, the enforcement of the AML has been revitalized and the oil cartel decisions⁵ by the Fair Trade Commission of Japan ("FTCJ") and the courts established the rule that easy utilization of cartels as tools for industrial policy would be subject to antitrust scrutinies. Therefore, MITI has come face-to-face with the fact that it must take into consideration the impact of the AML when enforcing industrial policy measures and must avoid using "cartels" as tools for implementing industrial policy goals. This requirement has become even more real as a result of the Strategic Impediments Initiative ("SII") between the U.S. government and the Japanese government⁶ in which the Japanese government promised that it would strengthen the enforcement of the AML and refrain from an excessive use of administrative guidance in implementing governmental policies. Also, more recently, deregulation of the governmental control of business activities has become increasingly important, and this makes it necessary to define the permissible scope of industrial policy even more narrowly.

As stated above, industrial policy should be regarded as a set of governmental measures designed to supplement the operation of market mechanism. It follows from this that when the government executes industrial policy, certain conditions must be met. First, measures taken under an industrial policy program should be limited in time. Measures taken by the government to carry out industrial policy often involve assistance to industries. For example, when the government

5. See 38 KEISHŪ 1287 (Sup. Ct., Feb. 24, 1984).

6. On the SII, see Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436 (1991).

provides financial assistance to an industry which is suffering from the loss of comparative advantage, such assistance should be limited in time and scope. Second, measures to be taken to implement industrial policy should be carried out according to a well-established time schedule, including a plan to phase out the measures. Third, in implementing industrial policy, the government should try to utilize private initiative as much as possible. For example, as long as it is practicable, a consortium of private enterprises may be formed to implement the policy rather than a direct intervention of the government.

C. The Effectiveness of Industrial Policy in Japan

Industrial policy involves governmental activities in business, whether promotional or regulatory. A close relationship between government and business is necessary for such a policy to be effectively implemented. It is said that industrial policy in Japan is effectively implemented as compared with other countries. Although it is hard to make a general statement that industrial policy in Japan is effectively implemented or vice versa, it is probably true that, at least in some industrial sectors, MITI's industrial policy in Japan has been effectively enforced. There are at least two reasons to explain why MITI's policy has been implemented. First, there has been an historically close relationship between the government and business community. Since the Meiji Restoration in 1868, the government has been quite active in promoting and helping industry build international competitiveness. Through this historical process, a close cooperative relationship has developed and industries have acquired the habit of working closely with the government under the leadership of the government. It is to be noted that administrative guidance has been an important tool in helping the government carry out industrial policy, and the effectiveness of administrative guidance depends on the close cooperative relationship between the government and business, as touched upon above.

Industrial policy exercised by MITI has been successful when its role is to provide incentive to industries which have some growth potential, such as the computer and semiconductor industries. On the other hand, industrial policies have failed when government tried to assist an industry which had little potential for growth.

Viewed as a whole, the post-war success of Japanese industry should be attributed primarily to the entrepreneurship of industries rather than the industrial policies of the government. Industrial poli-

cies, however, have played a significant, though supplemental, role in the industrial growth of the country by providing incentives to industries.

The scope of industrial policies is wide and includes the policies for promoting basic R&D; assisting depressed industries to recover or find exit; promoting small enterprises; controlling price and production, such as in agriculture; dealing with trade issues with trading partners; and many others. It is far beyond the scope of this paper to analyze all of the aspects of industrial policies. In the following pages, we discuss two important aspects of industrial policies and analyze legal and economic developments. One is joint R&D and the other is structurally-depressed industry. One important viewpoint of this analysis is the relationship between such policies and competition policies.

II. JOINT R&D

A. *Types of R&D*

Although Japan is known as a country of high technology, R&D in Japan has been focused mainly on development research. R&D can be divided into three categories: (1) basic research; (2) development research; and (3) applied 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 hypotheses. 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.

In Japan, R&D is primarily carried out by private enterprises, and a natural result is that the emphasis is placed on development research which leads to a particular product and profit. On the other hand, the public sector for R&D, such as public research institutions and universities, suffers from the lack of funds and is relatively inefficient. According to a report published by the government,⁷ more than seventy percent of the total amount of money invested in R&D is provided by private enterprises. Since basic R&D 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 eventually weaken the basis of technology. There has been growing awareness of this possibility and,

7. See TSUSHO SANGYŌSHO SANGYO SEISAKUKYOKU-KŌGYŌ GIJUTSUIN 7 (1985).

as a result, some measures for promoting basic R&D have been provided.

