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Japan - Measures Affecting Consumer Photographic Film and Paper

Report of the Panel

The report of the Panel on Japan - Measures Affecting Consumer Photographic Film and Paper is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 20 March 1998 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report, an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel, and that there shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. PROCEDURAL HISTORY

1.1 On 13 June 1996, the United States requested consultations[1] with Japan pursuant to Article 4.4 of the Dispute Settlement Understanding (DSU) and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT) regarding certain laws, regulations and requirements of Japan affecting the distribution, offering for sale and internal sale of imported consumer photographic film and paper.[2] The United States considered that the Japanese measures specified in its consultation request violated the obligations of Japan under GATT, including Article III and Article X, and that those measures nullified or impaired benefits accruing to the United States directly or indirectly under GATT, within the meaning of Article XXIII:1(a) and (b). The United States further stated that it reserved the right to raise additional factual claims and legal matters during the course of the consultations. The consultations were held on 11 July 1996, but failed to resolve the dispute.

1.2 On 20 September 1996, the United States requested the establishment of a Panel pursuant to Articles 4 and 6 of the DSU.[3] In its request, the United States alleged that Japan has implemented and maintains certain laws, regulations, requirements and measures (hereinafter collectively "measures" or "'countermeasures'")[4] affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper. The US considered that such measures nullify or impair benefits accruing to it, within the meaning of Article XXIII:1(a), as a result of the failure of Japan to carry out its obligations under Articles III and X of GATT. More specifically, the United States claimed that the Japanese Government measures:

a. were implemented and maintained so as to afford protection to domestic production of consumer photographic film and paper within the meaning of Article III:1 of GATT;

b. conflict with Article III:4 of GATT by affecting the conditions of competition for the distribution, offering for sale, and internal sale of consumer photographic film and paper in a manner that accords less favourable treatment to imported film and paper than to comparable products of national origin; and

c. conflict with Articles X:1 and X:3 of GATT because the measures lack transparency in that they were not promptly published and were not administered in a uniform, impartial and reasonable manner.

In addition, the United States claimed that the application of these measures by Japan nullifies or impairs, within the meaning of Article XXIII:1(b) of GATT, the tariff concessions that Japan made on black and white and colour consumer photographic film and paper in the Kennedy Round, Tokyo Round, and Uruguay Round multilateral tariff negotiations. The US claims are discussed in more detail in Part III below.

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[1]The request was circulated as WT/DS44/1 on 21 June 1996.

[2]The term "consumer photographic film" as used by the United States includes both colour and black and white film designed and used for capturing personal images by consumers through still photography using silver halide technology. It includes both negative and reversal (slide) film, and includes film incorporated in so-called "single-use cameras" which are returned along with the film to the photoprocessing facility. It excludes various specialized films used by professional photographers for resale ("professional" film) and various other specialty films (x-ray film, microfilm). The term "consumer photographic paper" as used by the United States refers to photosensitive paper used to make still colour and black and white photographic prints from consumer photographic film for the images and applications typically demanded by consumers.

[3]The request was circulated as WT/DS44/2 on 23 September 1996.

[4]The parties disagree on the translation on the Japanese word *taisaku*. The United States uses "countermeasure", whereas in Japan's view, "measure" or "policy in response to" are more adequate. See Annex on Translation Problems, translation issue 1.

1.3 At its meeting on 16 October 1996,[5] the Dispute Settlement Body (DSB) established a Panel in accordance with Article 6 of the DSU. However, since Japan expressed its concerns about the procedural problems of the US panel request, the DSB agreed that the terms of reference were to be drawn up by the parties to the dispute within 20 days in accordance with Article 7.1 of the DSU. The parties to the dispute failed to agree on the terms of reference and, as a result, the standard terms of reference as set out in Article 7.1 of the DSU were applied:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS44/2, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".[6]

1.4 The European Communities and Mexico reserved their rights as third parties to the dispute.

1.5 On 12 December 1996 the United States, pursuant to Article 8.7 of the DSU[7], requested the Director-General to determine the composition of the Panel.

