

# Northwestern Journal of International Law & Business

---

Volume 8

Issue 1 *Spring*

---

Spring 1987

## The Administrative Regulation of Technology Induction Contracts in Japan

K. Blake Thatcher

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [International Trade Commons](#)

---

### Recommended Citation

K. Blake Thatcher, *The Administrative Regulation of Technology Induction Contracts in Japan*, 8 *Nw. J. Int'l L. & Bus.* 197 (1987-1988)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Northwestern Journal of International Law & Business* by an authorized administrator of Northwestern University School of Law Scholarly Commons.

# The Administrative Regulation of Technology Induction Contracts in Japan

## I. INTRODUCTION

Beginning in the 1960s, Japan achieved an astonishing rate of economic growth. A major factor supporting this growth was technological innovations assimilated and utilized by Japanese companies. Most of these innovations were developed by United States and European research centers, universities, and companies, and later imported into Japan through various forms of licensing agreements. Consequently, during this period of rapid economic growth, Japan annually recorded a large deficit in technology trade with other developed countries.<sup>1</sup> Even today, in spite of the modernization and growth of Japanese industry, Japan remains a technology-importing nation.<sup>2</sup> This technology trade

---

Research for this Comment was conducted by the author under the auspices of the Center for the Study of United States-Japan Relations at Northwestern University, School of Law, and the Council on Foreign Relations in Tokyo.

<sup>1</sup> *Gaikoku Gijitsu Donyu Nenji Hokoku, Kagakugijutsuchōhen (Showa 58) 21-50* (SCIENCE & TECHNOLOGY AGENCY ANNUAL REPORT ON IMPORTATION OF TECHNOLOGY, 1950-1983) [hereinafter SCIENCE & TECHNOLOGY REPORT]. See also *infra* apps. A-B. The superficial precision of these statistics published by the Japanese government belies, to some degree, the true complexity of measuring the scope of technology transfers. M. HARRIS, *JAPAN'S ECONOMY AND TRADE WITH THE UNITED STATES*, S. REP. NO. 103, 99th Cong., 1st Sess. 114, 115 (1985). Ms. Harris described the complexity in this way:

Technology transfer is such a multifaceted process that it is virtually impossible to measure it precisely. Technology flows internationally in sales of equipment, technical services (including feasibility studies and training programs), and patents and licenses, as well as through exchanges between technical personnel in different countries and other mechanisms which involve no recorded sales.

[As the United States does not compile this kind of statistics regarding technology transfers, Japanese government statistics will be used in this Comment. At the outset, however, some inherent limitations regarding the Japanese mode of measuring technology transfers should be mentioned.]

Japan's technological balance of payments. . . records payments and receipts for industrial property rights, as well as technical services. In cases where no payment is made (such as in some instances of cross-licensing), however, there is no record in the technological balance of payments. Furthermore, technology transfer can also occur through foreign investment and joint R&D programs, additional avenues not fully reflected in the technological balance of payments. In short, *the best available indicators do not provide fully accurate measurements of technology transfer.*

*Id.* at 116 (emphasis added).

<sup>2</sup> SCIENCE & TECHNOLOGY REPORT, *supra* note 1, at 20. Regarding the importance of technology imports to the Japanese economy, one commentator stated:

[T]here can be no question that they [technology transfers] were crucial to Japanese economic growth and that the prices paid were slight compared with what such technology would cost

deficit with the United States is especially conspicuous.<sup>3</sup> This does not necessarily represent, the relative levels of technological development in the two countries, however, for there exist alternative explanations for this deficit.<sup>4</sup>

The two most important laws affecting technology induction contracts ("TICs")<sup>5</sup> in Japan are the Foreign Exchange and Foreign Trade Control Law (the "FECL")<sup>6</sup> and the Antimonopoly Law (the "AML").<sup>7</sup>

---

today, if it could be bought at any price. Japan imported virtually all of its technology for its basic and high-growth industries, and it imported the greater proportion of its technology from the United States.

C. JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975 16 (1982). Regarding Japan's importation of technology, another commentator stated that, "[w]e consider that Japan represents the best example of technology transfer in the world and throughout history." S. GEE, TECHNOLOGY TRANSFER IN INDUSTRIALIZED COUNTRIES 29 (1979).

<sup>3</sup> SCIENCE & TECHNOLOGY REPORT, *supra* note 1, at 20.

<sup>4</sup> One alternative explanation is that when one Japanese company licenses technology from a foreign company, other Japanese companies tend to follow suit and license the same technology to ensure that they will not fall technologically behind domestic competitors. J. BRANSON, THE JAPANESE CHALLENGE TO U.S. INDUSTRY 40 (1981). Another possible explanation is the relative openness of research centers in the United States, for example on college campuses, as contrasted to the closed nature of research centers in Japan. T. OZAWA, JAPAN'S TECHNOLOGICAL CHALLENGE TO THE WEST, 1950-1974: MOTIVATION AND ACCOMPLISHMENT 27-29 (1974). The attitudes of companies in the two countries toward technology transfers provide yet another explanation. *Id.* For instance, many United States companies have traditionally viewed royalty payments received for technology transfers as windfall profits, and have thus been quite willing to transfer technology on lenient terms. *Id.* Whatever the explanation for Japan's technology trade deficit, however, its existence is likely to continue, even if in an attenuated fashion.

For a recent description of the technology battles between Japan and the United States, see *High Technology: Clash of the Titans*, THE ECONOMIST, Aug. 23, 1986, at 4-18. This article concludes with an optimistic appraisal for high-technology industries in the United States.

Apart from possessing vastly greater resources of well-trained brains, more diverse and flexible forms of finance, and a bigger and more acquisitive domestic market, America has one final decisive factor moving in its favour—the pace of innovation itself.

High-tech products tend to have two things in common: they fall in price rapidly as production builds up (they possess steep learning curves) and they get replaced fairly frequently (they have short life cycles). The trend in high-tech is towards things becoming steeper and shorter. So the competitive advantage of being first to market is going increasingly to outweigh almost everything else.

This spells an end to the traditional low-risk, low-cost approach that Japanese companies have used so successfully to date—coming in second with massive volume and forward prices after others have primed the market. Henceforth, Japanese firms are going to have to take some of the same technological risks—and pay the same financial penalties—as everyone else. And that puts the advantage decidedly on the side of Yankee ingenuity.

<sup>5</sup> For a definition of a technology induction contract (a "TIC") under the 1979 Foreign Exchange and Foreign Trade Control Law, see *infra* notes 84-85 and accompanying text.

<sup>6</sup> After World War II, the *Gaikoku Kawase oyobi Gaikoku Bōeki Kanri-hō* (Foreign Exchange and Foreign Trade Control Law), Law No. 228 of 1949 [hereinafter old FECL] and the *Gaishi ni Kansuru Hōritsu* (Foreign Investment Law), Law No. 163 of 1950 [hereinafter FIL] made up Japan's foreign exchange laws. In a significant amendment in 1979, the Diet combined the functions of the two laws into one new law. *Gaikoku Kawase oyobi Gaikoku Bōeki Kanri-hō no Ichibu o Kaisei Suru Hōritsu* (Law to Amend a Part of the Foreign Exchange and Foreign Trade Control Law), Law No. 65 of 1979 [hereinafter FECL].

<sup>7</sup> *Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuhō ni Kansuru Hōritsu* (Act Concern-

Both laws were enacted at the end of World War II. Both were written in general terms, as is the case with many Japanese laws, with broad interpretive and administrative powers given to bureaucratic organs. Currently, both laws effect what may be termed administrative regulation of TICs through the use of reporting requirements. The FECL requires prior notification by both the Japanese and the foreign party before the contract is executed<sup>8</sup> while, on the other hand, the AML requires the Japanese party to notify the Fair Trade Commission (the "FTC") within thirty days after the contract is concluded.<sup>9</sup>

In the past, chiefly through the use of administrative guidance, the Japanese government has used these two laws both to restrict the type of TICs in Japan and to effect the most beneficial terms for the Japanese parties to TICs. The Japanese government claims, however, that as a result of liberalization measures, regarding TICs, the FECL is now "free in principle."<sup>10</sup> One commentator agrees, asserting that the new FECL no longer has any significant restrictive effect upon TICs.<sup>11</sup> Other commentators and experts disagree, however, claiming that the new FECL continues to provide broadly for the government option to intervene in exceptional circumstances relating to TICs.<sup>12</sup> These experts also claim that drastic liberalization of bureaucratic practices will be necessary before the validity of Japanese claims regarding alleged liberalization can be accepted.<sup>13</sup> Some experts also suggest that the FTC is quite transpar-

---

ing Prohibition of Private Monopoly and Maintenance of Fair Trade), Law No. 54 of 1947 [hereinafter AML].

<sup>8</sup> See *infra* notes 56-60 and accompanying text. One commentator made the following statement regarding regulation under the FECL:

Before the capital liberalization of the late 1960s and 1970s, no technology entered the country without MITI's scrutiny and frequent alterations of the terms; no patent rights were ever bought without MITI's pressuring the seller to lower the royalties or to make other changes advantageous to Japanese industry as a whole; and no program for the importation of technology was ever approved until MITI and its various advisory committees had agreed that the time was right and that the industry involved was scheduled for "nurturing".

C. JOHNSON, *supra* note 2, at 17.

<sup>9</sup> See *infra* notes 180-87 and accompanying text.

<sup>10</sup> *Tōkyō Ginkō Tōkyō Bōeki Tōshi Sōdansho, Tainichitōshi Handobokku* (BANK OF TOKYO, TRADE AND INVESTMENT INFORMATION SERVICE OFFICE, SETTING UP ENTERPRISES IN JAPAN) 149 (1985)[hereinafter SETTING UP ENTERPRISES].

<sup>11</sup> Smith, *The Japanese Foreign Exchange and Foreign Trade Control Law and Administrative Guidance: The Labyrinth and the Castle*, 16 LAW & POL'Y INT'L BUS. 417 (1984).

<sup>12</sup> Shibuya, *The Administrative Regulation of Transfer of Technology in Japan*, 1 EUR. INTELL. PROP. REV. 18, 22 (1982); Sharp, *Japanese Licensing Environment*, TECHNOLOGY LICENSING 235-65 (1985).

<sup>13</sup> Interview with a Japanese attorney of the Tokyo affiliate of a large United States law firm, in Tokyo (June 1985) [hereinafter Japanese attorney interview]. For a description of this research, see *infra* note 16. As a further example, one knowledgeable commentator has stated:

Although the Japanese legal structure concerning external transactions has made a dramatic move toward free trade, administrative guidance as implemented by MITI will likely still play

ent in its enforcement of the AML and assert that the AML, like the FECL, does not have a restrictive effect upon TICs.<sup>14</sup> Yet, FTC statistics regarding cases of the use of administrative guidance against foreign licensors in international TICs preclude a simple acceptance of these claims.<sup>15</sup>

The purpose of this Comment is to investigate the current effect of both the FECL and the AML on TICs.<sup>16</sup> It begins with a historical analysis of past applications of these laws to TICs. It then discusses the current terms of the AML and the FECL, the government's application of these terms to TICs, and the effect of this application on the formation of TICs. This Comment concludes that, although the means of regulation has changed and there has been some liberalization, the FECL and the AML continue to create substantial prejudicial effects for the interests of foreign parties to TICs in Japan, especially in the case of cross-licensing agreements for certain types of technology.

## II. ADMINISTRATIVE REGULATION OF TECHNOLOGY ASSISTANCE AGREEMENTS UNDER JAPAN'S FOREIGN EXCHANGE CONTROL LAWS

### A. The Old Foreign Exchange Control Law and Foreign Investment Law

#### 1. *Regulatory Mechanisms*

From shortly after the end of World War II until 1980, technology assistance agreements in Japan were regulated by either the old FECL or the Foreign Investment Law (the "FIL").<sup>17</sup> The FECL was termed *ip-*

---

the dominant role in regulating the inflow and outflow of technology under international license agreements. Consequently, international license agreements will continue to be adjusted to what MITI perceives as the Japanese national interest.

M. SHARP, *supra* note 12, at 263.

<sup>14</sup> Interview with the Director of the Research Division of the Fair Trade Center, in Tokyo (July 1985); Interview with two Japanese attorneys in a medium-sized law firm, in Tokyo (July 1985). These interviews were conducted from June to August 1985 while the author was conducting research at the Foreign Trade Council in Tokyo. Most of these attorneys and government officials requested that their names not be mentioned.

<sup>15</sup> For a discussion of cases of Fair Trade Commission ("FTC") administrative guidance, see *infra* text accompanying notes 196-211. See also Higgins, *Japanese Fair Trade Commission Review of International Agreements*, 3 LOY. L.A. INT'L & COMP. L. ANN. 43, 43-66 (1980).

<sup>16</sup> The data for the conclusions drawn in this Comment were obtained from extensive interviews conducted by the author in Tokyo during the summer of 1985 with lawyers, legal scholars, business executives, and government officials. This is the only research known to the author to investigate the effects of the FECL and the AML on technology induction contracts.

<sup>17</sup> Agreements were divided into two classes—Class A and Class B agreements. FIL art. 10. Class B agreements, which were usually less important, were handled under the old FECL and included three types: 1) contracts with a duration of one year or less covering a license, transfer of

*panho* (a general law), whereas the FIL was *tokubetsuho* (a specific law).<sup>18</sup> By Japanese rules of statutory construction, as a special law, the FIL governed all investment activities specifically placed within its jurisdiction while the FECL governed all else.<sup>19</sup> Together, the FIL and the FECL covered almost every kind of transaction and prohibited such transactions unless prior approval was obtained from the appropriate ministry.<sup>20</sup> In the case of technology assistance agreements, the FIL covered most significant contracts and, thus for the purpose of this historical review, the FIL will be the major point of emphasis. The FIL was formation oriented; it required *ninka* (validation) of all investment contracts within its purview.<sup>21</sup> On the other hand, the FECL was performance oriented; it prohibited all payments or credits between residents and non-residents unless they first obtained *kyoka* (approval) from the appropriate ministry or the Bank of Japan (the "BOJ").<sup>22</sup>

The definition of a Technology Assistance Agreement (a "TAA") under the FIL was as follows: 1) an agreement for the transfer of industrial property rights or other rights concerning technology, or an agreement for the granting of a license to use such rights; 2) agreements for technical advice or guidance on plant operations; and 3) other transfers

---

patent, or utility model rights; 2) contracts with a duration of one year or less covering only services, such as engineering or managerial assistance; and 3) all contracts, whether of more or less than one year's duration, between foreign parents and domestic branches. All other agreements were Class A agreements and were regulated under the FIL. Y. TAKAISHI, *Foreign Investment Regulations*, in *DOING BUSINESS IN JAPAN* § 4.08 (1982). See also *infra* app. C concerning validation for technical assistance agreements.

The legislative history of the FIL suggests that the Supreme Commander of the Allied Powers ("SCAP") permitted its passage under the expectation that the law would exist only temporarily. An official SCAP history described the situation as follows:

This broad enabling act authorized the Government to maintain a unified system of control over foreign exchange and foreign trade transactions only to the extent necessary to safeguard the balance of international payments, and in effect transferred to the Government certain responsibilities which had been exercised by SCAP since the beginning of the occupation. The restrictions in the law were to be gradually relaxed by cabinet orders and ministerial ordinances as the need for them subsided.