B. Research Associations

One such measure is the enactment of the Research Association Law⁸ which provides for the establishment of a research association. Basic research involves huge amounts of money and is difficult for a single enterprise to undertake; but if several enterprises pool their money and resources, something 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 various kinds and governmental subsidies are provided.

Private enterprises can engage in joint R&D in the form of a cooperative or joint venture. For example, private enterprises can form a cooperative under the Civil Code; each member contributes technology and funds, dispatches research personnel, and jointly engages in R&D of a product. Technology which results from the activities is jointly owned by members and utilized by them. Private enterprises can also form a joint venture company which engages in R&D in a technological area. The joint venture company owns the resulting technology, and patents on the technology are licensed to parent companies.

However, a research association under the Research Association Law has advantages over the above forms of cooperation among enterprises. First, a research association can apply for a patent and own it when granted. Then, the patent can be utilized by any member enterprise. Second, tax exemptions and other incentives are provided if private enterprises engage in R&D in the form of research association. Third, often government aids, such as subsidy or commission of a project, are available if private enterprises engage in R&D in the form of research association under the Research Association Law.

The government sometimes gives a subsidy to a research association to carry out a project in the form of a monetary grant and the participation of government scientists and engineers. Also, the government sometimes commissions a research association to carry out research for the government. In such areas as integrated circuits and computers, the device of forming a research association was actively

8. See *Kōkōgyō Gijutsukenkyū Kumiai Ho*, Law No. 81 of 1961.

used to accomplish the objective. Especially well-known is the research association formed by several enterprises to develop basic technology on super large-scale integrated circuits ("LSI"). This project was formulated at the suggestion of MITI, and several important enterprises in the field participated. MITI's scientists and engineers participated in the project, and financial incentives were provided by the government. As a result, an important technology (super LSI) was created.

However, a research association formed under this law should be temporary and its objective must be specified—such as research in a particular area or for a particular product. For this reason, a research association is suitable when the purpose is to create a basic technology which would not be created by private initiative alone and which should be open to any enterprise after a certain period of time.

Another important piece of legislation in this regard is the Basic Technology Research Facilitation Law⁹ enacted in 1985. Under this law, private enterprises can use government facilities for little rent when they engage in R&D. This law established the Basic Technology Research Facilitation Center, which provides funds to private enterprises which are engaged in R&D. The Center itself engages in R&D activities, arranges joint research projects among private enterprises and government research institutes, and collects and disseminates technological information.

C. Competition Policy Implications of Joint R&D

(1) Joint R&D and Restriction of Competition

Tension may arise between joint R&D and competition policy. Whereas competition policy endeavors to promote competition, joint R&D may eliminate competition with regard to research. For example, in a large R&D project in which many enterprises participate, there may be a provision that the member enterprises are prohibited from doing their own research or that the technology that will be produced shall not be licensed to outside parties. There also may be other forms of restriction. Such restrictions may outweigh whatever benefit such a joint R&D may produce.

Joint R&D takes a variety of forms. Research associations are one type of cooperative relationship in joint R&D. Other forms include arrangements among independent enterprises by which they

9. Kibangijutsu kenkyū Enkatsuka Ho, Law No. 65 of 1985. For a comment on this law, see *supra* note 8.

participate in a project, the establishment of a company or joint venture entity for the purpose of doing research, and a consignment by one enterprise to another for research in which the former provides financial resources. Whatever form it may take, the arrangement involves a joint operation in one way or another, and the freedom of the participants may be restricted in some ways.

Therefore, under some circumstances, the competition law should intervene and remove restrictions which would unduly stifle competition whether in research or in the production of a commodity which incorporates the results of research. It should be remembered, however, that the AML should intervene into joint R&D activities selectively. The AML should intervene only in those situations in which anticompetitive impacts of joint activities of R&D clearly surpass benefits that accrue from them.

The competition-law authorities and courts in major nations are aware that there should be this balance between those two policies. Each jurisdiction has tried to come up with some means of maintaining a proper balance between those two requirements. In the United States, Congress passed the National Cooperative Research and Production Act of 1993,¹⁰ which mitigates the legal responsibility under antitrust laws of enterprises engaged in joint R&D activities. Under this law, a research joint venture or a production joint venture is dealt with by "the rule of reason." When notified to and approved by the Antitrust Authorities, it enjoys an exemption from treble-damage liability. Also, the U.S. Department of Justice announced a set of guidelines in 1980 which set out principles that would apply when judging whether a joint project engaged in by enterprises infringes antitrust rules.¹¹ In 1995, the Department of Justice published a set of guidelines on licensing of intellectual property rights which have some bearing on joint R&D activities.¹²

In the European Union ("EU"), the Commission published a block exemption which exempts some activities involved in joint R&D from the application of Article 85(1) of the Treaty of Rome, which prohibits an agreement among enterprises which adversely affect competition in commerce between member nations.¹³

10. 15 U.S.C. § 4301 (1994).