1.6 On 17 December 1996, the Director-General composed the Panel as follows:

Chairman:	Mr. William Rossier
Members:	Mr. Adrian Macey
	Mr. Victor Luiz do Prado

1.7 The Panel held two substantive meetings with the parties to the dispute. The first was held on 17 and 18 April 1997, and the second on 2 and 3 June 1997. The Panel had one meeting with the third parties to the dispute, on 18 April 1997.

1.8 In view of the fact that the dispute involved the consideration of a large volume of documents, which were predominantly in the Japanese language, it was essential that these documents be translated into the working language of the Panel, which was English. It was essential that such translations be correct, and that in the event of any disagreement between the parties as to the correct translation, a mechanism be established to resolve such translation problems.

1.9 In this regard, the Panel, in consultations with the parties, drew up Procedures for the Resolution of Possible Translation Issues. These provided as follows -

> 1. The party first relying on a Japanese-language document in a written submission or oral presentation shall provide copies of the full Japanese-language document and the relevant portions in English at the time that the party first makes reference to the document in the Panel proceedings.
>
> 2. If one party believes that additional portions of a previously submitted document are relevant, it shall then supply the additional translation at the time that that party first makes reference to the document in the Panel proceedings.

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[5]WT/DSB/M/24.

[6]WT/DS44/3, dated 7 December 1996.

[7]Article 8.7 of the DSU: "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request".

3. If one party disagrees with the other party' s translation of a Japanese-language document or portion thereof, it shall prepare an alternative version of the contested portion of the translation. This shall be submitted to the Panel and to the other party with supporting written argumentation as needed. The other party may also submit its argumentation at this stage.

4. To the extent relevant for the resolution of the legal issues involved in this case, the Panel shall attempt to resolve any translation problem submitted to it, having recourse as necessary to independent experts appointed by the Panel, or to such other means as the Panel deems appropriate to the circumstances.

1.10 The Panel appointed the following translation experts:

Professor Zentaro Kitagawa, Kyoto Comparative Law Center, Kyoto, Japan; and

Professor Michael Young, Center for Japanese Legal Studies, Columbia University School of Law, New York, USA.

1.11 The translation problems raised by the parties which were submitted to the experts, and the responses by both experts are attached to this report in an "Annex on Translation Problems".

1.12 The Panel issued the descriptive part to the parties on 22 September 1997. The interim report was issued on 5 December 1997. Pursuant to Article 15.2 of the DSU, both parties submitted written requests for the Panel to review precise aspects of the interim report on 19 December 1997, but did not ask for a further meeting to discuss the issues identified in their requests. The Panel issued the final report to the parties on 30 January 1998.

II. SUMMARY OF FACTUAL ASPECTS

A. THE MARKET FOR PHOTOGRAPHIC FILM AND PAPER IN JAPAN

2.1 This dispute concerns the distribution of imported *consumer* photographic film and paper in Japan. Throughout this report, the terms "photographic film and paper" and "photographic materials" shall be understood to mean consumer photographic film and paper or consumer photographic materials.

2.2 The history of the Japanese tariff bindings and applied rates for photographic film and paper in Japan are as follows:

ROUND	**FILM**		**PAPER**	
	B&W	**Colour**	**B&W**	**Colour**
Pre-Kennedy (1964)	30%*	40%*	25%*	40%*
Kennedy Round (1967)	15.0%	40%*	12.5%	40%*
Tokyo Round (1979)	7.2%	4.0%	6.6%	4.0%
Uruguay Round (1994)	Free	Free	Free	Free

(* = Applied, not bound)

Until 1970-72, black and white film and paper were the predominant products used in Japan. Thereafter, the dominant products were colour film and paper. Today, colour film and paper account for 97 percent of Japan's total market for consumer photographic materials, with black and white film and paper accounting for only 3 percent.