SUPREME COMMANDER OF THE ALLIED POWERS, Monograph 50, *Foreign Trade* 110 (1951).

The law, however, persisted for over thirty years and, according to one scholar, "was the single most important instrument of industrial guidance and control that MITI ever possessed." C. JOHNSON, *supra* note 2, at 195. According to another scholar, "[i]n liquidating the occupation by handing back operational control to the Japanese, SCAP naively presided not only over the transfer of its own authority but also over the institutionalization of the most restrictive foreign trade and foreign exchange system ever devised by a major free nation." Hollerman, *International Economic Controls in Occupied Japan*, 38 J. ASIAN STUD. 719, 719 (1979).

<sup>18</sup> D. HENDERSON, *FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES* 217 (1973).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

specified by the competent minister.<sup>23</sup> Four central functions developed for the formal and informal enforcement of FECL terms relating to TAAs.<sup>24</sup> The most frequently mentioned function was the preservation and wise use of scarce foreign exchange.<sup>25</sup> A second function was the control of foreign industries attempting to enter Japan. By controlling the induction of technology into Japan, the Japanese government could control at a threshold point foreign operations in Japan.<sup>26</sup> A third function was the forced licensing of important technology to Japanese companies as a condition for the initiation of a foreign operation in Japan.<sup>27</sup> The Japanese government, through FIL/FECL administrative guidance pursuant to the FIL/FECL, thus attempted to prevent foreign companies from gaining monopolistic control of any sector of the economy by requiring that related Japanese industries be provided the important technology on reasonable terms. The fourth function was the balancing of what Japanese bureaucrats frequently perceived to be unequal bargaining power possessed by foreign licensors vis-a-vis the domestic licensees.<sup>28</sup>

From this kind of governmental participation in the negotiation of contract terms was born the reputation of Japan as a difficult place to do business. The perception is that a foreign firm must face two-to-one

---

<sup>23</sup> FIL art. 3.

<sup>24</sup> Interview with Amelia Porges, Official at the Office of the United States Trade Representative (the "USTR"), in Tokyo (Aug. 1985)[hereinafter Porges interview].

<sup>25</sup> SETTING UP ENTERPRISES, *supra* note 10, at 149. After World War II, Japan suffered from an extreme shortage of foreign exchange. Japanese governmental leaders had broad plans for rebuilding the nation. In order to fulfill such plans, a prerequisite activity was upgrading the level of technological development of Japanese industry. Governmental officials determined, probably correctly, that Japan did not have sufficient foreign exchange to allow the free importation of whatever technology Japanese companies determined to be potentially profitable. Rather, they determined technology importation should take place only if certain minimum standards were met.

<sup>26</sup> Porges interview, *supra* note 24. In order for a foreign company to establish a joint venture or a subsidiary in Japan, the foreign company must in many cases also export the necessary technology into Japan. By delaying or preventing the induction of technology, the Japanese government could prevent a foreign company from opening an operation in Japan and thereby protect less-advanced domestic industries in the same field. Japanese attorney interview, *supra* note 13.

In an important work on the Japanese Ministry of International Trade and Industry ("MITI"), one commentator stated that through the FIL/FECL regime, MITI was able to screen and approve all joint ventures and foreign subsidiaries in Japan because "[i]t is hard to imagine a joint venture or subsidiary that would not include the introduction of some form of technology or know-how." C. JOHNSON, *supra* note 2, at 279.

<sup>27</sup> D. HENDERSON, *supra* note 18, at 445. For example are these multiple conditions for validation of Texas Instruments' application which was filed in January 1964 and finally granted in 1968: 1) 50-50 equity in the joint venture; 2) curtailed production for several years in order to not disturb domestic production; and 3) the patents of Texas Instruments were to be made public by licensing to Sony, Mitsubishi Electric, Hitachi, Toshiba, and NEC. *Id.*

<sup>28</sup> *Id.*

odds: the foreign company must negotiate and compete not only against the Japanese company but also against the Japanese government.<sup>29</sup> The Japanese government initially required affirmative proof that a technology transfer would benefit the Japanese economy before the government would approve it.<sup>30</sup> Parties to a TAA were required to convince the appropriate ministry that a proposed transaction would positively benefit the Japanese economy and, thus, should receive the special privilege of contract validation. This requirement, combined with the broad powers of bureaucratic discretion in the Japanese ministries, created in the ministries an ability to use administrative guidance effectively to suspend what was determined to be an undesirable agreement or to force modifications in other agreements in order to benefit the Japanese parties.

## 2. *Gradual Liberalization of Regulatory Mechanisms* *Under the FIL/FECL*

The liberalization of Japan's regulation of TAAs through the FIC and the FECL was a gradual process that occurred over two decades, from the early 1960s to the early 1980s.<sup>31</sup> Governmental action affecting

---

<sup>29</sup> *Id.*

<sup>30</sup> FIL art. 8, § 1 provides the following positive proof standard.

1. The competent Minister shall apply the following standards on validating contracts in this Law, and the priority shall be given to those which will most speedily and effectively contribute to an improvement in the international balance of payment.

1) Directly or indirectly contributing to the improvement of the international balance of payments, or

2) Directly or indirectly contributing to the development of essential industries or public enterprises, or

3) Necessary for continuation of existing technological assistance contracts concerning industries or public enterprises or for the alteration of the articles of the contracts concerned, such as a renewal.

*Id.*

Section 2 of the same article provided for a negative standard. Under this standard, transactions would not be prohibited unless they had a specified negative effect on the Japanese economy.

2. The competent Minister shall not validate contracts prescribed in this Law which fall under any of the following paragraphs:

1) Contracts the provisions of which are not fair, or are in contravention of laws and regulations.

2) Contracts which are deemed to be concluded or the alteration of articles of which such as renewal of the contracts deemed to be made in a manner not free from fraud, duress or undue influence.

3) When deemed to have an adverse effect on the rehabilitation of the Japanese economy.

*Id.* art. 1, § 2.

<sup>31</sup> A general understanding of the liberalization process can be obtained from the following synopsis of the history of modifications of the FIL and old FECL.

Mar. 15, 1949. Accompanying the enactment of the Cabinet Order regarding acquisition of foreign property, the requirement of Foreign Trade Council approval for technology induction contracts.

Dec. 1, 1949. Accompanying the enactment of the FECL, the requirement of payment



this liberalization, save for the 1980 amendment modifying the FECL and abolishing the FIL, took place on the level of cabinet and ministerial orders.<sup>32</sup> The most important of these orders were promulgated in 1968, 1973, and 1978. The 1968 order provided for automatic validation of TICs with payment terms under \$50,000, and one-month BOJ validation for liberalized technologies, but with ministerial approval only for non-liberalized technologies.<sup>33</sup> According to one commentator, subsequent to this order, TICs into Japan went a long way toward being fully liberal-

---

approval for contracts of less than three months and service approval for contracts greater than three months.

May 10, 1950. Accompanying the enactment of the FECL, the requirement that contracts for more than one year (A-type technical assistance) receive approval of the Foreign Investment Council.

July 1, 1952. Partial amendment of the Foreign Investment Law such that approval was unnecessary in cases not requiring foreign payment but was required for contracts with either the payment period or terms exceeding one year.

July 21, 1959. Adoption of an approval system under the FECL and the FIL for heretofore unrecognized and less important technologies. Abolition of approval system under FIL because of substantial duplication.

May 23, 1961. Bank of Japan ["BOJ"] approval sufficient for less important matters (e.g., expenses for visiting technicians, payment for use of diagrams if under \$50,000 per case, etc.).

Apr. 25, 1962. BOJ approval sufficient for contracts to be concluded within one year with payment terms of less than \$10,000 (B-type technical assistance contracts).

July 1, 1963. BOJ approval sufficient for contracts to be concluded within one year with payment terms of less than \$30,000.

Apr. 1, 1964. Approval requirement under the FIL for contracts of over one year regardless of payment terms. (Previously, the approval requirement was for remittance of payment rather than approval of the contract itself.)

Apr. 1, 1964. Approval requirement under the FECL for contracts between the home company of a foreign juridical entity in Japan and its Japanese subsidiary. (Previously, the approval requirement was for remittance of payment rather than approval of the contract itself.)

Aug. 1, 1966. Automatic validation through BOJ for limiting scope of patents, etc., as designated by the appropriate ministry.

June 1, 1968. Execution of mechanism for liberalization of technology inductions following the Cabinet determinations of May 1968. (Automatic BOJ validation for contracts with payment terms under fifty thousand dollars. Nonliberalized technologies such as aircraft, arms, gun powder, atomic power, space development, electronic computers, and petroleum chemicals require approval from an appropriate ministry. Other technologies require BOJ validation within one month after filing a request.)

Dec. 3, 1973. Automatic BOJ validation if payment terms are under \$300,000 (except payment terms must be under \$100,000 in the case of aircraft, arms, gun powder, atomic power, space development, and electronic computers).

Apr. 1, 1978. Automatic validation for other than designated technologies. Aircraft, arms, gunpowder, atomic energy, space development, electronic computers, electronic parts for electronic computers of the next generation, appliances for laser processing and light communication, innovative materials, aluminum refining, salt electrolysis by non-mercurial methods, petroleum production at sea bottom, and leather or leather products are established as designated technologies. Also, shift to a prior notification system for contracts to be concluded within one year.

Dec. 1, 1980. Adoption of prior notification system (with some conditions including measures which may be taken to request or demand suspension or modification of the contract).

Unpublished Bank of Japan circular received during interview with K. Tsuchiya, Assistant Advisor, Foreign Department, Bank of Japan, in Tokyo (July 1985) (author's translation from Japanese).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

ized.<sup>34</sup> The 1973 order provided for automatic BOJ validation for TICs with payment terms under \$300,000. The 1978 order also established the system of designated technologies,<sup>35</sup> with automatic validation for TICs other than designated technologies, and instituted a prior notification system for TICs to be concluded within one year.

Whatever the formal mechanisms established by law, the most important factor in liberalizing TICs to Japan was the informal actions of Japanese bureaucracies.<sup>36</sup> It appears that along with liberalizations of formal regulatory mechanisms relating to TICs in Japan has come, at least to some extent, the liberalization of bureaucratic enforcement of the same.<sup>37</sup> It is interesting to note the reasons for the gradual liberalization of the FECL as to TICs. The first important reason is what Japanese disparagingly term as *gai-atsu* (foreign pressure).<sup>38</sup> With Japan's economic growth and development, its IMF reclassification, and its membership in the Overseas Council for Economic Development (the "OECD"), came increasing pressure from foreign governments to reduce the amount of formal and informal governmental interference with technology transactions.<sup>39</sup> The second major reason for liberalization was the greatly reduced need for governmental interference in technology transactions. By the mid- and late-1960s, Japan had developed sufficient economic strength that the broad and extreme restrictions on TAAs were no longer necessary to preserve foreign exchange or protect infant domestic industries. Besides, other mechanisms existed for protection of domestic industries that were being used increasingly in place of the FECL regulations.<sup>40</sup>

### 3. Effect of FIL/FECL Regulations on the Formation of TAAs

Formal and informal enforcement of the FIL/FECL prejudiced the interests of the foreign licensor. This was due to the broad and intrusive

---

<sup>34</sup> D. HENDERSON, *supra* note 18, at 229.

<sup>35</sup> For a current list of designated technologies under the FECL, see *infra* app. D.

<sup>36</sup> D. HENDERSON, *supra* note 18, at 195-208.

<sup>37</sup> *Id.*

<sup>38</sup> Kawamura, *History of Japanese Foreign Exchange and Foreign Investment Control*, in LAW AND BUSINESS IN JAPAN 73 (1982).

<sup>39</sup> *Id.* at 74.

<sup>40</sup> Interview with Toshio Nakamura, Executive Director of the Chicago Office of the Japan External Trade Organization ("JETRO"), in Chicago (May 1985). It is true that some high technology or especially depressed industries received the special status of a nonliberalized industry or a designated technology. Even now under the new FECL, the Japanese government monitors quite closely technology transactions in these areas. The likelihood, however, that the Japanese government will take direct action to prevent a certain TAA or alter its terms decreased greatly in the 1970s and 1980s so that it is now relatively rare.

nature of TAA regulations under the old FIL/FECL regime. The effects discussed in this section place in context the following section regarding the new FECL. That section examines a key concern of this Comment: the extent to which intrusive practices established under the old FIL/FECL regime continue under the new FECL.

a. Time delays

The first type of prejudicial effect resulting from enforcement of the FIL/FECL was time delays. Delays were likely under the early FIL/FECL regime because the ministries had the right to sit on an application for TAA approval without taking any action whatsoever.<sup>41</sup> This kind of inaction was also often a method to force a cancellation or modification of the request for TAA approval or simply provide the Japanese companies in the same industry with additional time to prepare for the entrance of strong foreign competitors into the Japanese market. In one interesting example of this type of delay, Texas Instruments filed, in 1964, an application for approval to establish a wholly owned subsidiary in Japan, which included a request to transfer to the subsidiary the relevant technology.<sup>42</sup> The Japanese government did not reply to this application for two years and seven months. When the government did finally reply, it strongly suggested, through administrative guidance, modification of the terms of the application, including open licensing of Texas Instrument's Japanese patents to Japanese companies. Finally, four years after the original application was filed, and upon Texas Instrument's submission to the Ministry of International Trade and Industry's ("MITI") terms, the application was approved.<sup>43</sup>

Another case involved a United States lock manufacturer, Yale and Towne, Incorporated.<sup>44</sup> Yale and Towne applied similarly for approval to form a subsidiary in Japan and transfer technology to that subsidiary. This application was filed in 1964, but the application was withdrawn in 1975 by the applicants in compliance with informal requests by MITI officials.<sup>45</sup> Many other United States and European companies were delayed in similar fashion.<sup>46</sup>

---

<sup>41</sup> Smith, *supra* note 11, at 424. The author here suggests that "the significance of the 1980 liberalization in procedure was that it made it more difficult for the ministries to exercise administrative guidance because they could no longer hold up a transaction by doing nothing based on the negative principle." *Id.*

<sup>42</sup> D. HENDERSON, *supra* note 18, at 445.

<sup>43</sup> *Id.*

<sup>44</sup> Kawamura, *supra* note 38, at 80.

<sup>45</sup> *Id.*

<sup>46</sup> The Organization for Economic Cooperation and Development (the "OECD") reported the following degree of intervention of the Japanese government:

With the adoption of the BOJ approval and automatic validation for certain liberalized technologies,<sup>47</sup> delays were reduced. Even in the case of nonliberalized technologies, after the middle of the 1970s, delays from purposeful ministerial nonaction were relatively nonexistent.<sup>48</sup> Even with liberalized technologies, however, TAA parties were required by governmental order to wait a minimum of thirty days after application approval to begin performance of the contract.<sup>49</sup> In the case of nonliberalized technologies, the delays tended to be somewhat longer as the ministries often required time to review the application before giving formal approval.<sup>50</sup>

b. Restrictive effect of the reporting requirements

This type of restrictive effect refers specifically to the expense and inconvenience of the reporting procedure. The reporting requirements force a party to gather the necessary information, fill in the forms correctly, and wait for the appropriate Japanese agencies to accept the approval application. It is related to other effects such as delays or forced alteration or cancellation of the TAAs through administrative guidance.