11. See ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (Nov. 1980).

12. See U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (April 6, 1995).

13. See Commission Regulation 418/85, O.J. L 53/5 (Feb. 22, 1985).

(2) The Antimonopoly Act Guidelines Concerning Joint Research

In Japan, the FTCJ issued in 1993 a set of guidelines which set forth principles to be used when regulating joint R&D under the AML.¹⁴ In 1989, the FTCJ also announced a set of guidelines on patent and know-how licensing arrangements.¹⁵ The Antimonopoly Act Guidelines Concerning Joint Research and Development ("the Guidelines") were announced on April 20, 1993. The announcement of the Guidelines was intended to clarify the principles which the FTCJ utilizes in judging whether a joint R&D activity runs counter to the prohibition of the AML. The Guidelines reflect the efforts of FTCJ in attempting to balance the promotion of R&D through joint activities and the maintenance of competition in R&D and in production which embodies the results of R&D.

The Guidelines divide application of the AML into: (1) joint undertaking of R&D; and (2) arrangements accompanying the implementation of joint R&D.

1. Joint Undertaking of R&D

Joint undertaking of R&D may amount to collusive activity which unduly restrains competition. The Guidelines state that in judging whether a joint R&D is compatible with the AML, the FTCJ takes into consideration such factors as the number of participants in a project, their market shares, and other related matters. If the joint R&D concerns enterprises which are not in competition, in principle there is no problem.

If the cumulative share of participants in the production of a product that will embody research results is twenty percent or less, in principle there is no problem. A joint R&D project in basic research is less likely to be questioned than one in applied research, since basic research is less related to production of the commodity and, therefore, its impact on competition in a market is likely to be more remote. Also to be considered are: (1) the need for the joint activity; (2) the scope of the project in question; and (3) the duration of the project.

However, the Guidelines state that if the cumulative market share of participants is greater and the result of R&D in question is indispensable to enterprises in business (for example, the technology

14. A translation of this set of guidelines is published in *FTC/Japan Views, Information and Opinion from the Fair Trade Commission of Japan*, No. 15, at 23 (1993).

15. A translation of this set of guidelines is published in *FTC/Japan Views, Information and Opinion from the Fair Trade Commission of Japan*, No. 6, at 16 (1989).

becomes the standard formula in the market), the AML may require access by outside parties to this technology. This is similar to the "essential facility" doctrine developed in U.S. antitrust laws which require that an enterprise holding an essential facility in a market without which other enterprises cannot operate must allow outside enterprises to utilize the facility.

2. Arrangement Accompanying the Implementation of Joint R&D

This section concerns rules that govern the implementation of joint R&D, such as restrictions imposed on the participants with regard to the freedom of selling products and results of their own independent research. Many such restrictions come under unfair business practices as defined in Article 1(9) and General Designations of Unfair Business Practices as published by the FTCJ. The Guidelines classify restrictive provisions included in the implementation of joint R&D into three categories: (1) provisions which, in principle, do not fall under unfair business practices ("white clauses"); (2) those which may fall under unfair business practices ("gray clauses"); and (3) those which are highly likely to fall under unfair business practices ("black clauses").

The Guidelines establish regulations with regard to these three areas (we do not need to present details of them here). We will briefly touch on one aspect of the Guidelines as an example of how these three categories operate. The Guidelines state, with regard to restrictive provisions concerning the implementation of a joint R&D project, that the following examples, in principle, do not fall under unfair business practices: (1) an arrangement on the objective, duration, sharing, and related matters of a R&D project; (2) a request for the obligation to disclose among the participants information on technologies and related matters necessary for the joint R&D project; (3) a request for the obligation to report on the progress of the shared part of the research work to other participants; (4) a restriction on another joint R&D project with a third party or parties on the same subject matter as that of the joint R&D project during a reasonable period after the completion of the joint R&D project, where such restrictions are deemed necessary for preventing a dispute arising over the fruits of the joint R&D project; (5) a restriction on the introduction from some other party of technology which is the object of the joint R&D project; and (6) a restriction on the participation of other firms in the joint R&D project. As an example of restrictions which may fall under unfair business practices, the Guidelines cite a restriction im-

posed on the introduction from some other party of any technology similar to the technology which is the object of the joint R&D project beyond the extent necessary for the implementation of the joint R&D project.