2.3 Japan's photographic materials market is supplied by four manufacturers, two domestic and two foreign.[8] The two domestic manufacturers are Fuji Photo Film, Ltd. (Fuji), and Konica Corporation (Konica). The two foreign manufacturers, Eastman Kodak Company of the United States (Kodak) and Agfa-Gevaert Aktiengesellschaft of Germany (Agfa).

2.4 **Japan** notes that since 1965 the share of imports in the Japanese market for colour film has ranged from 9 percent to a peak of 20.0 percent in 1981. According to the **United States** and **Japan**, the import share of the Japanese market for photographic film was around 15 percent by 1995 and that of this, Kodak's share is around 10 percent and Agfa's around 5 percent of the market. **Japan** further submits that for black and white film the share of imports has ranged from about 2 percent in 1965 peaking at around 41.4 percent in 1985 and settling at around 25 percent by 1995. According to Japan, Kodak's share of the black and white market has increased from 3.6 percent in 1967 to a peak of 17.6 percent in 1983.

2.5 The **United States** submits that foreign film manufacturers distribute all of their film through wholly-owned local sales subsidiaries. Two-thirds of Kodak film is, in turn, sold to retailers, 9 per cent is sold to so-called secondary photospecialty wholesalers, with the remaining sold through Kodak-affiliated photofinishing laboratories. Agfa's local subsidiary sells 90 per cent of its film to retailers and the rest to secondary wholesalers. Fuji sells all of its film to primary wholesalers, who then resell through regional secondary wholesalers and 8 per cent through laboratories, while the remainder is sold direct to retail. Konica sells through sales subsidiaries that were once independent photospecialty wholesalers.

[8]Polaroid, which specializes in instant-print film, also sells photographic materials in Japan. However, the United States is not claiming nullification and impairment or violation with regard to instant-print film. Two domestic manufacturers, Oriental Photo Industrial Co., Ltd. and Mitsubishi Paper Mills, Ltd., produce paper only. All four domestic photographic manufacturers distribute paper to photo finishing laboratories.

2.6 According to the **United States** and **Japan**, photographic film is sold in Japan by 280,000 retailers. These retailers can be divided into three groups:

(a) Traditional photospecialty stores, whose primary line of business is the sale of film, cameras and accessories. There are some 30,000 such stores, selling roughly half of the film sold in the Japanese market.

(b) General merchandise stores (including supermarkets and discount, department, drug and convenience stores). There are some 70,000 such stores, selling roughly one-third of the film sold.

(c) Other retail outlets (including kiosks, tourist resorts, parks and other small outlets). There are some 180,000 such outlets, selling the remainder of the film not sold by traditional photospecialty and general merchandise stores.

B. JAPANESE ENTITIES AND MEASURES RELATED TO THE US CLAIMS

2.7 As summarized in Sections III and IV, the claims raised by the United States concern two principal government agencies, several councils and business associations, and numerous specific measures. The "countermeasures" are divided by the United States into three broad categories: (1) distribution "countermeasures", which allegedly encouraged and facilitated the creation of market structures for film and paper in which imports are excluded from traditional distribution channels (collectively referred to by the United States as "distribution countermeasures"); (2) the Large Stores Law, which allegedly restricts the growth of an alternative distribution channel for film; and (3) restrictions on premiums and misleading representations under the Premiums Law, which allegedly disadvantage imports by restricting sales promotions (collectively referred to by the United States as "promotions countermeasures"). The United States refers to the three sets of measures collectively as "liberalization countermeasures."[9]

2.8 This section contains descriptions of the two principal Japanese government agencies and other entities (i.e., several councils and business associations) whose activities have been challenged by the United States. The provisions of specific measures challenged by the United States are described in relevant parts under the relevant entity, except for the 1967 Cabinet Decision, which is set out separately at the beginning. The provisions of these measures are set out here so as to provide a single reference point containing the background and text of these measures for the arguments of the parties and the findings of the Panel. The inclusion of a measure or selected text of a measure in this section does not address whether it is a "measure" as that term is used in a technical sense in any particular GATT provision.