Under the old FIL/FECL regime, completion of the application procedures was considerably more difficult than it is today under the new FECL. First, it was sometimes difficult to determine which of the laws, the FIL or the FECL, would be applicable.<sup>51</sup> Second, enforcement of the FIL/FECL was not based strictly on a rule of law as much as what bureaucrats thought was appropriate or beneficial for the situation.<sup>52</sup> Third, even if specific bureaucratic regulations and circulars did exist, they were not published as extensively as they are today.<sup>53</sup> Fourth, there was a scarcity of legal experts who could advise foreign companies on the

---

The scope of the technology is frequently changed; the royalties and initial payments are reduced; minimum royalties and back royalties are reduced; minimum royalties and back royalties are eliminated; arrangements must be made for the Japanese partner to get privileged access to certain foreign markets; provisions are disallowed under which the Japanese partner renounces manufacture of the product after the expiration of the contract; sublicensing is made subject to further governmental approval; undertakings are deleted under which the Japanese partner would hand over a list of his customers at the end of the contract; the duration of the contract is reduced; automatic renewal is excluded, etc.

OECD, LIBERALIZATION OF INTERNATIONAL CAPITAL MOVEMENTS: JAPAN 57-58 (1968).

Among the United States companies that have been particularly affected by restrictive enforcement of FIL/FECL are Avon, Norton Co., General Foods, Ampex, and IBM. D. HENDERSON, *supra* note 18, at 208.

<sup>47</sup> D. HENDERSON, *supra* note 18, at 229.

<sup>48</sup> Kawamura, *supra* note 38, at 7-18.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> D. HENDERSON, *supra* note 18, at 217.

<sup>52</sup> *Id.* at 195-96.

<sup>53</sup> *Id.*

execution of a TAA in Japan.<sup>54</sup> Finally, there were frequent requests from government ministries to provide additional information concerning the terms of the proposed TAA.<sup>55</sup>

- c. The effect of reporting requirements of the FIL/FECL on the bargaining power of the respective parties

Under the early FIL/FECL regime, the Japanese government played a major role in the negotiation of TAAs.<sup>56</sup> It is through this type of involvement that the Japanese government and Japanese companies combined earned the name "Japan, Inc." In terms of bargaining power, the effect of the Japanese government's involvement in the negotiation process created a two-to-one bargaining situation, with the foreign company pitted against the Japanese government and the Japanese company.<sup>57</sup> In terms of altered bargaining power alone, enforcement of the FIL/FECL can be said to have caused significant and frequent modifications in TAA terms in favor of the Japanese parties.

The effect of the FIL/FECL reporting requirements on bargaining power results from several different causes. First, the amount of legal and technical information possessed by the respective parties has a significant effect on the relative bargaining strength of the two parties.<sup>58</sup> The

---

<sup>54</sup> Japanese attorney interview, *supra*, note 13.

<sup>55</sup> *Id.* Approval application under the early FIL/FECL can be understood as an attempt to convince government officials that a special privilege of selling technology to a Japanese company should be granted to the foreign company. Thus, foreign companies were often at the mercy of the Japanese government; they had to sell the Japanese ministry on the benefits of a particular transaction and their willingness to cooperate with the Japanese government.

<sup>56</sup> *Id.*

<sup>57</sup> D. HENDERSON, *supra* note 18, at 207. Henderson described this situation as follows:

Foreigners have often negotiated a licensing or joint-venture contract, with detailed terms representing their maximum concessions, assuming (we do not say with justification) that the contract would be approved or disapproved, as signed by the parties, under Japan's "free enterprise" system. But the official practice was for years, and in the case-by-case screening of important cases still is, for the government to go over contract terms and suggest revisions in the favor of the Japanese party. Of course sophisticated foreigners with experience have long been aware of the "two-against-one" routine—as it was known among foreigners. But it often caught first-timers unawares, because there were for years no guidelines that specified the outer limits of key terms such as royalty rates or foreign management participation; nevertheless, the foreigners were frequently subjected to officially required reductions, sometimes beyond the point at which business was voluntarily possible and despite mutual interest between the parties on the agreed terms.

*Id.*

<sup>58</sup> Japanese attorney interview, *supra* note 13. This kind of technical information was necessary to prove to the Japanese ministries the fairness of the numerous provisions of the TAA. For example, if the Japanese licensee is able to receive information from the Japanese government about the efficacy of the technology which the licensor is preparing to sell, the licensee may be able to bargain more effectively for price or other terms. Similarly, if the licensee can receive information about alternative sources or processes, it may be able to effect different provisions regarding exclusivity of use.

amount of technical information possessed by the parties, especially in the days of *kobetsu shinsa* (case-by-case analysis), was largely dependent upon the closeness of their relationship with the applicable government ministries.<sup>59</sup> Second, well-established Japanese firms with extensive connections in important government ministries often were able to influence ministries to aid them in obtaining more beneficial TAA terms.<sup>60</sup>

d. Effect of administrative guidance pursuant to the FIL/FECL

The chief means of enforcement under the old FIL/FECL regime was through "administrative guidance."<sup>61</sup> The effects of the execution of administrative guidance pursuant to the old FIL/FECL have already been mentioned, but they are summarized here in the context of administrative guidance. As a result of informal actions taken by government officials, the execution dates of TAAs have been significantly delayed un-

---

<sup>59</sup> Y. NUNOI, *The Know-How Contract in Japan*, in *THE KNOW-HOW CONTRACT IN GERMANY, JAPAN AND THE UNITED STATES* 176 (1984).

<sup>60</sup> Japanese attorney interview, *supra* note 13. The interconnected nature of Japanese business and government can be illustrated by several interesting phenomena. One is *amakudari*, translated literally as "falling from the sky." This term refers to the practice of businesses hiring retired government officials. By Japanese reasoning, the bureaucrat is lowered from the bureaucracy (the sky) to a business firm (the ground). The effect of this practice is to plant well-connected and influential bureaucrats in various Japanese firms. These "fallen" bureaucrats can be very effective in obtaining information from and in influencing bureaucrats in their former government office. Among other important practices is the extensive cooperation between Japanese firms and the government in industry cartels and research. For examples of the Japanese government's attempts to enforce this kind of cooperation through administrative guidance, see Young, *Judicial Review of Administrative Guidance: Governmentally Ensured Consensual Dispute Resolution in Japan*, 84 *COLUM. L. REV.* 923 (1984).

<sup>61</sup> A common definition given to "administrative guidance" in the Japanese context is a "request by an administrative body for voluntary cooperation." Matsushita, *Administrative Guidance and Economic Regulation in Japan*, 1 *JAPAN BUS. L. J.* 209 (1980). See also Narita, *Administrative Guidance*, *LAW IN JAPAN* 45 (1969); Yamanouchi, *Administrative Guidance and the Rule of Law*, *LAW IN JAPAN* 45 (1974).

Professor Matsushita presented the following characteristics of administrative guidance in Japan: 1) compliance is legally voluntary; 2) administrative guidance is de facto direction by the government and does not automatically become an official action of the government; 3) as an expression of a government policy, administrative guidance should be distinguished from private conduct by officials; 4) administrative guidance is a form of government regulation imposing rules of conduct on private persons; 5) even though administrative guidance is informal, it is done with government officials in a superior, not equal, position vis-a-vis the private parties; 6) there is no precise procedure or delineated scope for administrative guidance. Matsushita, at 210.

Some commentators have extolled the virtues of administrative guidance in effecting industrial policy, but other commentators have been more critical, stressing that numerous problems may result. The problems of administrative guidance begin when it is suspected that a ministry is not neutral on an issue it is arbitrating, or when it has been captured by the parties in the arbitration, or when its administrative guidance is really only a governmental cloak hiding an otherwise illegal cartel, or when the deliberation councils in which administrative guidance is carried out have been packed with people predisposed to a certain view. C. JOHNSON, *supra* note 2, at 267.

til an approval application is withdrawn or modified or until governmental officials determine that the relevant domestic industry has had sufficient time to prepare for the entrance of the foreign competitor. Consequently, the bargaining power of foreign companies is significantly weakened. In addition, at times the Japanese government informally requested changes in the terms of a TAA with the view toward aiding or protecting the Japanese party. All of these informal governmental actions may be regarded as forms of administrative guidance. Through such informal administrative actions, the Japanese government was able to regulate the introduction of technology, and therefore, firmly control at a threshold point the entrance of foreign companies into Japan.

## II. THE AMENDED FOREIGN EXCHANGE AND FOREIGN TRADE CONTROL LAW

### A. Introduction

The decreased need for blanket control regulations and the increasing foreign pressure for liberalization of its foreign exchange laws induced the Japanese government to begin a gradual process of liberalization of the FIL and the FECL beginning in the mid- to late-1960s. Conceptually, the strict and complete regulation of technology transfers into Japan gradually evolved into a system in which transfers were *gensoku kinshi* (prohibited in principle), yet freely permitted in an increasing number of cases. This system, however, was still an approval or validation system that required the positive permission of appropriate governmental ministries in a significant number of cases.<sup>62</sup> Furthermore, this system was fraught with the complexities resulting from the overlapping coverage of the FIL and the FECL.

Consequently, in 1979 and 1980 the Diet enacted a major overhaul of the FIL/FECL system. In a word, it abolished the FIL, vesting full authority in a revised FECL<sup>63</sup> and ministerial ordinances<sup>64</sup> and changed the approval and validation system to one of prior notification. Japanese government officials repeatedly emphasize that the change to the new FECL effected a change from *gensoku kinshi* (a prohibited-in-principle system) to *gensoku jiyū* (a free-in-principle system).<sup>65</sup> These officials often emphasize that, with the new FECL, reporting procedures have been significantly simplified and rationalized.<sup>66</sup>

---

<sup>62</sup> Smith, *supra* note 11, at 422-24.

<sup>63</sup> For the new FECL provisions relating to TICs, see *infra* app. E.

<sup>64</sup> For the ministerial ordinances relevant to TICs, see *infra* app. F.

<sup>65</sup> See, e.g., SETTING UP ENTERPRISES, *supra* note 10, at 149.

<sup>66</sup> *Id.*

Some commentators claim that the system had been de facto liberalized by the early- or mid-1970s and that the 1980 amendments effect only a nominal change in actual procedure.<sup>67</sup> Others assert that bureaucratic practices are the most important element to consider in determining the effect of the FECL and conclude that, because bureaucratic practices were still not liberalized after 1980, an amendment to the Diet Act would have little effect on actual practice.<sup>68</sup> Still others claim that because of the change from an approval or validation system to a prenotification system, administrative guidance has become much more difficult for ministries to execute.<sup>69</sup> According to this rationale, administrative guidance has been the most important element in producing major restrictive effects on TICs. Consequently, the increasing difficulty in its execution should force significant liberalization of actual procedures.

Another view holds that, with the old FIL/FECL regime, the government aggressively regulated the inflow of technology, but, with the new FECL, the government carefully controls the outflow of certain technologies.<sup>70</sup> This view would lead to the conclusion that, although TICs involving only the inflow of technology are generally unrestricted, TICs with cross-licensing or grant-back provisions still require approval from MITI.<sup>71</sup> Thus, there remain differences of opinion on the state of the law and actual practice as to TICs. The following portion of the Comment examines these differing opinions and determines which most accurately represents actual administrative practice. In so doing, it will describe the extent and degree of formal and informal restrictive effects that continue to result from enforcement of Japan's foreign exchange laws.

## B. Express Purpose of the New FECL with Respect to TICs

Article 1 of the FECL sets out the fundamental purpose of the legislation:

This law aims at ensuring basic freedom of foreign exchange, foreign trade and other international transactions, and facilitating orderly development of international transactions through *exercising an avoidable, minimum control* or adjustment, providing thereby for an equilibrium in the balance of payments, the stability of the currency, and the sound development of our national economy.<sup>72</sup>

---

<sup>67</sup> D. HENDERSON, *supra* note 18, at 229.

<sup>68</sup> Shibuya, *supra* note 12, at 20.

<sup>69</sup> Smith, *supra* note 11, at 424.

<sup>70</sup> Sharp, *supra* note 12, at 246.

<sup>71</sup> *Id.*

<sup>72</sup> FECL art. 1 (emphasis added).



Article 1 presents the general purpose of the act: ensuring free and orderly international transactions. The reference to an "unavoidable, minimum control," however, when combined with provisions in later articles providing for such controls seems to provide broad justification for continued governmental interference in such transactions. Later articles, specifically referring to TICs, provide that the Japanese government may require delays, modifications, or cancellations in TICs if they are deemed to affect adversely "national security, public order," or domestic "business enterprises."<sup>73</sup> Yet, as has been frequently emphasized, actual bureaucratic practices are more important in determining the effect of a general authorization act than are the provisions of the act itself. Nonetheless, the Japanese government continues to cling to the policy that a degree of entry-level control over technology transfers is necessary to ensure continued economic growth and stability.<sup>74</sup>

### C. Functions of the New FECL with Respect to TICs

For TICs, "this unavoidable, minimum control" effected by the FECL takes the form of a notification requirement prior to execution of the contract. According to many legal practitioners and business executives, the FECL no longer presents a restrictive, prohibitive barrier to TICs.<sup>75</sup> Many still complain, however, about the troublesomeness of the present reporting requirement despite its declared liberalization.<sup>76</sup> They see little use in a reporting requirement because the checking procedures completed by the BOJ and government ministries are almost wholly pro

---

<sup>73</sup> FECL art. 29. *See also infra* app. E.

<sup>74</sup> The author questioned a MITI official who participates in FECL administration about what types of emergency cases regarding TICs would cause Japanese government officials to take action to modify or cancel a TIC pursuant to emergency provisions in the FECL. The official described a situation similar to an oil crisis, but this hardly relates to TICs and would not likely require an emergency provision in the FECL to effect action. Interview with M. Noburu, Office for the Promotion of Foreign Investment in Japan, MITI, in Tokyo (July 1985)[hereinafter Noburu interview]. Many Japanese attorneys seriously question whether this emergency power will ever be used and believe that it should be repealed for public relations purposes. Japanese attorney interview, *supra* note 13; Interview with a Japanese attorney and part-time professor of law, in Tokyo (July 1985)[hereinafter Law professor interview].

<sup>75</sup> This statement is based on numerous interviews conducted by the author in Tokyo from June to August 1985. *See supra* note 16. The responses were quite uniform. There may be areas in which the Japanese government continues to restrict foreign investment under the FECL but technology transfers is not one of these. One USTR official stated that she had recently contacted numerous business firms to inquire whether any of them had any difficulty under the new FECL with the execution of TICs in Japan. The response uniformly conveyed was that there were no longer any significant problems. Porges interview, *supra* note 24.

<sup>76</sup> Interview with Japanese attorney at a small Japanese law firm, in Tokyo (June 1985)[hereinafter Small Japanese law firm interview]; Law professor interview, *supra* note 74.

forma.<sup>77</sup> These circumstances demonstrate that there remain significant doubts as to the feasibility of the screening function that the FECL performs with respect to TICs.