Some restrictions are regarded as highly likely to fall under unfair business practices. The Guidelines cite as examples the following: (1) restrictions on R&D in the same subject matter as that of the joint R&D project after completion of the said joint R&D project; (2) restrictions on the use of existing technologies by a participant or upon granting of a license of such technologies to a third party; and (3) restrictions on the production and sales activities by any participant with respect to any competing product or the like other than products based on fruits of the joint R&D project.

3. Evaluation of the Guidelines

The Guidelines were drafted on the basis of a task force report commissioned by the FTCJ to study the relationship between joint R&D activities and competition policy. The FTCJ announced drafts of guidelines and conducted informal hearings on them in which business persons, lawyers, and academics expressed their views. Taking all such views into consideration, the FTCJ drafted the final version which became the Guidelines. This process of drafting shows that the FTCJ engaged in a careful weighing and balancing of different and conflicting interests and principles. Therefore, we can safely say that the Guidelines take a balanced and middle-of-the-road approach.

However, there are a few questions that may be raised with regard to approaches taken by the Guidelines. Let us mention two of them. As stated earlier, the Guidelines state that if the total market share of participants in a joint R&D project amounts to twenty percent or less with regard to the product line in which the subject matter of R&D will have some bearing, there is in principle no problem. This presumption of validity on the basis of twenty percent market share may mean, *in contrario*, that if the market share with regard to the product produced by participants is more than twenty percent, it may be regarded more skeptically.

However, in a joint R&D project, if more enterprises pull their resources together, there may be more research results. If the purpose of a joint R&D project is to maximize results, would the twenty percent rule be always valid? If there is any possibility of restraining competition in the product market, is it not sufficient to exercise a

vigilant watch on collusive activities with regard to the product and leave the R&D free from antitrust risks?

The Guidelines also state that a clause which is in principle held valid (a white clause) may raise a problem "if its contents significantly lack balance among the participants and thereby place any specific participating firm at an unreasonable disadvantage."¹⁶ A question here is: Is a task of competition laws to balance interests of contracting parties when they negotiate a private agreement? If a private agreement leads to restraint of competition and affects a market as a whole, the competition laws should intervene. However, absent such proof, would such an intervention not lead to an infringement of the freedom of contract? Also, can the FTCJ judge that the contents of an agreement "significantly lack balance among participants"? Any misjudgment on this question may lead to an excessive intervention into the realm of free activities of enterprises.

The above rules in the Guidelines are quite similar to those contained in a block exemption with regard to joint R&D issued by the EU authority in 1985 (Regulation 417/85 on Block Exemption of Specialization Agreements, 1985 IL 53/1). In the EU, the rules are similar to Japanese rules in that they contain a twenty percent threshold rule and a list of "black clauses," "white clauses," and "gray clauses." Undoubtedly, the FTCJ took the EU rules into consideration when it drafted the Guidelines.

III. POLICIES TOWARD DEPRESSED INDUSTRIES

A. *Cyclical Depression and Structural Depression*

1. Cyclical Depression

It is generally said that there are two kinds of depression. One is cyclical depression and the other is structural depression. A cyclical depression occurs as a process of economic ups and downs. There is a business cycle in the economy which goes through the stages of economic boom, recession, depression, recovery, and again boom. This is a natural cycle of the economy, but when a depression comes, enterprises suffer from slackening business activities, a decreasing demand, and consequently, shrinking business opportunities.

The frequency and length of depression varies from one depression to another, and from country to country. In any market economy, however, a depression as a phase of business cycle occurs

16. See *supra* note 14, at 43.

inevitably. When a depression comes, appropriate measures which the government should take are measures of global steering, such as monetary policy or fiscal policy. The monetary policy is designed to control the supply of money to the market and, when a depression comes, the government lowers the discount rate and make it easier for banks to borrow money from the central bank. Thereby banks have greater resources to supply money to enterprises. In a fiscal policy, the government utilizes tax policy to affect the economy, and, when a depression comes, the government provides tax reduction and exemptions to various industrial sectors, and thereby provides incentives to enterprises to engage in business activities. Global steering measures, as above explained, are aimed at controlling the total demand and supply of money and do not, in principle, interfere with activities of any one sector of industry or any one enterprise.

Whether the government should extend a protection to a specific industrial sector or a group of enterprises when a depression comes is a matter of debate. On the one hand, one may argue that a depression is a good opportunity to weed out inefficient enterprises and, when they are eliminated, the economy is more efficient. Measures which belong to social policy, such as unemployment insurance, retraining of workers and adjustment assistance, should be given to unemployed workers of such enterprises.

There is, however, another school of thought which maintains that when a depression is exceptionally hard, those enterprises which have a sufficient viability may be eliminated; that it would be an expensive proposition to reconstruct those enterprises again; and that it would not be contrary to the market principle to give such enterprises some protection as an "emergency relief."