1. 1967 CABINET DECISION

2.9 The United States focuses attention on the Cabinet Decision Concerning Liberalization of Inward Direct Investment of 6 June 1967 ("1967 Cabinet Decision").[10] This was a decision of the Cabinet of the Government of Japan regarding liberalization of direct investment and the "(counter)measures"

[9]According to the United States, the "distribution countermeasures", Large Stores Law and related measures, and "promotion countermeasures" in combination nullify or impair benefits within the meaning of Article XXIII:1(b). The "distribution countermeasures", as a set, also violate Article III:4 and nullify or impair benefits within the meaning of Article XXIII:1(b). The Large Stores Law and related measures also nullify or impair benefits within the meaning of Article XXIII:1(b), in the context of the restrictive distribution structure in Japan. And, the promotions countermeasures, as a set, nullify or impair benefits within the meaning of Article XXIII:1(b), in the context of the restrictive distribution structure in Japan. The specific failures to publish laws, regulations, or administrative rulings of general application discussed below each constitute a violation of Article X:1.

[10]1967 Cabinet Decision, US Ex. 67-6.

that should be taken in proceeding with liberalization. The Government of Japan had requested the Foreign Investment Council ("FIC") to conduct an enquiry regarding inward direct investment. It was on the basis of the report of this Council that the Government of Japan made its Decision. In this decision the Japanese Government expressed its support for the Report of the Foreign Investment Council Expert Committee of 2 June 1967 ("1967 FIC Report").[11] The FIC was established pursuant to the Law Concerning Foreign Investment, which provided it would be established as an organization attached to the Ministry of Finance with the Minister of Finance as its chairman.[12] The 1967 FIC Report was, in turn, based on the Report of the FIC Expert Committee of 17 May 1967 ("1967 FIC Expert Committee Report").[13] Regarding the regulation of unfair trade practices, the 1967 FIC Expert Committee Report also stated what follows:

> "(1) When foreign capital is brought into Japan, it is possible for a parent company to use vast amounts of capital to engage in dumping, offer premiums, and conduct large-scale publicity and advertising, etc. In the future, as liberalization of direct investment in the domestic market progresses, such risk may conceivably be reinforced. Therefore, in such a situation, it is necessary to fully study whether these actions qualify as unfair trade practices as defined in Article 2 of the Antimonopoly Law and can be regulated pursuant to provisions under Article 19 of the said Antimonopoly Law or the Law Against Unjustifiable Premiums and Misleading Representations.
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> (2) For the application of the Antimonopoly Law, while one may not specifically select foreign capital affiliated firms for differential treatment, foreign capital affiliated firms nevertheless have the strong capital and technological background of the parent company and are usually in an economically strong position. Consequently, it is believed that they will often become the object of regulation of the Antimonopoly Law. On this point, we must be able to apply standards to deal with any disorderly activities by foreign capital because existing standards of regulation of unfair trade practices are not necessarily clear and we may, for example, clarify them by making use of a special designation or some other method".[14]
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> (3) For the provision of large-scale premiums, it is believed that establishing fair competition codes pursuant to the [Premiums Law] with assistance from the industry that might be affected, would be an effective ["countermeasure"]".[15]

The 1967 Cabinet Decision provided the following basic direction for the "(counter)measures" to be taken in carrying out capital liberalization:

> "One. Basic Policy Concerning the Liberalization Inward Direct Investment
>
> 1. Basic Attitude Toward the Liberalization of Inward Direct Investment
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> Our country has been endeavouring to deepen its ties with the international economic community through such means as the liberalization of foreign trade, foreign exchange and participation in the Kennedy Round tariff cut negotiations. Now we are prepared to move forward also with regard to the liberalization of capital movements.

[11]US Ex. 67-5A.
[12]Article 19 of the Foreign Investment Law.
[13]US Ex. 67-5B.
[14]Ibid., p. 3.
[15]Ibid.