Although the new FECL has not previously been used effectively to screen out TICs potentially detrimental to Japanese parties individually or to the Japanese economy as a whole, the potential for this function remains. In fact, it is the most readily apparent function of the new FECL. Thus, the new FECL may provide a mechanism by which the government can restrict or suspend transactions which are determined to imperil the national security, disturb the public order, or adversely affect domestic business.<sup>78</sup> In a sense, the existence of this latent power contradicts strong assertions by the government that there are no restrictive effects with the new FECL.<sup>79</sup> This power, however, has never been formally used in relation to TICs and there appears little possibility that such use will occur in the future.<sup>80</sup>

The second function of the new FECL is that of information gathering.<sup>81</sup> Based on the reports filed with the BOJ, government officials collect and analyze extensive information relating to TICs.<sup>82</sup> For instance, the Science and Technology Agency publishes an annual report on TICs in Japan.<sup>83</sup>

Judging simply from the nonuse of the express statutory power to cancel or modify potentially detrimental TICs, the complaints of scholars, lawyers, and business executives that there is not a substantial function for the TIC reporting requirements under the FECL appear quite reasonable. Nonuse of express statutory powers, however, must be distinguished from nonuse of informal powers such as administrative guidance. Use or nonuse of express statutory power is easy to document. Use of administrative guidance, however, is almost never known to anyone outside the parties to the transaction. Therefore, it is quite simple for Japanese government officials now to claim that statutory FECL powers regarding TICs have never been used, but it is difficult to prove that informal persuasive powers of bureaucrats have not been used to influence the terms of a TIC.

---

<sup>77</sup> *Id.*

<sup>78</sup> FECL arts. 29-30; *see also* app. E.

<sup>79</sup> Noburu interview, *supra* note 74.

<sup>80</sup> *Id.*

<sup>81</sup> Interview with MITI official, in Tokyo (Aug. 1985); Interview with Bank of Japan official, in Tokyo (July 1985).

<sup>82</sup> *Id.*

<sup>83</sup> *See supra* note 1.

#### D. Definitions of Applicable Terms Under the New FECL

In the context of the new FECL, there is a special group of service transactions, separate from and traditionally more strictly supervised than others, known as "conclusion of contracts for the induction of technology."<sup>84</sup> These are the TICs discussed in this Comment. The "induction of technology" means any transfer of industrial property rights, rights over other technologies, and business managerial expertise.<sup>85</sup>

#### E. Effect on TICs of the New FECL

##### 1. *Frequency and Duration of Time Delays in TIC Execution from the New FECL*

The first type of effect that has been shown to have existed under the old FIL/FECL was time delays.<sup>86</sup> Delays of a couple of weeks or months would probably not be particularly detrimental to either the Japanese or foreign party.<sup>87</sup> But if the resulting delay takes over six months, there is a possible detriment to a foreign firm trying to introduce technology in order to establish a joint venture or a subsidiary in Japan.<sup>88</sup> Such a delay could also harm a Japanese firm seeking to introduce a new technology in an industry of rapid technological growth.<sup>89</sup>

The first type of delays that may occur under the new FECL is pre-notification. This type of delay occurs when the BOJ, for whatever rea-

---

<sup>84</sup> See *infra* apps. E-F.

<sup>85</sup> SETTING UP ENTERPRISES, *supra* note 10, at 150-52. In this context, the following definitions are especially relevant.

"Conclusion" means either a conclusion or a renewal of a contract or alteration of contract terms.

"Industrial property right" means a patent right, a utility model right, a design right, or a trademark right.

"Rights over other technologies" means any right concerning industrial expertise, including blue prints, specifications, information, know-how, etc., on the manufacture of products which do not constitute industrial property rights.

"Business managerial expertise" refers to expertise on the management of a factory, such as quality control methods, stock control methods, labor management techniques, etc., and to expertise on effective business management, such as publicity methods and market research methods.

"Conclusions of contract" include any succession of the status of a party to the existing contract through merger or consolidation, transfer of business assets, a transfer of contract, etc.

"Alteration of contract provisions" means alteration of any of the following particulars of an existing, legally concluded contract within its term as notified to the government, including any correction of clerical errors or other mistakes after the notice has been received; (i) kind of technology, (ii) term of contract, (iii) remuneration, (iv) method of payment, (v) outline of introduction of technology as given in the notice, and possible area of export, (vi) description of technology.

*Id.*

<sup>86</sup> See *supra* notes 41-50 and accompanying text.

<sup>87</sup> Interviews with attorneys, in Tokyo (June-July 1985).

<sup>88</sup> Japanese attorney interview, *supra* note 13.

<sup>89</sup> *Id.*

son, refuses to accept formally the notification forms. The BOJ may refuse to accept the notification forms if there are obvious errors or insufficiencies in the provision of information with the forms,<sup>90</sup> or if in the case of a TIC involving a designated technology, the failure of the parties to consult adequately with the Ministry of Finance (the "MOF") or another appropriate ministry.<sup>91</sup>

The frequency of delays resulting from alleged errors in the information provided on the notification forms under the new FECL should be minimal. The notification forms are not especially difficult to complete as shown by the fact that most notification forms are handled by paralegals or non-lawyer members of a certain company.<sup>92</sup> Furthermore, in the case of nondesignated technologies, the review of the forms by the BOJ is chiefly pro forma. In such cases, if an obvious error were to exist, the BOJ would call the responsible firm member or paralegal and the problem would most likely be corrected, with formal notification accepted within a week.<sup>93</sup>

Insufficiencies of information may be a slightly more difficult issue.<sup>94</sup> The notification procedures require that the submitting party provide a description of the "type of technology" involved in the TIC.<sup>95</sup> The tendency of TIC parties, especially in the case of know-how, has been to provide as vague a description as possible.<sup>96</sup> In the case of nondesignated technologies, if the description provides enough concrete information for BOJ officials to fit the particular TIC into a certain pigeonhole of technology type for statistical purposes, then the description will most likely be accepted.<sup>97</sup>

There is also a potential problem if the submitting party does not

---

<sup>90</sup> The notification forms require that the following information be included: 1) name, address, and type of business of the submitting parties; 2) kind of technology; 3) period of the contract; 4) contract payment scheme; 5) outline of agreement; 6) content of technology; 7) reason for conclusion of TIC; 8) summary of industrial property rights; 9) production plan under imported technology. Attached Form No. 9, Notification or Conclusion or Alteration of Agreements for Importation of Technology (available from Foreign Department, Bank of Japan). This is, of course, just an English translation of the information that must be provided in Japanese. For designated technologies, see *infra* app. D, the BOJ and appropriate ministries may also request a complete copy of the technology induction contract. Interview with an official of the Foreign Department, Bank of Japan, in Tokyo (July 1985).

<sup>91</sup> Interview with K. Tsuchiya, Assistant Advisor, Foreign Department, Bank of Japan, in Tokyo (July 1985) [hereinafter Tsuchiya interview]. See also Smith, *supra* note 11, at 469-71.

<sup>92</sup> Law professor interview, *supra* note 74.

<sup>93</sup> Tsuchiya interview, *supra* note 91.

<sup>94</sup> Japanese attorney interview, *supra* note 13.

<sup>95</sup> See *supra* note 90 for a description of the kind of information that must be provided.

<sup>96</sup> Japanese attorney interview, *supra* note 13.

<sup>97</sup> Tsuchiya interview, *supra* note 91.

possess some of the required information such as number of employees, the total capital possessed by the parties involved, or other information, such as the registered patent numbers of the technology in other countries.<sup>98</sup> Providing such information, while criticized as extremely burdensome by some,<sup>99</sup> requires little more than a couple of phone calls to the relevant persons.<sup>100</sup>

In the case of designated technologies, the potential for delay is much greater.<sup>101</sup> The BOJ will scrutinize the application forms more closely.<sup>102</sup> It is likely that the BOJ will require a more concrete and explicit description of the type of technology involved.<sup>103</sup> Furthermore, in the case of designated technologies, the parties may have to consult with or provide information to the appropriate ministries.<sup>104</sup> MITI has specifically stated that, if information sufficient for it to make an informed opinion is not provided, MITI will refuse to accept formally the notification application.<sup>105</sup> If MITI or another appropriate ministry does not formally accept the notification application, the BOJ, which simply acts as a *madoguchi* (window) for communication between the applicants and the appropriate ministries, will refuse to accept formally the notification application.<sup>106</sup> Such cases, while infrequent, have been known to occur.<sup>107</sup> This is especially true with the first five of the twelve designated technologies: aircraft, arms, gunpowder, atomic energy, and space development.<sup>108</sup>

The result of this situation is that the appropriate ministry will telephone the submitting parties and request the provision of additional information or possibly a meeting to discuss the particular technology

---

<sup>98</sup> *Id.*

<sup>99</sup> Japanese attorney interview, *supra* note 13.

<sup>100</sup> Law professor interview, *supra* note 74.

<sup>101</sup> See *infra* app. D for a list of designated technologies.

<sup>102</sup> Tsuchiya interview, *supra* note 91.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* Before submitting formal notification forms, the parties may need to consult with the appropriate persons at the BOJ, the appropriate ministry, and, in some cases, the parties may need to submit prenotification applications to inform and prepare the BOJ and other ministries for the formal notification to come later.

<sup>105</sup> Interview with M. Mikami, et al., Office for the Promotion of Foreign Investment in Japan, MITI, in Tokyo (Aug. 1985). Several MITI officials were quite adamant, when pressed, about this position. The author questioned whether the quality of this information was an important issue at all given the pro forma nature of the review of the notification forms. The officials insisted that the information must be specific and accurate with designated technologies.

<sup>106</sup> Tsuchiya interview, *supra* note 91.

<sup>107</sup> *Id.*

<sup>108</sup> Noburu interview, *supra* note 74. These five are the most closely scrutinized of all technologies. National security concerns are given as the reason for the more rigorous regulation in each of these five technologies.

transfer.<sup>109</sup> This procedure may only require several weeks or, at the most, a month or two.<sup>110</sup> Even in this worst case scenario, therefore, delays are likely to be minimal.

Moreover, in practice, significant prenotification delays are unlikely to occur with any frequency. First, as described earlier, the application procedures are relatively simple.<sup>111</sup> Second, the Japanese party or an experienced Japanese law firm is likely to submit the notification forms for the foreign party.<sup>112</sup> Consequently, none of the nightmares that foreign business executives may conjure up about dealing in Japanese with obstinate Japanese bureaucrats are likely to occur in reality. Their proxies, the Japanese business executives and lawyers, are likely to have the necessary experience to make sure that the forms are properly submitted by ensuring that the persons submitting the forms consult properly with the BOJ and the appropriate ministry. They are also likely to have the necessary connections with government agencies to iron out particular problems that may occur.<sup>113</sup>

The second kind of potential delay is that of postnotification. While the potential for delays of four to five months are legally possible under the terms of the new FECL,<sup>114</sup> such a situation has never been the case.<sup>115</sup> All of the important screening work is done prior to the formal acceptance of the notification forms.<sup>116</sup> In the case of nondesignated technologies, execution of the TIC may begin the day after the formal acceptance of the notification.<sup>117</sup> In the case of designated technologies, the parties are required to wait two weeks before proceeding with the execution of the contract.<sup>118</sup> According to the BOJ, this two-week period is never waived if a designated technology is involved, regardless of the exigencies of the situation.<sup>119</sup>

In sum, with designated technologies, there is a possibility of prenotification delay and a required period of nonperformance for two weeks after formal acceptance of the notification. With nondesignated technologies, however, without a serious blunder on the part of the submitting

---

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See *supra* note 92.

<sup>112</sup> Interview with the legal department manager of a major Japanese company, in Tokyo (Aug. 1985)[hereinafter Legal department manager interview].

<sup>113</sup> *Id.*

<sup>114</sup> See *infra* app. G.

<sup>115</sup> Noburu interview, *supra* note 74.

<sup>116</sup> *Id.*

<sup>117</sup> See *infra* app. H.

<sup>118</sup> *Id.*

<sup>119</sup> Tsuchiya interview, *supra* note 91.

party, the application is likely to be accepted at once, with performance on the contract permitted the very next day.

## 2. *Restrictive Effect of Formal Notification Procedure*

This section deals with the restrictive effect of the required notification procedure. This procedure consists of filing notification forms with the BOJ and the appropriate ministry and the ministry's formal acceptance of the forms.<sup>120</sup> The parties must obtain the requisite information, properly fill in the information, consult with the appropriate ministry when necessary, and submit the forms to the BOJ.<sup>121</sup> As described earlier, this is not a particularly difficult process, for it is commonly accomplished by paralegals at law firms and non-lawyers in a business firm.<sup>122</sup> However, some critics of the notification requirement claim, that, for various reasons, there is a significant restrictive effect resulting from the mere existence of a notification requirement.<sup>123</sup>

First, the critics claim that obtaining all of the required information for the application forms is a difficult and troublesome task.<sup>124</sup> Among the most difficult pieces of information are the technical description of the type of technology involved, the patent or trademark number if relevant, and numerous bits of information about the foreign firm. Although the process of obtaining information may require some effort, it cannot be said to have a truly restrictive effect on the execution of the great majority of TICs.<sup>125</sup> If the TIC is of so little commercial value that the requirement of obtaining certain information and providing it to the Japanese government will effectively restrict its execution, then such a TIC would probably be too trivial for consideration.

The same critics may counter, however, that the relative simplicity of the present notification procedures is not important, rather it is the foreign firm's perception—or misperception—of the difficulty of the notification procedures.<sup>126</sup> Based on past experience, or hearsay concerning past procedures, foreign firms may be deterred from licensing technology.<sup>127</sup> This argument seems to point more to a deficiency in the knowl-

---

<sup>120</sup> It seems ironic that TIC parties must persuade a government agency to accept a notification application, but this is precisely what occurs here. If the forms are not in appropriate condition, the BOJ will not accept them and the waiting period for nonperformance will not begin to expire. *Id.*

<sup>121</sup> See *supra* notes 90-99 and accompanying text.

<sup>122</sup> Interview with a Japanese attorney, in Tokyo (June 1985).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Law professor interview, *supra* note 74.

<sup>126</sup> Interviews with attorneys of the Tokyo affiliate of a large United States law firm, in Tokyo (June 1985).

<sup>127</sup> *Id.*

edge of the foreign firms rather than a problem with Japanese investment laws.

In the past, some commentators have claimed that, because of the strict regulation of legal activities in Japan by the government, and because of the difficulty of the Japanese language, foreign firms are handicapped in their attempts to do business in Japan.<sup>128</sup> This argument may have some applicability with more complicated procedures or with business ventures in which it is difficult to obtain the help and advice of a Japanese company. This will probably not be a problem, however, with notification procedures under the new FECL.<sup>129</sup> With FECL notification, in most cases, the notification is handled by the Japanese party to the TIC.<sup>130</sup> And even if it is not, there is a sufficient supply of international law firms in Tokyo willing and very able to handle such procedures.<sup>131</sup> Overall, this process is simple and often handled by the Japanese party, so the cost of legal services to fulfill the notification procedure should not be a significant barrier to TIC execution.