In Japan, differences of views with regard to what is the proper role of the government in a cyclical depression have not been entirely resolved. However, Article 23-3 of the AML provides for a "depression cartel" and this article is premised on the proposition that it is to the benefit of the national economy to give enterprises a temporary relief when they are in great difficulty in a cyclical depression.

2. Structural Depression

A structural depression poses more difficult problems. A structural depression may be defined as a depression which is specific to one industrial sector and caused by the loss of comparative advantages of the industry vis-a-vis those in foreign countries. An example

might be the difficulties of depth mining in Japan in comparison with strip mining in Australia.

Within the category of structurally-depressed industries, there may be another variation. An example is the aluminum and petrochemical industries of Japan in the 1980s. In those industries, there were sufficient resources in terms of technology and personnel, and they were not totally inefficient. However, they were hit hard by the oil crisis and rising costs of oil, which had enjoyed comparative advantages due to lower costs of oil and natural gas. Therefore, those industries in Japan experienced difficulties.

When enterprises are in the state of structural depression, they should exit from this sector, wind up business, or shift to another sector. However, there may be exit barriers. For example, if the industry is characterized as one in which the debt ratio is high, it would create difficulty for enterprises in the industry to exit since debt must be liquidated and they may find it difficult to shift to other sectors. Also, if mobility of labor is low, it would create an exit barrier.

There is no completely satisfactory answer to the question of whether a structurally-depressed industry should be given protection. The general principle is that a structurally-depressed industry whose efficiency is lacking should not be given protection in such a way as to make it possible for it to stay in existence in spite of inefficiency. However, if a depressed industry is extinguished abruptly, it may cause social disruptions to the area which depends on that industry, such as wide-spread unemployment. In this context, one may argue that a depressed industry should be given a certain time period to phase itself out gradually. Even if the industry must be phased out, it should be given a chance for a "soft landing."

Another structurally depressed industry may be revitalized by some governmental measures. For example, as in the aluminum and petrochemical industries, they may suffer from excess production capacity and, if given some assistance to reduce excess capacity by governmental measures, their conditions may improve and they may regain vitality.

It is probably true that governmental measures to deal with structurally depressed industries must vary from industry to industry depending on the nature of the problems. Sometimes the measures should aim at phasing out the industry in a certain period of time and at preparing a smooth way out. At other times, the measures should

aim at providing some conditions to the industry so that it can remove barriers and difficulties and regain strength.

The Organisation for Economic Co-operation and Development ("OECD") coped with this problem and announced that the policy to deal with a structural depression should be the positive adjustment program ("the PAP") in which the government provides a temporary assistance to the industry concerned. A reform program should be formulated by enterprises concerned, and the assistance should be in terms of financial aid or otherwise should be given in relation to the reform program. Such a reform program with governmental assistance should be carried out by a time schedule. The PAP emphasizes that private initiatives should be utilized as much as possible along with governmental measures. Therefore, a joint venture of enterprises should be promoted.

B. Depression Cartel

Article 24-3 of the AML is designed to provide temporary relief to enterprises when a cyclical depression causes serious injury to industries by allowing enterprises in an industry to agree upon a "depression cartel" and cut back production. Under this article, in a depression, when price goes below the average cost of production, thereby causing the majority of enterprises in the affected industry to have difficulty in continuing their operations, and this depression cannot be overcome by rationalization of enterprises, members of the depressed industry may enter into an agreement regarding output reduction, utilization of capacity, or sales quantity. If the above measures cannot be taken for some reasons or if those measures are proven to be ineffective, price-fixing is allowed.

When a depression comes and enterprises in an industry wish to enter into a depression cartel, they must file with the FTCJ a draft depression cartel agreement. The FTCJ then examines the draft in light of the requirements in Article 24-3 of the AML and grants a license to the depression cartel in question for a limited period of time. A depression cartel duly entered into under Article 24-3 of the AML is exempted from the application of the AML.

As stated earlier, a depression cartel is allowed only under stringent requirements such as that, in the industry in question, price must be below the average cost of production and there is no means to overcome the difficulty. A relief period is specified in the license given by the FTCJ and it is usually quite short, such as a four-month

period or a six-month period. From this, one can see that a depression cartel allowed under Article 24-3 of the AML is designed to deal with a cyclical depression but not a structural depression. Since there is no language in Article 24-3 of the AML which says that a depression cartel cannot be used for the purpose of dealing with a structural depression, it could be used if parties chose to do so. However, it would be an ineffective tool.