Under these internal and external circumstances, it is time to gather the energy and wisdom of the [Japanese] people in order to further develop our economy and to improve the standard of living. For the liberalization of capital movements, and in particular, the liberalization of inward direct investment, which is an issue with this Council, it has been determined that this country should be taken to deal with them as independent tasks, in order to deepen cooperation with the international economic community and plan the long-term development of our own economy …

As for our national economy as liberalization progresses, although foreign capital may advance in to many of our industries, it is hoped that our firms will be able to compete fairly and effectively with them fairly and cooperate with them on equal terms, thereby promoting national economic interests. The largest future goal of the people, business circles and government must be the swift attainment of such a stage by our national economy …

In order to facilitate such activities on the part of the private sector, and guide and complement these efforts, the government, too, must make unprecedented efforts to revitalize science and technology and research and development, while paying close attention to the improvement of industrial system and the financial system so as to create an environment in which the economy can cope with liberalization. At the same time, the government should take the initiative by setting an example of good administration befitting the age of liberalization by making its own finance and administration efficient and modernized and lowering the cost of administration. It is hoped that such efforts will build the basis on which our enterprises can compete against foreign capital on equal terms. The measures for liberalization should be reviewed after an appropriate interval of one to two years to expand the scope of liberalization, taking into consideration the results of efforts made by the private sector and the effect of government measures.

…

If, therefore, our enterprises are to compete against foreign capital on equal terms, the following would be necessary: companies must improve their own quality and pursue the organization of the industrial system, intensively strengthen the capacity for technological development, organize the financial system in parallel with the organization of the industrial system, and lower of long-term interest rates.

On the other hand, it would be necessary to restrain foreign enterprises coming into Japan after liberalization from disturbing order in domestic industries, by resorting to the strength of their superior power, and from advancing into the non-liberalized sectors by evading control.

The establishment of these "(counter)measures" for strengthening the capacity of our enterprises for international competition and for preventing foreign enterprises from disturbing order in our industries and market would be a basic necessity if the liberalization is to be promoted and if our people are to enjoy its economic benefits.

…

The basic direction of the "(counter)measures" that the government should adopt are the following three points:

1) Prevent disorder that may arise from the advancement of foreign capital;

> 2) Create the foundation to enable our enterprises to compete with foreign enterprises on equal terms;
> 3) Actively strengthen the quality of [domestic] enterprises and reorganize the industrial system so that they can fully compete with foreign capital.[16]
>
> …
>
> Modernization lags behind most in the distribution sector. Here, the power of resistance against the inroad of foreign capital is weak, and the impact of foreign capital advancing into this sector will also pose significant impact on the production sector. It is necessary, therefore, to implement countermeasures in support of the efforts of industry with the objectives of modernizing the distribution structure, fundamentally strengthening the enterprises in this sector, and establishing a mass sales system."[17]

2.10 **Japan** submits that the 1967 Cabinet Decision was formally repealed 26 December 1980.[18] The **United States** contends that the repeal affects only the portion of the Cabinet Decision relating to controls on international investment in Japan. The United States alleges that the 1980 decision did not revoke the distribution policies and liberalization "countermeasures" directed by the 1967 Cabinet Decision.

2. MITI AND RELATED ITEMS

2.11 The US submissions focus in particular on the activities of the Japanese Ministry of International Trade and Industry (MITI). Among other things and of particular concern in this proceeding, according to the United States, MITI established various groups in the 1960s and 1970s to examine issues related to distribution of goods, both generally and in respect of photographic materials. In addition, MITI is responsible in part for the implementation of the Large Scale Retail Store Law, one of the principal measures challenged by the United States.