### *3. Disclosure of Information Obtained through Notification Procedures Under Japan's FECL*

In the case of a TIC involving know-how or business expertise, the foreign party's fear of disclosure by the Japanese government could serve conceivably as a deterrent to the execution of TICs.<sup>132</sup> In the course of this research, this author asked numerous government, legal, and business leaders about the possibility of secret and illegal disclosure of trade secrets by the BOJ or the appropriate ministry to a Japanese business firm. The responses were either that such is never the case and, even if it were, it would be illegal and subject that particular official to discharge and possible criminal prosecution.<sup>133</sup> Such disclaimers do not disprove the possibility of industrial espionage involving Japanese governmental organs, and subsequent to the case involving Hitachi espionage of IBM, United States firms are likely to be wary of the possibility of information leaks from government ministries to Japanese firms.<sup>134</sup> Even if there were proven examples of such illicit disclosure of information obtained

---

<sup>128</sup> Interview with a United States attorney at the Tokyo affiliate of a large United States law firm, in Tokyo (June 1985)[hereinafter United States attorney interview].

<sup>129</sup> Law professor interview, *supra* note 74.

<sup>130</sup> Legal department manager interview, *supra* note 112.

<sup>131</sup> Law professor interview, *supra* note 74.

<sup>132</sup> *Id.* This kind of worry would probably not exist for TICs involving patents, utility models, or trademarks, which are already available to public knowledge.

<sup>133</sup> Noburu interview, *supra* note 74.

<sup>134</sup> United States attorney interview, *supra* note 128.



through the TIC notification procedures, it is unlikely that the information will be of much importance to another business firm. As described earlier, the information included on the application forms is likely to be very general, especially in the case of know-how.<sup>135</sup>

MITI, the MOF, and the Science and Technology Agency do release general statistics to the public regarding the number and type of TICs for a particular year. This information can be helpful to the government as well as other business firms.<sup>136</sup> (The United States government may be well-advised to provide somehow for a means to discover the same statistics for the United States.) The mere fact that this information is published, however, will not seem to have a restrictive effect on the execution of TICs. On the contrary, such information may prompt competitors of firms who have completed TICs to inquire with the foreign firm about a similar licensing agreement for itself.<sup>137</sup>

#### 4. *Effect of FECL Regulations on the Bargaining Power of the Respective Parties*

This section is closely related to the next section which relates to administrative guidance under the new FECL. In a sense, the effects of formal and informal enforcement of the FECL on the bargaining power of the parties may be a subset of the effects of the same resulting from administrative guidance. The first way in which FECL enforcement could affect the bargaining power of the parties is by a disparate provision of governmental expertise and information to the respective parties. This clearly occurred under the old FIL/FECL regime.<sup>138</sup> The close ties between Japanese business and government, and the desire of the government to aid businesses resulted in the provision of large amounts of information to the Japanese party and almost no information to the foreign party.<sup>139</sup> In the days when so much of the important operating procedures were informal and unwritten, a flow of information to and from the government was crucial.

Given that disparities in information provision existed under the old

---

<sup>135</sup> Tsuchiya interview, *supra* note 91.

<sup>136</sup> Law professor interview, *supra* note 74.

<sup>137</sup> One possible explanation for the great disparity in the number of TICs from the United States to Japan as compared to the reverse is the competitive, almost paranoiac attempts of Japanese firms to license technology when they perceive one of their competitors to have access to the same technology. For example, Fujitsu, NEC, and Mitsubishi may each deem it necessary to license a certain software product. In these cases of potential double or triple licensing of a certain technology, the wide dissemination of information regarding TICs through government reports would seem to be beneficial to the foreign licensors contemplating the sale of the technology.

<sup>138</sup> D. HENDERSON, *supra* note 18, at 231.

<sup>139</sup> *Id.*

regime, this Comment will now consider whether these practices still exist under the new FECL. It appears that the Japanese government has continued to cooperate closely with Japanese companies. The fifth generation computer program is a good example of such cooperation in a high-technology industry, the Voluntary Restraint Agreement with automobiles<sup>140</sup> is a good example in the manufacturing sector, and government promotion and protection of agriculture and leather producers are examples in the primary sector. While this general cooperation continues to exist in various modes, the key question is whether such cooperation continues to exist pursuant to TICs.

Although the research conducted pursuant to this topic is not conclusive on the subject of bargaining power, the following generalizations can be based on the research conducted. First, the conspicuous two-to-one bargaining situation with Japanese government and the Japanese licensee pitted against the foreign licensor in TIC negotiation is virtually nonexistent today.<sup>141</sup> As to specific TIC terms, the Japanese government is no longer the trusted information source that it once was.<sup>142</sup> Nor does the threat of its disapproval of TIC terms carry the weight that it once did.<sup>143</sup> In fact, with today's numerous trade problems including the huge United States trade deficit with Japan, it seems likely that the complaints of a foreign party could have greater or equal clout to that of a Japanese party.<sup>144</sup> Thus, in terms of conspicuous advice provided by the Japanese government to Japanese parties with the implicit purpose of gaining advantages over foreign parties in a bargaining situation, this type of effect on bargaining power is virtually nonexistent.

The more difficult question, however, is whether Japanese firms, be-

---

<sup>140</sup> JAPAN EXTERNAL TRADE ORGANIZATION, JAPAN HANDBOOK (1985).

<sup>141</sup> Noburu interview, *supra* note 74.

<sup>142</sup> Law professor interview, *supra* note 74. Well-oiled information channels surely continue to exist between Japanese bureaucrats and business firms, but it is unlikely that Japanese bureaucrats will provide the provision-by-provision analysis of the technical and economic feasibility and fairness of TICs to Japanese firms that they once did. One reason for this change is that it is now more difficult for ministry officials to stay up with all of the rapid technological development in various fields. Interview with MITI official, in Tokyo (July 1985). Another reason is that, with the increase in the number of TICs handled by the ministries, the time that can be devoted to any single one has been reduced. *Id.* Finally some Japanese ministries, particularly MITI, now no longer have the antiforeign bias that they once had. *Id.* This may be in order to assuage criticism from the United States or arising from a perceived decrease in the need for the protection of Japanese companies. Most large Japanese companies have such large and well-informed legal and engineering personnel that it would be difficult to imagine MITI or some other ministry has very significant legal or technical information that these firms now do not have. Interview with the Director of the Engineering Department of a major Japanese steel company, in Tokyo (Aug. 1985).

<sup>143</sup> *Id.*

<sup>144</sup> This may be especially true subsequent to the creation of the trade ombudsman whose chief function is to hear complaints from foreign parties seeking to conduct business in Japan.

cause of the network of connections, or simply because they are domestic firms, are able to obtain significant amounts of technical, commercial, and legal information from Japanese governmental ministries that are unavailable to foreign firms. Both MITI and the BOJ claimed to lack the technical expertise to provide helpful advice.<sup>145</sup> While this claim may be valid for persons who perform the pro forma checking of FECL reports involving nondesignated technologies, MITI and the MOF provide expert advice to the parties involved in most types of TICs.<sup>146</sup> Yet, while the ministries probably have the capability to provide relevant technical advice on TICs, for most large Japanese companies that are parties to the great majority of international TICs, such information is not necessary because equally qualified technical experts exist within their own companies.<sup>147</sup> Commercial advice is a similar story; although the ministries might have significant technical expertise, equal or greater expertise may likely exist within the large Japanese company.<sup>148</sup> Legal advice is also similar. The ministries have the greatest legal expertise, because they are administering the notification procedures. However, since the procedures are now quite simple and because most large or medium-sized businesses have their own legal experts or have ready access to attorneys, attempts to obtain particular legal advice probably would not aid in the negotiation of TIC terms.<sup>149</sup> In sum, while in the past, the Japanese government, through the unilateral provision of technical, commercial, and legal information, significantly aided the Japanese party in the process of negotiating and forming a TIC, today, because most of the requisite expertise exists within the Japanese firms or is readily accessible to them through private means, differential provision of information can no longer be said to significantly affect the bargaining of TIC parties.

The second way in which the Japanese government has affected the bargaining power of TIC parties in the past was through the threat of formal and informal sanctions against the foreign parties. This threat of sanctions may occur during the TIC negotiation or after formation of the terms of the TIC between the time the TIC parties first submit the notification forms to the BOJ and when the BOJ officially accepts the notification.

In the past the threat of formal or informal sanctions detrimentally

---

<sup>145</sup> Noburu interview, *supra* note 74; Tsuchiya interview, *supra* note 91.

<sup>146</sup> Interview with the Assistant General Manager of the Engineering, Sales, and Consulting Department of a major Japanese steel company, in Tokyo (Aug. 1985).

<sup>147</sup> Legal department manager interview, *supra* note 112.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

affected the bargaining power of the foreign party to a TIC.<sup>150</sup> Such threats were thought necessary to equalize the bargaining power of the licensee and licensor.<sup>151</sup> However, judging from the extensive research conducted by the author in Tokyo, such threats of sanctions pursuant to the FECL are now virtually nonexistent.<sup>152</sup> There are two interrelated reasons for such a dramatic turnaround. With the equalization of the relative economic strength and accompanying bargaining power of the Japanese and foreign parties, such attempts to aid the Japanese party were no longer necessary.<sup>153</sup> In fact, not only were such threats no longer necessary, but they were no longer acceptable to Japan's trading partners.<sup>154</sup> Second, as a result of the combined factors of the decreasing need for government assistance in TIC formation and increasing pressure from foreign nations for TIC law liberalization, the Diet amended the FECL significantly in 1979. Previously, the FIL/FECL regime operated on the "negative principle" that prohibited all transactions without specific ministry permission.<sup>155</sup> The new FECL, however, operates on the "positive principle" that all transactions are permitted except those specifically prohibited.<sup>156</sup> Under the "positive principle," administrative guidance which would significantly affect the bargaining power of the respective parties has been limited significantly. This principle eliminated the most frequently used sanction under the FECL which was to sit on the application without taking any action.<sup>157</sup> Under the new FECL, the ministries must take the step of positively prohibiting the transaction and provide reasons for such a prohibition in order to achieve the same result. Such a step is much more difficult both administratively and politically.<sup>158</sup> In sum, the threat of the imposition of sanctions as a device to help the bargaining power of the Japanese party to a TIC is virtually nonexistent for both international economic and legal reasons.

##### 5. *Effect on TIC Terms of Administrative Guidance Pursuant to the FECL*

Most of the effects of the execution of administrative guidance under

---

<sup>150</sup> See *supra* notes 56-60 and accompanying text.

<sup>151</sup> Interview with attorney, in Tokyo (June 1985).

<sup>152</sup> Smith, *supra* note 11, at 462.

<sup>153</sup> For a list of the TICs for 1983, see SCIENCE & TECHNOLOGY REPORT, *supra* note 1. This list indicates that, in the great majority of cases, the foreign licensors now have less economic power than the Japanese licensees.

<sup>154</sup> See *supra* notes 38-39 and accompanying text.

<sup>155</sup> Smith, *supra* note 11, at 421.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Noburu interview, *supra* note 74.

the new FECL have already been mentioned.<sup>159</sup> As the result of informal governmental action, there is a possibility of some time delay occurring in the execution of a TIC. There is also a potential for government action which would affect the bargaining power of the respective parties. However, now that the government plays a greatly decreased role in TICs, it is very unlikely that such types of administrative guidance will adversely affect the foreign party. The most likely type of administrative guidance, however, will occur between the time when the parties present the notification forms to the BOJ and when the BOJ formally accepts notification. Before the submission, barring extraordinary circumstances, the ministries will know little about the proposed transaction. Except for technology transfers involving extraordinary industries such as nuclear energy, weapons, or space, the ministries are unlikely to be concerned at all with the proposed transaction until the notification submission with the BOJ.<sup>160</sup> After the BOJ formally accepts the notification, the ministries have no legal authority or precedent for intervening in the transaction.<sup>161</sup> Thus, the only time that significant administrative guidance takes place under the new FECL is during this interim period.

With nondesignated technologies, even during the period between notification submission and formal acceptance of notification, the ministries are unlikely to pursue any types of administrative guidance.<sup>162</sup> With designated technologies, some type of administrative action is more likely. MITI has stated specifically that it will refuse to accept the submission of notification forms that provide inadequate information for it to make a rational decision.<sup>163</sup> The problem of adequate information is, however, not as difficult as it may sound. MITI officials claim that with the first five designated technologies, except in the case of conspicuous inadequacies, they will approve the applications pro forma without significant consideration of the technical content.<sup>164</sup> In the case of the first five designated technologies, the consideration is, of necessity, much more careful. These are technologies, however, that one would naturally assume the government to regulate more strictly. The United States government similarly regulates the import and export of most of these technologies through one agency or another.<sup>165</sup> Thus, while some regulation is likely (and in Japan this regulation will probably take the form of ad-

---

<sup>159</sup> For a description of administrative guidance in the Japanese context, see *supra* note 61.

<sup>160</sup> Noburu interview, *supra* note 74.

<sup>161</sup> Tsuchiya interview, *supra* note 91.

<sup>162</sup> See Smith, *supra* note 11, at 470-75.

<sup>163</sup> *Id.* at 471; Noburu interview, *supra* note 74.

<sup>164</sup> *Id.*

<sup>165</sup> UNITED STATES-JAPAN TRADE STUDY GROUP: PROGRESS REPORT 52-53 (1984).

ministrative guidance), such regulation is not likely to be contrary to the expectations of the parties. Indeed, such regulation seems to be of the very nature a governmental function.

#### 6. *Effect of FECL on Cross-Licensing Arrangements*

In certain fields, an international licensing agreement in which the Japanese party agrees to grant back a license to certain technology to the foreign party will probably be deemed a service transaction requiring a license from MITI or the MOF.<sup>166</sup> The statute grants to the competent ministry the authority to require a prior license for service transactions "considered to be obstructive to the faithful performance of treaties. . . or the maintenance of international peace and security."<sup>167</sup> MITI, for example, has designated about 150 strategic items that require a prior license for export, including numerous important high-technology items such as diodes, transistors, integrated circuits, other semiconductor products, and electronic computers.<sup>168</sup> Of these 150 items, only twenty-three are nuclear or defense related.<sup>169</sup> Alternatively, if, as part of the international licensing agreement, the Japanese party agrees to sell certain strategic or high-technology goods to the foreign party, a license from the relevant ministry will be required.<sup>170</sup>

Thus, the outward flow of certain technologies and goods that is frequently involved in contemporary TICs into Japan will be controlled by prior licenses. Cross-licensing agreements must be structured not only so the Japanese government will accept the prior report regarding the inflow of technology, but also so the Japanese government will issue a license for the export of the relevant good or service.<sup>171</sup> In this way, the emphasis has shifted from the regulation of the import of technology to the export of technology. Therefore, it is difficult to assert that the amendment of the FECL has had much effect in liberalizing the execution of cross-licenses. Yet, bureaucratic practices regarding cross-licenses as well as one-way TICs have been liberalized so that conditions for foreign licensors have improved in both cases. Be that as it may, the prevailing opinion among legal practitioners in Japan is that, concerning cross-license agreements, the Japanese government still exerts a significant amount of control that can be used by the Japanese party to extract favorable contract terms.

---

<sup>166</sup> FECL art. 25.

<sup>167</sup> *Id.*

<sup>168</sup> Sharp, *supra* note 12, at 245.