In recent years, depression cartel has come under criticism that its effect tends to "spill over" into other areas. When a depression cartel is allowed and competing enterprises are given a chance to negotiate terms of competition among themselves, they acquire a habit of collusion, lose competitive attitudes, and, even after the depression cartel has been phased out, they tend to engage in collusive activities in other areas. For this and other reasons, the depression cartel is not used today. At the time of this writing, the Japanese economy was in a serious depression which has lasted for six years, and yet no depression cartel has been allowed. It may be that this depression cartel may be abolished in future.

C. Measures for Structurally Depressed Industry

In Japan, the governmental policy provides some forms of assistance to structurally depressed industries, provided that they possess sufficient viability to be restored to competitiveness. The Specific Industries Structure Improvement Temporary Measures law, which existed between 1984 and 1988, was typical of such legislation. Although this law no longer exists, it is a useful model for dealing with structural depression, and the subsequent legislation is partly modelled after it. Therefore, it is worthwhile to take a brief look at this law and see how it operated.

Under this law, MITI was authorized to designate an industry as a "specific industry" which needed measures under this law. Basically there were two measures provided for in the law. One was a type of depression cartel, and the other was a business cooperative arrangement. One cause of economic difficulty in a structural depression is a surplus of production capacity in relation to effective demand. However, a company operating in the depressed industry tends to be reluctant in unilaterally cutting back production capacity, 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 was authorized to issue a directive (administrative guidance) to companies in a specific industry to cut back total production capacity, and in accordance with this directive, the companies entered into an agreement to limit total capacity in the industry and to allocate a quota to each company in cutting back production capacity. This directive was not compulsory but had a de facto impact over the industry. When companies in this industry agreed to cut back excess production facility jointly, the government extended a loan guarantee to the companies so as to make it easier for the companies to borrow money from banks. This was an authorized cartel arrangement, and an agreement to cut back excess production facility under this law was exempted from the application of the AML.

The other device for dealing with a structurally-depressed industry is a business cooperative arrangement. To implement this device, MITI announced a master plan for reorganization of a designated industry, and the companies in the industry then developed a more elaborate program including provisions for measures such as mergers and acquisitions, the establishment of a joint buying or selling agency, and technological cooperation. These arrangements had to be approved by MITI, and even though the approved arrangement did not technically enjoy exemption from the application of the AML, a negotiation between MITI and the FTCJ preceded the approval and execution of the program, and this provided assurance that the FTCJ would not take action against an approved arrangement. The above relief measures were applied in industries such as aluminum, petrochemicals, steel, and wood pulp, and accomplished some degree of success in alleviating the difficulty in those industries. This law expired in 1988 and was not renewed.

In 1987, a law entitled the Specific Industries Reorientation Law was enacted. This legislation lasted for nine years (1987-1996). The difference between the 1984 Act and the 1987 Act is that, whereas in the former, a sort of depression cartel was incorporated, no cartel device is included in the 1984 Act. It is also to be noted that the primary emphasis of the 1987 Act was not so much to restore or revive structurally-depressed industries as it was to shift economic resources utilized in those industries and workers employed there to different and more promising areas.

The issue of how to deal with structurally-depressed industries in relation to competition laws is a difficult task for the enforcement agencies of competition laws, not only in Japan but also in other countries. In the United States, a task force organized by the Defense De-

partment dealt with the issue of defense industries which are faced with "down-sizing" due to a cut in the defense budget and changes in international circumstances. The report published by the task force¹⁷ states that the antitrust authorities can examine antitrust questions in a merger of enterprises in the defense industry purely from the anti-trust standpoint. However, it also states that the Defense Department can express its view on such a merger. The implications are not clear. However, it may be that a defense necessity may be taken into consideration when assessing an antitrust question in a case in which the defense industry is involved. In Germany, the Minister of Economics permitted a merger in the defense industry (the merger of Daimler/MBB) although the Germany Cartel Authority had decided that it was contrary to the merger provision in the GWB (the Law against Restraints of Competition).¹⁸

Governmental measures dealing with structurally-depressed industries do affect international competitiveness of such industries, and it is hoped that there will be international guidelines (whether formal or informal) within the framework of the OECD, the World Trade Organization ("WTO"), or other appropriate international bodies.