(a) Industrial Structure Council Distribution Committee: Sixth and Seventh Interim Reports

2.12 The United States notes that in 1964, MITI established the Industrial Structure Council, authorizing it to "investigate and examine important issues concerning industrial structure" in response to an inquiry by the MITI Minister.[19] The Industrial Structure Council is an advisory council, composed of academics and industry representatives. MITI plays an important role in staffing[20] the Council and the general affairs of the Council are managed by MITI, its Industrial Policy Bureau and Industrial

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[16]MITI History Vol. 17, pp. 379-388, (provisional translation) US Ex. 67-6, pp. 3-4.

[17]1967 Cabinet Decision, p. 6, US Ex. 67-6. According to the **United States**, on the same day the Cabinet announced its decision, the Chief Cabinet Secretary issued a formal statement directing foreign firms to inter alia: "collaborate with our industry's efforts to voluntarily maintain order; cooperate with the improvement of international balance of payments, such as export promotion; hire Japanese nationals as executives … [and] cooperate with the economic policies of the government." Chief Cabinet Secretariat Talk, Regarding Implementation of Liberalization Measures for Inward Direct Investment, 6 June 1967, reprinted in Yoshida Fujio, Capital Liberalization and Foreign Investment Law, 30 October 1967, p. 160, US Ex. 67-16.

[18]Cabinet Decision of 26 December 1980 Concerning the Application Policy of Inward Investments, Japan Ex. B-55.

[19]Article 102 of the Cabinet Order No. 390. The Industrial Structure Council Order provides that the ISC be "composed of no more than 130 members" to be "appointed by the Minister of International Trade and Industry." Industrial Structure Council Order, Cabinet Order No. 79, 31 March 1964, Japan Ex. B-3.

[20]**Japan** disagrees with the US allegation that the Distribution Committee was staffed by MITI officials and contends that the Industrial Structure Council including the Distribution Committee consists of persons with learning and experience appointed by MITI. Investigations, deliberations, and decision-making are all carried out by the members. According to Japan, although MITI officials sometimes attended meetings as observers, they take no part in the decision-making process.

Structure Division.[21] The Industrial Structure Division has responsibility for "matters pertaining to the Industrial Structure Council".[22]

2.13 The United States notes that the Council established the Distribution Committee to study and report on matters relating to the Japanese distribution system. The Distribution Committee issued 19 interim reports between 1964 and 1995. Both parties refer to a number of these interim reports in their submissions and the United States lists two of them, the Sixth Interim Report on "Distribution Modernization Outlook and Issues (5 August 1968)[23] and the Seventh Interim Report on "Systemization of Distribution Activities" (22 July 1969)[24], as among the specific measures that it is challenging in this dispute. As set out in the description of the parties' arguments, the parties cite different parts of the reports to support their contentions as to the general thrust of the reports.

(i) The 1968 Sixth Interim Report

2.14 The Sixth Interim Report dealt with a broad spectrum of issues with a bearing on distribution. These issues were categorized into four parts:

(i) the strengthening and modernizing of persons in charge of distribution functions;
(ii) the adjustment of market conditions;
(iii) the rationalization of physical distribution;
(iv) the adjustment of the environment which is the common basis for the realization of these issues.

The Report listed the goals of distribution policy for the next five years as:

(i) organization and cooperative business formation;
  (1) the formation of voluntary chains;
  (2) the formation of combinations among stores in the retail industry group department stores, group supermarkets, universal markets, etc.;
  (3) the redevelopment or construction in shopping districts;
  (4) the integration of functions based on wholesale industry collectivization (general wholesale centres, wholesale trade complexes);
(ii) the modernization of management methods and facilities;
(iii) securing the labour force and education of personnel;
(iv) the rationalization of trade practices and trade system;
(v) reform of physical distribution technology;
(vi) the rationalization of conditions of location;
(vii) the formation of a distribution information network and improvement of statistics;
(viii) facilitating financial aspect of distribution.

According to the United States, the Report also addressed the negative impact liberalization could have on distribution in Japan, notwithstanding that liberalization could rationalize and modernize the Japanese distribution system:

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[21]Article 7 of the Industrial Structure Council Order, US Ex. 64-1 and Japan Ex. B-3.