<sup>169</sup> *Id.*

<sup>170</sup> Export Trade Control Order, Cabinet Order No. 378 (Dec. 1, 1984).

<sup>171</sup> Sharp, *supra* note 12, at 246.

### III. TIC REGULATION UNDER THE ANTIMONOPOLY LAW

#### A. Introduction

The Japanese AML,<sup>172</sup> enacted in 1947, was the first permanent law in Japanese history whose purpose was to promote free and fair competition.<sup>173</sup> It was patterned after the antitrust laws of the United States, adopting into a single statute, principles from the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act.<sup>174</sup> Unlike United States antitrust laws, the Japanese law is essentially an administrative law enforced by government bureaucrats chiefly through private consultation with the parties.<sup>175</sup> The declared purpose of the AML states:

This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of power over enterprises and by excluding undue restriction of production, sale, price, and technology through combination or agreement, and all other unreasonable restraint of business activities, aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interest of the general consumer.<sup>176</sup>

The original 1947 AML was stricter than United States antitrust laws, but, in order to make the AML facilitate the rebuilding of the Japanese economy, it was amended several times.<sup>177</sup> The 1949 amendment eased the control on "intercorporate stockholding and interlocking directorates among noncompetitive companies."<sup>178</sup> The 1953 amendment, passed a year after the end of the occupation period, provided certain exemptions for cartels for depressed industries and cartel agreements contemplating the rationalization of enterprises.<sup>179</sup>

Article 6, section 1 of the AML prohibits businesses from entering into international agreements containing terms constituting an unreasonable restraint of trade or unfair trade practice.<sup>180</sup> Section 2 of the same

---

<sup>172</sup> AML, *supra* note 7.

<sup>173</sup> M. ARIGA, REGULATION OF INTERNATIONAL LICENSING AGREEMENTS UNDER THE JAPANESE ANTIMONOPOLY LAW 278 (1975).

<sup>174</sup> *Id.* at 279.

<sup>175</sup> Higgins, *supra* note 15, at 45.

<sup>176</sup> AML § 1.

<sup>177</sup> M. ARIGA, *supra* note 173, at 279.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Article 2 of the AML defines these important terms. The phrase *futō na torihiki seigen* (unreasonable restraint of trade) refers to:

such business activities, by which any entrepreneurs by contract, agreement, or any other con-

article provides that, when a firm has concluded an international agreement, the company must file a report of the agreement with the FTC within thirty days.<sup>181</sup> Unlike the report required under the FECL, the AML report is filed after the conclusion of the agreement and only by the Japanese party. This after-the-fact system was adopted with the idea that the anticompetitive effects of an agreement would be more readily apparent at a stage shortly after the conclusion of the agreement.<sup>182</sup> The FTC, however, has not followed through with this policy. Instead of investigating closely the anticompetitive effects of an agreement, the FTC mechanically reviews the form of the text of an agreement to ascertain whether certain prohibited terms have been included.<sup>183</sup> If the FTC determines that such provisions exist, it may order the deletion of the offending provisions or take other necessary measures.<sup>184</sup> In practice, however, subsequent to the 1953 amendment to the AML, the FTC has taken no formal action against offending parties, but has resorted to administrative guidance, requesting that the parties delete the offending provisions.<sup>185</sup>

---

certed activities mutually restrict or conduct their business activities in such a manner as to fix, maintain, or enhance prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

AML art. 2.

The phrase *fukōsei na torihikihōhō* (unfair business practices) means:

any act coming under any one of the following items, which tends to impede fair competition and which is designated by the Fair Trade Commission to: (i) unreasonably discriminate against other entrepreneurs; (ii) unreasonably induce or coerce customers of a competitor to deal with oneself; (iv) trade with another party on such conditions as will restrict unreasonably the business activities of the said party; (v) deal with another party by unwarranted use of one's bargaining position; (vi) unjustly interfere with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is the stockholder or an officer and his customers, or, in case such entrepreneur is a company, unjustly induce, instigate, or coerce a stockholder or an officer of such company to act against the interest of such company.

*Id.*

<sup>181</sup> The operative provision of the AML regarding international TICs is found in Chapter II (Private Monopolization and Undue Restraint of Trade), art. 6 (International Agreements).

1. No entrepreneur shall enter into an international agreement or an international contract which contains therein such matters as constitute undue restraint of trade or unfair business practices.

2. In accordance with the rules of the Fair Trade Commission, any entrepreneur who has concluded an international agreement or an international contract (provided only that such agreement or contract is of a kind designated by the Rules of the Fair Trade Commission as considered likely to contain matters that may constitute undue restraint of trade or unfair business practices) shall file a report to that effect, together with a copy of such agreement or contract (in the case of a verbal agreement or contract, a document indicating the substance thereof) with the Fair Trade Commission within thirty days after the day of such conclusion.

AML art. 6, §§ 1-2.

<sup>182</sup> Shibuya, *supra* note 12, at 19.

<sup>183</sup> *Id.* For this reason, the view that the current after-the-fact reporting system should be changed to a before-the-fact system seems quite persuasive.

<sup>184</sup> AML art. 7, § 1.

<sup>185</sup> Shibuya, *supra* note 12, at 21.



The exercise of industrial property rights is exempted from AML application by section 23, which provides that "[t]he provisions of this Act shall not apply to acts recognizable as the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, and the Trademark Act."<sup>186</sup> Section 100, however, provides for the revocation of a patent right that has been misused in violation of the provisions of the AML.<sup>187</sup>

## B. The Fair Trade Commission

The AML is administered and enforced by the FTC, which was established by the provisions of the AML.<sup>188</sup> The FTC is part of the prime minister's office, but maintains complete independence in the performance of its duties.<sup>189</sup> The FTC consists of five commissioners with the chairperson included.<sup>190</sup> The commissioners are appointed by the prime minister for five-year terms.<sup>191</sup> The general functions of the FTC are to: 1) investigate suspected violations of the AML (on its own authority or upon the complaint of a member of the public) and render decisions in these cases;<sup>192</sup> 2) designate unfair practices;<sup>193</sup> 3) receive reports or notifications;<sup>194</sup> and 4) grant approval to depression or rationalization cartels.<sup>195</sup>

The FTC function specifically related to TICs is to receive the notification report of the Japanese party to an international TIC and review the validity in terms of the AML of the terms of the TIC.<sup>196</sup> If the FTC

---

<sup>186</sup> AML § 23.

<sup>187</sup> For substantive provisions of the AML, see *supra* note 181 and *infra* note 196. See also FTC guidelines.

<sup>188</sup> AML § 27(1).

<sup>189</sup> M. ARIGA, *supra* note 173, at 280.

<sup>190</sup> AML § 29(1).

<sup>191</sup> AML § 29(2).

<sup>192</sup> AML §§ 45-61.

<sup>193</sup> AML §§ 71-72.

<sup>194</sup> AML § 8.

<sup>195</sup> AML § 24.

<sup>196</sup> Details of the notification procedure are provided by the Regulation Concerning the Reporting of International Agreements, FTC Regulation No. 1, 1971. Form 1, which is used with TICs, requires disclosure of the following information: 1) matters concerning the reporting party (i.e., the Japanese firm); 2) matters concerning the foreign party; 3) matters concerning the conclusion of the agreement; 4) the contents of the agreement; and 5) other relevant information. Category 4 regarding the contents of the agreement requires description of the following important contract terms: 1) technology involved; 2) types of industrial property; 3) types of technical assistance; 4) manufacturing territory; 5) sales territory; 6) restrictions on sale price or quantity; 7) restrictions on sale of competing products or use of competing technology; 8) restrictions on the raw material source; 9) restrictions on the quality of raw materials, parts, or products; 10) restrictions on manufacture or sale; 11) obligations to disclose improvement technology; 12) ownership of patents or other in-

determines that a particular term in the TIC constitutes a "private monopoly," "unreasonable restraint," or "unfair trade practice," the FTC will initially request a voluntary deletion of such a term through the use of administrative guidance.<sup>197</sup> If the Japanese party refuses to accept such a request, the FTC will next issue an official recommendation which it strongly urges the Japanese party to accept.<sup>198</sup> If the formal recommendation is also refused, the FTC will start formal trial procedures to delete the allegedly violative term.<sup>199</sup> The decision of this trial may be appealed before the Tokyo High Court.<sup>200</sup>

In an important case regarding the FTC formal recommendation to delete a violative term, the foreign party, Novo Industries, filed suit demanding the cancellation of such a recommendation addressed to the Japanese party to the contract, Amano Pharmaceutical Company.<sup>201</sup> The Supreme Court upheld the Tokyo High Court decision to deny such a claim because Novo, obtaining no legal benefit from such a recommendation, had no standing to sue.<sup>202</sup> The rationale of the Supreme Court was that such a recommendation can be enforced only when the Japanese party accepts the recommendation.<sup>203</sup> Since the acceptance of the recommendation is wholly dependent upon the will of the Japanese party, it was held not to have a binding effect on a third party.

### C. FTC Guidelines

In order to distinguish more clearly between the proper exercise of a patent right and an illegal unfair trade practice, the FTC issued the Antimonopoly Act Guidelines for International Licensing Agreements. Item I of these guidelines, noted below, presents nine types of restrictive clauses which the FTC finds categorically illegal.

- 1) To restrict the area to which the licensee may export the goods covered by patent rights, etc. (hereinafter referred to as "patented goods"). However, cases coming under a, b, or c listed below are excluded:

---

tangibles; 13) territory for use of assigned improvement technology; 14) period to use assigned improvement technology; 15) payment for the assignment or license of improvement technology; 16) other restrictions on improvement technology; 17) calculation of consideration for technology assistance; 18) licensing of trademarks; 19) causes of contract termination; 20) arbitration clauses; and 21) governing law and jurisdiction of the contract.

<sup>197</sup> Y. KUMAKURA, *LEGAL ASPECTS OF DOING BUSINESS WITH JAPAN* 43 (1981).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Novo Industri A/S v. FTC*, 22 Gyosei reishi 761, 17 Kotori Shintekishu, 4 Kokusaitorihiki hanreishu 211 (Tokyo High Court, May 19, 1971).

<sup>202</sup> *Novo Industri A/S v. FTC*, Hanrei Jiho (No. 800)(35 Sup. Ct., Nov. 28, 1975).

<sup>203</sup> *Id.*

a) In case the licensor has patent rights, etc., which have been registered in the area to which the licensee's export is restricted (hereinafter referred to as the "restricted area");

b) In case the licensor is selling patented goods in the restricted area in one's normal business;

c) In case the licensor has granted to a third party an exclusive license to sell in the restricted area.

2) To restrict the licensee's export prices or quantities of patented goods, or to make it obligatory for the licensee to export patented goods through the licensor or a person designated by the licensor. However, such cases are excluded where the licensor grants license to export to the area coming under either of the preceding a, b, or c and the said restrictions or obligations imposed are of reasonable scope.

3) To restrict the licensee from manufacturing, using, or selling goods and/or employing technology which is in competition with the licensed subject. However, such cases are excluded where the licensor grants an exclusive license and imposes no restriction of goods already being manufactured, used, or sold or technology already being utilized by the licensee.

4) To make it obligatory for the licensee to purchase raw materials, parts, etc., from the licensor or a person designated by the licensor.

5) To make it obligatory for the licensee to sell patented goods through the licensor or a person designated by the licensor.

6) To restrict the resale prices of patented goods in Japan.

7) To make it obligatory for the licensee to inform the licensor of knowledge or experience newly obtained regarding the licensed technology, or to assign the rights with respect to an improved or applied invention by the licensee to the licensor or to grant the licensor thereon. However, such cases are excluded where the licensor bears similar obligations and the obligations of both parties are equally balanced in substance.

8) To charge royalties on goods which do not utilize licensed technology.

9) To restrict the quality of raw materials, parts, etc., or of patented goods. However, such cases are excluded where such restrictions are necessary to maintain the credibility of the registered trademark or to insure the effectiveness of the licensed technology.<sup>204</sup>

Item III of the same guidelines lists the following types of license restrictions which the FTC considers to within the proper exercise of industrial rights.

1) To grant license to manufacture, use, sell, etc., separately;

2) To grant license for a limited period within the life of patent rights, etc., or for a limited area within the whole area covered by patent rights, etc.;

3) To restrict the manufacture of patented goods to a limited field of technology or to restrict the sale thereof to a limited field of sales;

---

<sup>204</sup> Fair Trade Commission, Criteria for Decisions on International Contracts for Technological Introduction (1968)[hereinafter FTC Criteria].

4) To restrict the use of patented processes to a limited field of technology; and

5) To restrict the amount of output or the amount of sales of patented goods or to restrict the frequency of the use of patented processes.<sup>205</sup>

There are three areas under these guidelines that have historically presented foreign licensors with the most trouble. First, in grant-back license provisions, which may be considered a subset of the larger group of general cross-licensing agreements, the FTC approach has been initially to prohibit such provisions except for those that meet the guidelines' exclusion—when “the obligations of both parties are equally balanced.”<sup>206</sup> This has been interpreted to mean that a foreign licensor will have to grant improvements to the Japanese licensee if it wishes to receive the same from the Japanese party.<sup>207</sup> Merely agreeing to disclose the existence of technological improvements may well prove insufficient to the FTC. For the foreign licensor, this required mutuality in grant-back obligations can be a serious obstacle to proceeding with the agreement.

Second, noncompetition provisions, such as grant-back license provisions, are initially prohibited by the FTC.<sup>208</sup> For the foreign licensor unwilling to grant an exclusive status to the Japanese party, the ban is absolute.<sup>209</sup> In addition, the enforceability of noncompetition provisions will likely last only as long as the foreign licensor continues to grant an exclusive status to the Japanese licensee.

Finally, quality control provisions are permitted only to “maintain the credibility of the registered trademark or to ensure the effectiveness for the licensed technology.”<sup>210</sup> Drafting seems to be the key to avoiding FTC objections in this respect.<sup>211</sup> Licensors should be careful to use neutral-sounding language with respect to quality control requirements for the Japanese licensee. If the licensor uses language that seems to require a very high standard of quality control, it may raise an FTC objection.

#### D. Effects of FTC Regulation on the Formation of TICs in Japan

As has been noted earlier, not since 1953 has the FTC used formal adjudicatory procedures to mandate a modification or cancellation of a

---

<sup>205</sup> *Id.* at item III.

<sup>206</sup> *Id.* art. 1(7).

<sup>207</sup> Higgins, *supra* note 15, at 51.

<sup>208</sup> See FTC Criteria, *supra* note 204, art. 1(6). Noncompetition provisions include those restricting sublicensing or distributorship arrangements.

<sup>209</sup> Higgins, *supra* note 15, at 55.

<sup>210</sup> See FTC Criteria, *supra* note 204, art. 1(9).

<sup>211</sup> Higgins, *supra* note 15, at 60.