Now, with the remaining space I just want to discuss two other issues. One is about the intellectual property aspect. The *Financial Times* of October 6, 1995, carried an article by Marco Bronchers, a Dutch lawyer, about a Japanese case. Let me just briefly discuss this Japanese case. Now, what is at issue in this case is a Japanese patent owned by BBS, a German company which produces an aluminum wheel. There was, at least, a large price differential for the product between Germany and Japan. So, the company has patents in Germany, Japan, and other countries also. There is another company in Japan which wanted to import this aluminum wheel from Germany, which it did. That company was then sued by BBS in Japan. BBS said that in patent law, each patent is independent in each country, therefore, even if a patent right was exhausted in Germany, it was not exhausted in Japan. In the District Court in Tokyo, BBS won, and the plaintiff took an appeal to the Tokyo High Court, and the Tokyo High Court reversed the decision. It recognized the international exhaus-

17. Office of the Under Secretary of Defense for Acquisitions and Technology, *Report of the Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation*, 66 ANTITRUST & TRADE REG. REP. No. 1659 (Special Supp. April 14, 1994).

18. Untersagung eines Zusammenschlusses wegen Entstehens und Verstärkung marktbeherrschender Stellung, Beschukuss des BKartA won April 1989 (Dimler-MBB), WuW 7 u.8/1989, S. 633-670.

tion doctrine, saying that once the product is sold in Germany, a patent right has been exhausted internationally. Therefore, BBS cannot assert the patent right in Japan to block the importation of it. The Court generally gave three rationales for this decision. The first is that if you allow BBS to block the parallel importation, it means that BBS sold a product in Germany, and got a profit there already. Then, anybody who wants to import that to Japan must get the license and pay royalty to BBS. This means that BBS will get the profit twice. A second rationale is that in the trademark area, parallel importation is generally allowed, and many trademarked goods are patented at the same time. Therefore, if a patented product could not be imported by a parallel importation, it means that many trademarked goods cannot be imported by a parallel importer. So this would undermine this policy of trademark law. The third rationale is that this trademark law's purpose is to promote distribution, and this is also the objective of patent law.

This case was decided on March 23, 1995 and is currently being appealed to the Supreme Court. Since that date, there has been much argument in Japan about this case. Let me just briefly describe to you some of the issues there. Generally speaking, some academics are favorable to this decision, and most practitioners are against it. Now, the arguments against this decision are something like this. One is that this will be too disruptive of the production in Japan, and so, if you recognize international patent-exhaustion doctrine generally, you will have to allow the importation of the product from anywhere. If it is from Germany, maybe that is okay, because the economic conditions in Germany are not so different from those in Japan. But, what about China? What about Malaysia? Malaysia's wage level is something like 1/20th of Japan's. Then, local production would be impossible.

Another argument is that it will conflict with the compulsory licensing provisions in patent law. In Japanese patent law, there is a provision which says that if a patent is not used for a long time, one can apply for a license to use it. Then a patent office can grant you a license, a nonexclusive license. Suppose this doctrine is recognized, then nobody is going to produce in Japan anymore. Somebody can apply for this compulsory license, get it, and then you have to compete with a product that comes from a country in which the wage level is 1/20th. It does not make sense. So, this is another argument.

Third, there will be international conflicts because of this decision, especially with the United States, because the United States does

not like the international exhaustion doctrine, so there may be another section 301 problem. So, this is suspicious to everyone. At this point, I do not know what is going to happen, because everybody is waiting for the Supreme Court decision. Before I finish this subject, let me just make one comment. I think this case should have been dealt with as one of competition law rather than patent law, because if you approach the problem by patent law, then you will have to recognize international exhaustion doctrine in general.

Now what about the antitrust aspect of it? If you look at the factual situation of this case, there must have been a high degree of product differentiation, because they are competing brands. But this brand was priced very highly. This means this market was separate from the other market, so this is the differentiated market. This means there was a monopoly in this area and the monopoly was abused. I think this is what was involved in this case. Article XXIII of the Japanese Antimonopoly Law says that if there is an exercise of a patent right, then it is exempted from antimonopoly law; however, I think you can construct a theory that when that right is abused, then the exemption is not given. I think the Court, the FTCJ, or somebody should at least look into the situation and try to come up with some kind of answer to it. Now, I think one of the advantages of dealing with it as competition law is that you can make selective intervention. You can intervene only in this situation, without generally saying that you allow imports from everywhere. Of course, you have to establish abuse, and you have to overcome this exemption clause and so on, which may not be easy, but I think it is worth thinking about it. I do not know what the Supreme Court is going to decide, but I think the petitioner should stress this point in the Supreme Court. I am not predicting what the Supreme Court decision is going to be, but I think this will be a very interesting case.