TIC.<sup>212</sup> The FTC has continued, however, to make extensive use of informal guidance to require TIC modification or cancellation if the TIC contains provisions violative of the AML or its guidelines.<sup>213</sup> Listed below is a summary of the type of administrative guidance exercised by the FTC in 1983 and the number of cases.<sup>214</sup>

1) Restrictions on improved technology	66 cases
2) Restrictions on dealing in competing goods	29 cases
3) Restrictions on seller's supplying licensee with raw materials, parts, etc.	2 cases
4) Customer restrictions	5 cases
5) Restrictions on resale price	1 case
6) Suppression of parallel imports	3 cases
7) Restrictions on advertising	12 cases

This summary is quite representative of historic trends in the area of administrative guidance.<sup>215</sup> It is clear that the FTC has and continues to exert a substantial amount of influence in the formation and execution of licensing agreements.<sup>216</sup> It is also readily apparent that in each of these cases the ostensible beneficiary of such informal FTC action was the Japanese licensee. In each of these categories, the foreign licensor had included in the agreement some type of restrictive clause as to the Japanese licensee's use of the particular technology which the FTC requested be changed.

The next question is: To what extent does this informal guidance work to the detriment of the foreign licensor? It is clear that the influence of the AML and the FTC reaches much deeper than the number of cases of reported informal guidance.<sup>217</sup> During negotiations between the foreign licensor and the Japanese licensee, if the licensor attempts to include any terms in the agreement that may violate the AML and its guidelines, the Japanese party will quickly inform the licensor that such a term must be stricken because it is illegal under Japanese law.<sup>218</sup> One wonders whether the foreign party really has adequate knowledge because, in many cases, the foreign party will not challenge the judgement

---

<sup>212</sup> See *supra* notes 196-200 and accompanying text.

<sup>213</sup> See *supra* note 204 and accompanying text.

<sup>214</sup> *Kōseitōrihikiinkai Nenjihōkoku, Dokusenkinshihakusho, Kōsei torihikiinkaihen (Showa 59)*(FAIR TRADE COMMISSION, ANNUAL REPORT FOR FISCAL 1984) 130. Note that the FTC and the Science and Technology Agency have different methods for the computation of TIC statistics.

<sup>215</sup> *Id.*

<sup>216</sup> There has been some suggestion that the FTC is quite rigorous in its enforcement of restrictive provisions relating to international licensing agreements while not being quite lenient in its enforcement of domestic practices that constitute unreasonable restraints of trade or monopolization. D. HENDERSON, *supra* note 18, at 180.

<sup>217</sup> Legal department manager interview, *supra* note 112.

<sup>218</sup> *Id.*

of the Japanese party.<sup>219</sup>

This may not be so important as one might think because of the reciprocal nature of licensing agreement terms. If the agreement limits use of the technology to a certain sales area, the royalty rate may be lowered commensurately or the other party may request the insertion of a beneficial term in return.<sup>220</sup> This is the kind of give and take involved in licensing agreement negotiations.

In the past, FTC guidance had a greater effect on bargaining power<sup>221</sup> than it now does. Previously, the FTC often worked closely with the Japanese licensees in effecting beneficial TIC terms.<sup>222</sup> The Japanese party may have met with FTC officials and determined which TIC terms should be modified or stricken in order to benefit optimally the Japanese party.<sup>223</sup> Then, pressure could be applied to the foreign party either by the FTC or by the Japanese party threatened with FTC intervention.<sup>224</sup> Today, it appears that FTC guidance is quite transparent.<sup>225</sup> The FTC mechanically reviews the post-execution report by the Japanese party to determine whether violative clauses exist. Their determinations are said to be very predictable and quite fair.<sup>226</sup> It is also certain that the FTC continues to enforce vigorously its laws and regulations and that this enforcement is almost always for the ostensible benefit of the Japanese licensee.

#### IV. CONCLUSION

The central focus of this Comment was clearly on the FECL as it related to technology transfers. Since a review of technology transfers in Japan would not be complete without mentioning the effects of FTC enforcement of the AML, mention has been made here. In the past, the FECL was the chief vehicle for regulating TICs into Japan. The FECL

---

<sup>219</sup> *Id.* This appears to be another case in which the lack of knowledge of foreign firms regarding Japan may cause a detriment to their bargaining position. The author questioned numerous engineers and legal personnel involved in licensing negotiations if they ever try to "buffalo" the foreign party on aspects of Japanese law. They predictably claimed that they would not do such a thing, but noted that it would be quite possible because of the ignorance of the foreign parties.

<sup>220</sup> *Id.*

<sup>221</sup> For discussion of the effect of FECL administrative guidance on TIC terms, see *supra* notes 160-65. While enforced by different agencies (i.e., the FTC rather than the MOF or MITI), AML administrative guidance has many of the characteristics of FECL administrative guidance.

<sup>222</sup> Interview with both United States and Japanese attorneys at the Tokyo affiliate of a large United States law firm, in Tokyo (June 1985).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Interviews with attorneys in Tokyo (June-July 1985).

<sup>226</sup> *Id.*

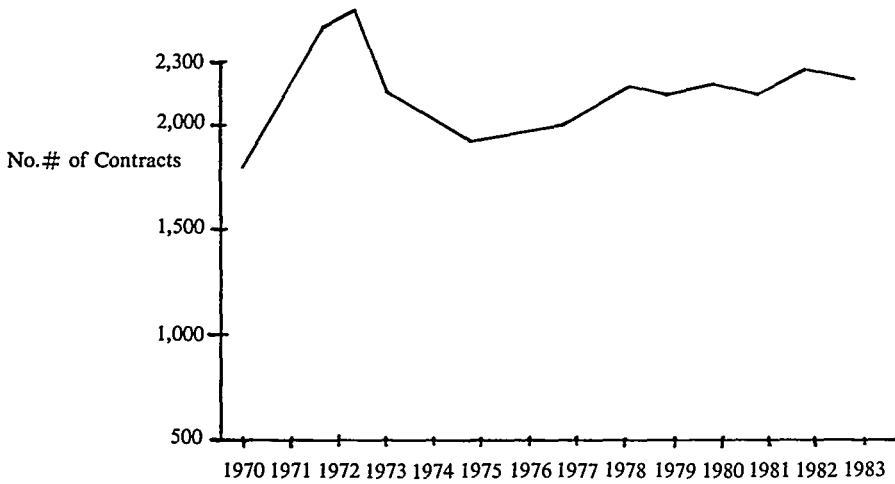
regulated imports of technology through approval and, later, notification requirements. These reporting requirements for technology importation now seem to play little more than an informational function for the Japanese government. Yet, with cross-licensing arrangements in many fields, the FECL requires a license from the competent ministry before a technology can be exported and before the agreement can be executed. Thus, the focus of regulation has shifted from the import to the export of technology. This seems a natural result as Japan has become a great economic and technological power. It can be said that the FECL has a much less restrictive and prejudicial effect on the interests of foreign licensors than it did in the past. But it cannot be said that the FECL no longer has any restrictive effect, especially with cross-licensing agreements. Moreover, while FTC enforcement of the AML remains in full force, it is generally predictable and transparent. Although almost exclusively for the benefit of the Japanese licensee, the FTC is quite mechanical and predictable in its review and informal enforcement of its laws and regulations.

Since the types of foreign exchange and technology imbalance problems that prompted the strict regulation of TICs twenty years ago no longer exist, the motivation for vigorous intervention by the Japanese government, whether by the BOJ, the MOF, MITI, or the FTC, into the formation of TICs also no longer exists. In step with this economic and technological evolution has been an evolution of the Japanese governmental policies regarding TICs. The administrative regulation of TICs in Japan is no longer the great problem for foreign licensors as it once was, but it is an area that continues to merit careful concern.

*K. Blake Thatcher*

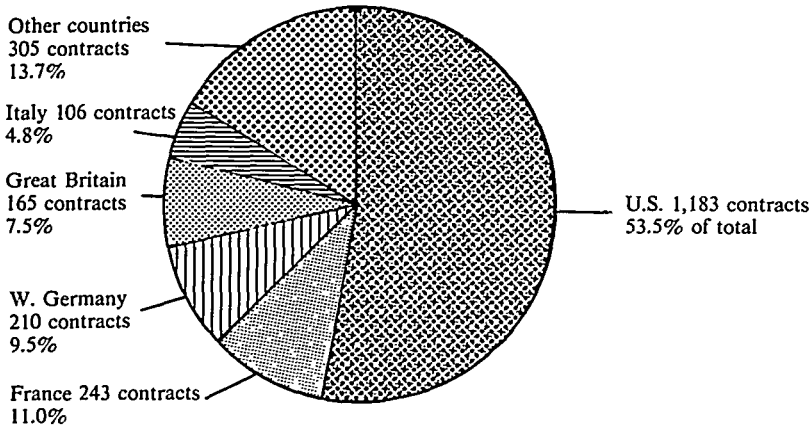
## Appendix A

### TRENDS IN TECHNOLOGY INDUCTION CONTRACTS INTO JAPAN



Source: Science and Technology Agency,  
Annual Report on Importation of  
Technology, 1983, p. 20.

### TECHNOLOGY INDUCTION CONTRACTS INTO JAPAN BY COUNTRY

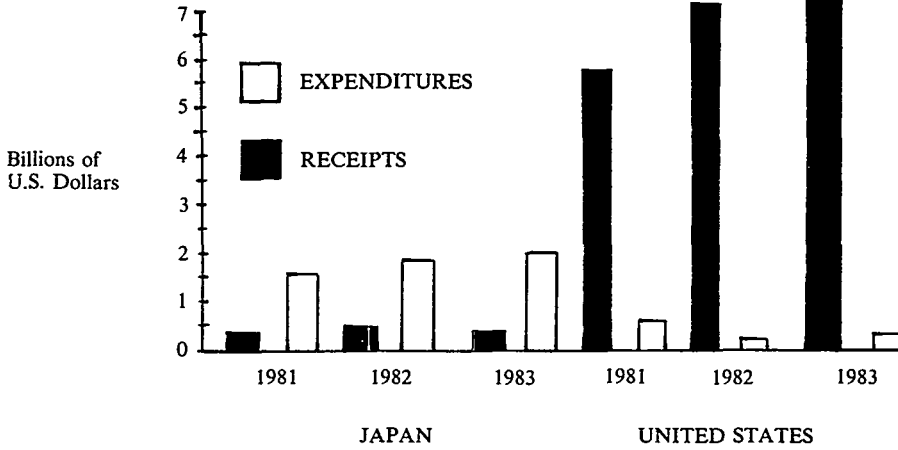


Source: Science and Technology Agency,  
Annual Report on Importation of  
Technology, 1983, p. 20.



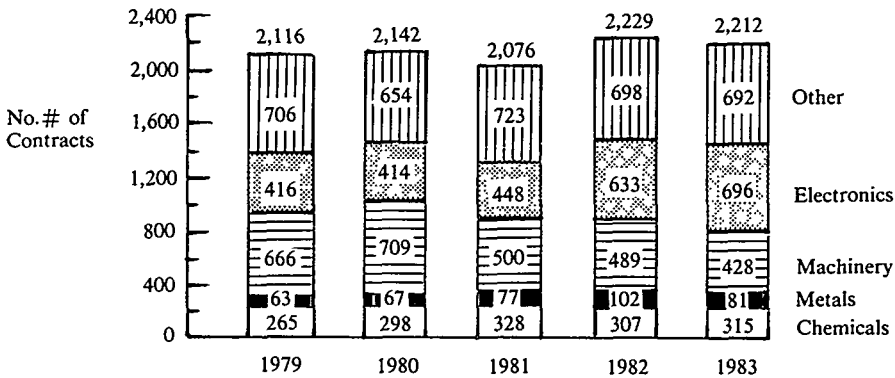
## Appendix B

### TECHNOLOGY TRANSFERS IN JAPAN AND UNITED STATES



Source: Science and Technology Agency  
Annual Report on Importation of  
Technology, 1983, p. 20.

### TYPES OF TECHNOLOGY TRANSFERS TO JAPAN



Source: Science and Technology Agency,  
Annual Report on Importation of  
Technology, 1983, p. 20.

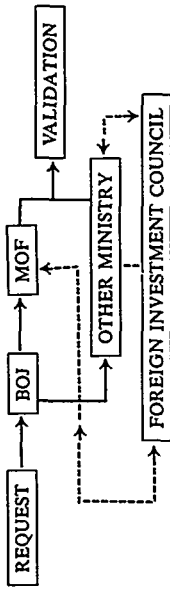
# Appendix C

## VALIDATION FOR TECHNICAL ASSISTANCE AGREEMENTS ("TAA")

### FIL

(A-type TAA)

- (1) Contract period exceeds one year;
- (2) payment to foreign nation contemplated.



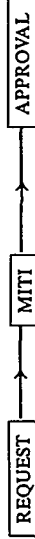
### OLD FECL

B-type TAA

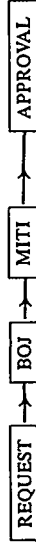
Other than A-type TAA

PAYMENT TERMS GREATER THAN \$30,000

#### INDUSTRIAL PROPERTY RIGHTS



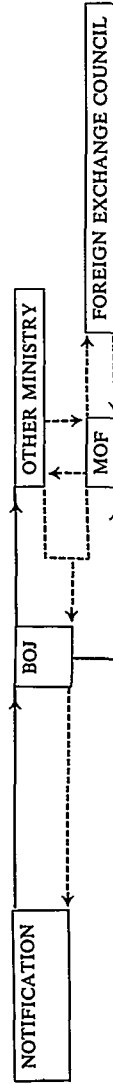
#### KNOW-HOW RIGHTS



PAYMENT TERMS OF LESS THAN \$30,000



### NEW FECL



Source: Interview with MITI Official,  
July 26, 1985.

## APPENDIX D

On Prescribing Outward Direct Investments Stipulated by the Minister of Finance, Ministry of Finance Notification No. 118 of the 28th Day of November, 1980.

1. Aircraft
  - 1) Technology relating to the manufacturing of aircraft;
  - 2) Technology relating to the manufacturing of aircraft parts or attachments.
2. Arms
  - 1) Technology relating to the manufacturing of arms;
  - 2) Technology relating to the manufacturing of arms parts or arms accessories;
  - 3) Technology relating to the manufacturing of electronic appliances and installations for military use.
3. Gun powder  
Technology relating to the manufacturing of gun powder of all kinds.
4. Atomic energy
  - 1) Technology relating to the manufacturing or commissioning of atomic reactors (including nuclear fusion reactors; hereinafter the same) or parts or attachments or component material thereof, or turbines for atomic energy, or generators for atomic energy;
  - 2) Technology relating to the manufacturing or use or retreatment of nuclear fuels, or to the manufacturing of installations therefor;
  - 3) Technology relating to the manufacturing or utilization of radioactive ray generators, or to the utilization or treatment of radioactive substance, or to the manufacturing of installations therefor;
  - 4) Technology relating to the utilization of nuclear reaction obtainable otherwise than by atomic reactors.
5. Space development
  - 1) Technology relating to the manufacturing or use of spacecraft (excluding weather survey rockets; hereinafter the same) or of specially designed installations for launching, or guiding and controlling, pursuing, or utilizing, spacecraft;
  - 2) Technology relating to the manufacturing or operation of specially designed testing installations for the development of spacecraft;

- 3) Technology relating to the manufacturing or use of spacecraft propellants or exclusive parts or attachments or materials of 1) or 2).
6. Electronic computers
  - 1) Technology relating to the manufacturing of electronic computers (including attachments);
  - 2) Technology relating to the manufacturing of electronic computer application installations;
  - 3) Technology relating to the utilization of 1) or 2).
7. Electronic parts for electronic computers of next generation
  - 1) Technology relating to the manufacturing of super large-scale integrated circuit. Super large-scale integrated circuit means integrated circuit produced by microminiaturized fabrication method involving such technologies as electronic beam exposure technique and X ray exposure technique, the single circuit of which contains the capacity equivalent to that of more than 100,000 pieces of transistors or diodes.
  - 2) Technology relating to the manufacturing of new theoretical elements and new memory elements. New theoretical elements and new memory elements mean theoretical elements and memory elements formed on different principles from those of the known semiconductivity techniques, such as the superconductive element, microwave semiconductive element, and light element.
8. Appliances for laser processing and light communication
  - 1) Technology relating to the manufacturing of laser oscillator and active and passive light element of semiconductor for light communication.
  - 2) Technology relating to the manufacturing of optical fiber and light circuit.
9. Innovative materials
  - 1) Technology relating to the manufacturing of amorphous material.
  - 2) Technology relating to the manufacturing of superconductive material.
10. Salt electrolysis by non-mercurial method  
Technology relating to the production of caustic soda or chlorine or hydrogen by electrolyzing salt without using mercury.
11. Petroleum production at sea bottom  
Technology relating to the construction of devices for recovering petroleum and combustible natural gas from the seabed oil field and

technology relating to installing and utilizing such devices (limited to those that can be used at oil fields of 200 meters or more deep), excluding know-how for the use of platforms.

12. Leather or leather products
  - 1) Technology relating to the manufacturing of leather or leather products.
  - 2) Industrial property rights relating leather or leather products.

## APPENDIX E

Foreign Exchange and Foreign Trade Control Law, Law No. 228, Dec. 1, 1949, as amended by the Law to Amend a Part of the Foreign Exchange and Foreign Control Law, Law No. 54 of 1979.

### *Article 29*

1. Any nonresident (including any branch, etc., in Japan of a nonresident, which shall apply to this Paragraph and Paragraph 3) and resident who are to conclude an agreement for transfer of the former's industrial property rights or other rights concerning technology, or for establishment of a right to the use of the same, or for rendering technical guidance in managerial know-how by the former, including renewal or amendment of such an agreement (hereinafter referred to as "conclusion, etc., of agreement for importation of technology") shall give a prior notice, as a Cabinet Order provides for, to the Minister of Finance and the Minister(s) in charge of the industry involved with those matters as designated by the Cabinet Order such as the particulars of that conclusion, etc., of agreement for importation of technology and others.

2. The provisions of the preceding Paragraph shall not apply to the conclusion, etc., of agreement for transfer of the technology which is developed independently by a branch, etc., in Japan of a nonresident, or to other cases determined by a Cabinet Order.

3. Any nonresident and resident who have given a notice under the provisions of Paragraph 1 concerning the conclusion, etc., of agreement for importation of technology mentioned in the same Paragraph shall not execute the conclusion, etc., of agreement for importation of technology under notice until a period of thirty (30) days has elapsed, counting from the day of receipt of the notice by the Minister of Finance and the Minister(s) in charge of the industry involved. However, the Ministers may shorten this period when they deem it not specifically harmful, judging from the type of the technology and other condition(s) of the conclusion, etc., of agreement for importation of technology under notice.

(Recommendation of alteration, etc., of conclusion, etc., of agreement for importation of technology.)

### *Article 30*

1. When a notice is given to the Minister of Finance and the Minister(s) in charge of the industry involved under the provisions of Paragraph 1 of the preceding Article, and the Ministers deem it necessary to make an inquiry in order to determine whether the conclusion, etc. of agreement for importation of technology under notice, if executed, would cause apprehensions as to the occurrence of any one of the below mentioned consequences, they may extend the period during which the exe-

cution of the conclusion, etc., of agreement for importation of technology is prohibited up to four months, counting from the day of their receipt of the notice.

1) It might imperil the national security, disturb the maintenance of public order, or hamper the protection of the safety of the general public; or

2) It might adversely and seriously affect activities of our business enterprises engaging in a line of business similar or related to the one for which the technology is to be imported, or the smooth performance of our national economy.

2. When a notice is given to the Minister of Finance and the Minister(s) in charge of the industry involved under the provisions of Paragraph 1 of the preceding Article, and the Ministers deem that if the conclusion, etc., of agreement for importation of technology under notice were executed it would cause apprehensions as to the occurrence of any consequences mentioned in each Item of the preceding Paragraph, the Ministers may, upon hearing the opinion of the Committee of Foreign Exchange and Other Transactions mentioned in Article 55-2, recommend the persons who gave the notice, as a Cabinet Order provides for, either to alter the particulars of the conclusion, etc., of agreement for importation of technology, in whole or in part, or to suspend the execution thereof, provided that such recommendation is given within the period mentioned in the same Paragraph, or within the extended period provided by the next Paragraph, counting from the day of their receipt of the notice.

3. When the Committee on Foreign Exchange and Other Transactions mentioned in Article 55-2 is asked for its opinion for the inquiry mentioned in Paragraph 1, and tenders its intimation that to form its opinion within the period of four (4) months as provided by the same Paragraph during which the conclusion, etc., of agreement for importation of technology is prohibited, shall become five (5) months, irrespective of the provisions of the same Paragraph.

4. When recommendation is given under the provisions of Paragraph 2, the provisions of Article 27, Paragraph 4 through Paragraph 9 shall be applicable thereto *mutatis mutandis*, and a Cabinet Order shall provide for the technicalities of such *mutatis mutandis* application.

## APPENDIX F

Cabinet Order concerning Direct Domestic Investments, etc., Ordinance No. 1, Oct. 11, 1980.

Chapter III Conclusion, etc., of Agreements for Importation of Technology

### *Article 4*

1. Prior notices provided in Article 29, Paragraph 1 of the Law shall be made in accordance with the procedures determined by an Ordinance of the competent Ministry, within a period determined by the Minister of Finance and the Minister in charge of the industry involved, which shall be no longer than a three-month period prior to the intended date of conclusion, etc., of agreements for importation of technology provided in the same Paragraph (hereinafter referred to as the "conclusion, etc., of agreements for importation of technology").

2. When a person who is required to make a prior notice under the provisions of Article 29, Paragraph 1 of the Law is as nonresident, he shall appoint a resident as his proxy, and the latter shall make such a prior notice. (Such a resident proxy shall be limited to the one entitled to receive documents delivered under the provisions of Paragraph 1 and Paragraph 3 of the next Article.)

3. "Those matters as designated by the Cabinet Order" provided in Article 29, Paragraph 1 of the Law shall be the following ones:

1) Name, place of domicile or residence, nationality, and occupation of the parties involved in the conclusion, etc., of agreements for importation of technology (for a judicial person, its name, location of its main office, description of the business it is engaged in, amount of its capital, and the name of its representative);

2) Type of the technology, and its *quid pro quo* subject to the conclusion, etc., of agreements for importation of technology;

3) Time of the conclusion, etc., of agreements for importation of technology;

4) Reason of the conclusion, etc., of agreements for importation of technology;

5) In addition to those mentioned in the preceding Items, terms, and conditions of the conclusion, etc., of agreements for importation of technology, and any other matter designated by and Ordinance of the competent Ministry.

4. "Other cases determined by a Cabinet Order" provided in Article 29, Paragraph 2 of the Law shall be the conclusion, etc., of agreements for importation of technology concerning technical guidance for



managerial know-how (excluding those designated by the Minister of Finance and the Minister in charge of the industry involved.)

Ordinance concerning Direct Domestic Investments, etc., Ordinance No. 1, Nov. 20, 1980.

(Prior notice, etc., of conclusion, etc., of agreements for importation of technology)

*Article 3*

1. When a nonresident. . .and a resident are to file a prior notice under provisions of Article 4, Paragraph 1 of the Order, they shall fill in a form attached hereto as Appendix 9, and file it with the Minister of Finance and the Minister in charge of the industry involved, through the BOJ, within a three-month period prior to the intended date of conclusion, etc., of the agreement for importation of technology provided in Article 29, Paragraph 1 of the Law (hereinafter referred to as "conclusion, etc., of an agreement for importation of technology"). For the number of such a prior notice, the provisions of the latter part of Article 2, Paragraph 3 shall be applicable.

2. When the Minister of Finance and the Minister in charge of the industry involved have received a prior notice under the provisions of the preceding Paragraph, they shall enter therein a note to that effect, and deliver one copy thereof to the notifier as a receipt.

3. A person who is to inform the Minister of Finance and the Minister in charge of the industry involved as provided in Article 27, Paragraph 4 of the Law, whose *mutatis mutandis* application is provided in Article 30, Paragraph 4 thereof, under the provisions of Article 5, Paragraph of the Order, shall do so by submitting a note in a form attached hereto as Appendix 10 to the said Ministers through the Bank of Japan. For the number of such a note, the provisions of the latter part of Article 2, Paragraph 6 shall be applicable.

(Reports)

*Article 4*

2. When a nonresident and a resident who made conclusion, etc., of an agreement for importation of technology under a prior notice provided in Article 29, Paragraph 12 of the Law, have performed a transaction as mentioned in one of the following items, they shall report to that effect to the Minister of Finance and the Minister in charge of the industry involved, through the BOJ, in a form designated in the said Item, within a thirty-day period after the date of such a transaction or act. For the number of such a report, the provisions of the latter part of the preceding paragraph shall be applicable.

(Method to notify shortened period, etc.)

*Article 5*

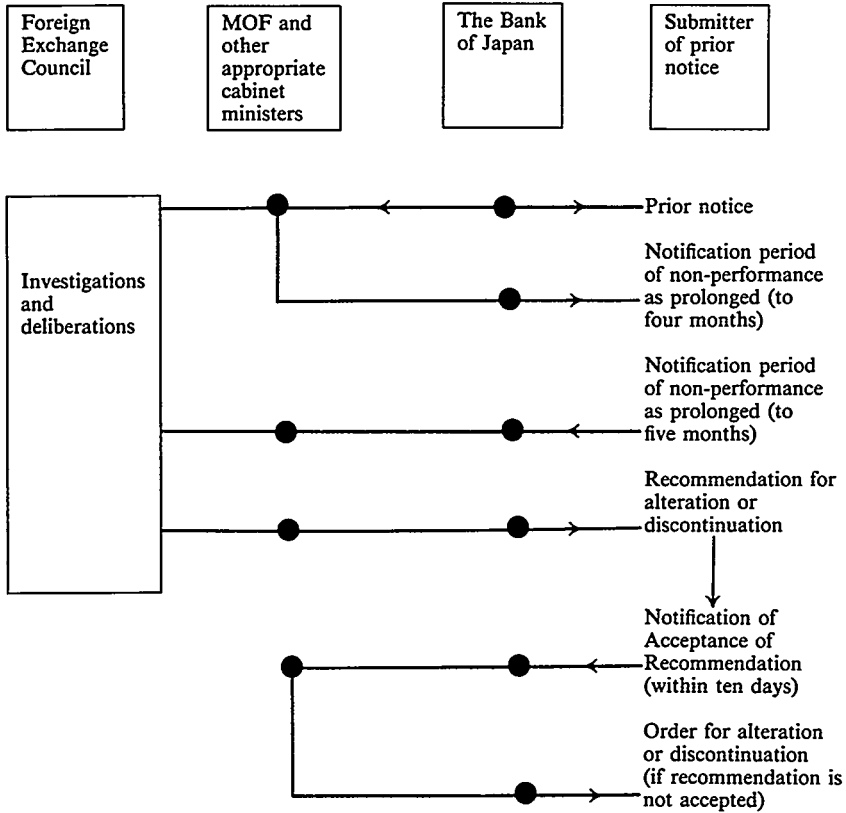
2. When a prior notice provided in Article 26, Paragraph 3 of the Law, or Article 29, Paragraph 1 thereof, covering a transaction or act mentioned in one of the following Items, is on file with the Minister of Finance and the Minister in charge of the industry involved, and the Ministers deem the transaction or act to be not specifically harmful, they shall inform the notifier, in a manner provided in the preceding paragraph, and on the date mentioned in the said Item that the transaction or act may be executed on or after that date.

- 2) Conclusion, etc., of an agreement for importation of technology falling under a), b), c), or d) below—The day of receipt of the prior notice;
  - a) Conclusion, etc., of an agreement for importation of technology, excluding conclusion, etc., of an agreement for the importation of designated technology;
  - b) Conclusion, etc., of an agreement for importation of the designated technology, whose amount of the proceeds payable to a nonresident or resident (excepting travelling expenses to and from Japan, and staying expenses in Japan, and the same shall apply in this Item) is an equivalent to one hundred million (¥100,000,000) yen or less, or nil;
  - c) Conclusion, etc., of an agreement for importation of the designated technology, intending to change a party or parties to a previous agreement, without any other alteration of terms and conditions of that previous agreement, provided that a prior notice of conclusion, etc., of that previous agreement has already been filed under the provisions of Article 29, Paragraph 1 of the Law, and the conclusion, etc., thereof has already been qualified to be executable; or
  - d) Conclusion, etc., of an agreement for importation of the designated technology, intending to renew or to amend the terms and conditions of a previous agreement, whose amount of proceeds payable to a nonresident or nonresidents exceeds an equivalent to one hundred million (¥100,000,000) yen, or is unascertainable whether to be the said equivalent or less, provided that a prior notice of the conclusion, etc., of that previous agreement has already been filed under the provisions of Article 29, Paragraph 1 of the Law, and the conclusion, etc., thereof has already been qualified to be executable (excluding the one involving a new type of the designated technology which was not contained in the previous agreement).

- 3) Conclusion, etc., of an agreement for importation of the designated technology other than those mentioned in b), c), or d) of the preceding Item—The day after the elapse of a two-week period counting from the day of receipt of the prior notice.

## Appendix G

### THE FLOW OF STEPS FOR THE PROLONGATION OF THE PERIOD OF NONPERFORMANCE




Source: Science and Technology Agency, Annual Report on Importation of Technology, 1983, p. 7.

Appendix H

RELATIONSHIP BETWEEN DATE OF NOTIFICATION SUBMISSION AND  
DATE OF PERMITTED CONTRACT PERFORMANCE

Technology type		Payment type	Under 100 million yen	Over 100 million yen
NEW CONTRACTS	DESIGNATED TECH.	1. Aircraft 2. Arms 3. Gun powder 4. Atomic Power 5. Space development 6. Computers 7. Next generation of computers 8. Lasers 9. Innovative materials 10. Salt electrolysis by nonrecrural method 11. Sea bottom petroleum production 12. Leather products	PERFORMANCE PERMITTED ON DAY OF NOTIFICATION (SAME DAY)	PERFORMANCE PERMITTED AFTER TWO-WEEK PERIOD OF NON-PERFORMANCE
		Other than designated technologies	SAME DAY	SAME DAY
MODIFIED CONTRACTS		Involving designated technologies	SAME DAY	TWO-WEEK PERIOD OF NON-PERFORMANCE
		Not Involving designated technologies	SAME DAY	SAME DAY
		Change in contract parties only	SAME DAY	SAME DAY



For description of cases involving extension of period of non-performance, see diagram number

Source: Science and Technology Agency, Annual Report on Importation of Technology, 1983, p. 7.