My last point is the recent U.S./Japanese trade disputes. There are two of them, one is the U.S./Japan auto dispute, the other one is the *Kodak v. Fuji* dispute. Speaking about the auto parts dispute, what happened was that the U.S. government said that Japanese auto manufacturers did not purchase enough parts and components from abroad. It also claimed that Japan did not handle a sufficient number of foreign cars in its market. The third claim was that the Japanese car inspection system is too stringent. Now, as far as this third one is concerned, this is the question of technical barriers to trade, so this is a WTO issue, I think. As far as the first two are concerned, this is essentially an antitrust matter. What happened was that the United

States said “you do something about it, you set up some type of criteria by which you can measure that imports are increasing, or the increase of car dealers is there, and so on.” And the Japanese government said, “No, we cannot do that, it is contrary to the free market.” So, it was a stalemate between those two governments, and the United States was going to invoke section 301. Actually, it invoked it, and it was going to impose the 100% retaliatory tariff on the high value of Japanese cars to the United States. Now, the Japanese government said, “Well, we will take you to WTO Dispute Settlement.” Now, both governments could not really back off because of the past negotiating process. I think, in this case, private industry was a kind of savior. Private industry came up with a program which said that we will attempt to increase purchase of parts and components from abroad.

The Japanese Car Dealers Association said that they would encourage car dealers to sell more foreign cars in Japan. Now, both governments jumped on it right away, and the Japanese government said that this is a very good sign, we welcome this, but we have nothing to do with it. This is a private industry decision. The U.S. government said this was a very good sign by private industry. The purchase of the parts and components was likely to increase this much. As far as the number of car dealers in Japan who handle foreign cars is concerned, there will be something like 1000 dealers in Japan who handle foreign cars by the year 2000 or 2005. The Japanese government said “this is a U.S. figure, we have nothing to do with it.” This is our agreement—not to agree. The important thing is that this resolved the problem—at least temporarily. So this is the U.S./Japan auto problem.

Regarding *Kodak*, what Kodak claims to the USTR is that Fuji Film Company, which has about seventy percent market share in Japan, uses rebates given to the distributors, and there are several distributors in Japan. This rebate is an incentive to stop selling Kodak products. This is Kodak’s claim. Fuji’s claim is that Kodak never approached those distributors, so how could they sell the product? The factual situations claimed by those two parties are so different that at this point, you cannot say much about it, but I think these are basically competition-law problems rather than governmental problems.

This raises an issue as to whether or not so-called restricted business practices can be dealt with in the framework of WTO. This is a very different problem, and I do not have any definite conclusions yet, but let me comment. We have situations that nullify and impair the benefits of WTO. For example, export cartels and import cartels are

generally licensed by the government, but they have some restrictive effects. If that happens, then you can claim that because of the governmental measure, the WTO benefit has been nullified. Also, there is the language in the safeguard agreement that the government should not encourage private enterprises to engage in export restraint. So, it also may be in violation of WTO.

Another type of problem is the administrative guidance that is used in Japan. It is not a government measure, but it has de facto power to create some exclusive situations. In fact, Kodak, I think, argues that MITI did that in the past. Well, suppose MITI does it today. Would that count still? Well, it probably would—if it is effectively enforced. In fact, there is the General Agreement on Tariffs and Trade (“GATT”) panel decision in connection with the semiconductor agreement between the United States and Japan, in which the panel said that an administrative exercise by the Japanese government amounted to such a measure. So that probably will come within the WTO. Well, what about the situation where there is no administrative guidance, no licensing, just private conduct? That, I think, is the hardest case. Generally speaking, it is very hard to get into the WTO dispute settlement, but there may be discrimination. Suppose in the Japanese *Kodak v. Fuji* case—this is all hypothetical—Kodak applied to the FTCJ, under Article 45. Suppose also that Fuji has been doing exclusive dealing that excluded Kodak products from the Japanese market. If FTCJ has been prohibiting this in relation to domestic firms in the past, and if Kodak is denied this relief, I think this will bring the case close to the WTO.

There may not be a government measure, but I think it is something close to a discriminatory measure, because only foreign companies are denied the antitrust relief. This is all hypothetical, but this, I think, is one possible type of situation. Let me close with one last point involving restrictive business practices. Some of the restrictive business practices have the clear effect of an impediment to market access—like boycott, which is a clear case, and exclusive dealing, which is another one; tie-in is probably another type. Export cartels are a slightly different type, but they may still be contrary to Article XI of the GATT. But, on the other hand, what about mergers? I think it is more difficult. When a merger creates a huge company, that company may be able to engage in predatory pricing, but it may also raise prices. So, I think it is a little bit more uncertain. What about the minimum resale prices? What about the cartels to fix the minimum price? Those are regarded as bad in competition law; but, how

would that be an impediment to market access standing alone? Well, it probably will not hinder market access as such, so can you find a connection between this and WTO benefit? That, I think, is quite doubtful. And so, the badness, in the sense of the antitrust law, does not necessarily coincide with market-access issues. Some issues do overlap, but not necessarily. This is something that we have to think about in the future.