[22]The United States provides in US Ex. 52-2 the following translation:
The Industrial Structure Division is in charge of the following administrative matters:
1. development of, as well as comprehensive coordination in implementing, the policies and plans relating to the industrial structure relating to business under the supervision of the MITI;
2. general management of administrative matters pertaining to new industries under the supervision of the MITI; and
3. matters pertaining to the Industrial Structure Council.

[23]US Ex. 68-8, and Japan Ex. B-7.

[24]US Ex. 69-4.

1. There is a risk that growth sectors will fall under the monopolistic control of foreign capital, resulting from the difference in capital resources and the like.

2. There is a risk that the process of sales expansion by foreign capital affiliated distribution enterprises will aggravate excessive competition and hinder the smooth implementation of distribution modernization plans, and the [established] order of trade will be disrupted.

3. There is a risk that the manufacturing sector will be dominated by controlling the sales routes, bringing about the international subcontracting of Japanese industry.[25]

(ii) The 1969 Seventh Interim Report

2.15 The United States also submits that the Seventh Interim Report was issued as a "first step in meeting the challenges currently facing Japan's distribution sector". Although the Report notes that the aim of systemization[26] in the distribution system was to improve functionality and productivity, it specifically identified the threat of foreign capital as a reason to reform the distribution sector:

> "Today, amidst calls for the active promotion of capital liberalization in the distribution sector, we think that efforts to systemize distribution have a vital importance in strategic significance. … [T]he systems gap [between Japan and America] is expected to have a decisive effect on distribution activities in particular, the concerted efforts of the government and the private sector must be directed at systemization from the point of view of a capital liberalization countermeasure.
>
> …
>
> [I]t is true that one effect of systemizing Japan's distribution system is the simplification of entry [into Japan's market] by foreign capital, [enterprises] which are more adept at systems methodology. [But] to make inroads, we should instead emphasize preventing the immense impact that would be felt if foreign capital took the lead in systemizing Japan's distribution activities, and quickly develop a system sufficiently capable of countering the rational systems introduced by foreign capital."[27]

In the US view, the Report acknowledged that systemization must be approached by looking at the distribution system as a single whole and not as a cluster of separate and individual distribution functions. It was acknowledged that with respect to goods, the most important factor is distribution, and that systemization could only progress around the centralized processing of physical distribution control at distribution centres and stock points. The Committee identified three approaches to systemization:

(i) the commodity approach;
(ii) the institutional approach;
(iii) the functional approach.

The Committee proposed the following policies for the government to adopt:

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[25]Sixth Interim Report, p. 8, US Ex. 68-8.

[26]It is Japan's view that MITI distinguished rationalization and systematic policies. The United States does not follow this distinction and uses the single term "systemization" to cover both concepts.

[27]Industrial Structure Council Distribution Committee, Systemization of Distribution Activities (Seventh Interim Report), 22 July 1969, p. 4, US Ex. 69-4.

(i) establishing a Distribution Systemization Council;[28]
(ii) presenting guide posts and promoting standardization;
(iii) establishing a system for providing distribution-related information;
(iv) providing incentives in the areas of financing, taxation, etc.

(b) 1969 Survey on Transaction Terms

2.16 In 1968, the Institute for Distribution Research, a private, but MITI-affiliated organization, was commissioned by MITI to conduct a survey of transaction terms in several industries. Its survey on transactions terms in the film industry (1969 Survey)[29] was submitted by the Institute to MITI in 1969, and (re-)published by MITI in 1971.[30] The purpose of this Survey was "to research current trade practices, isolate problems, and prepare basic materials to develop and spread rational trade practices."[31] The Survey identified foreign companies and changes in distribution as problems:

> "As we have already seen, there is a view and an impression that the industry of general use photographic film, based on an oligopoly of two domestic manufacturers, is superficially in a stable and normal state in which contract formation and documentation of transactions are progressing. Consider, however, one postulate:
>
> (1) If the oligopoly of the two domestic manufacturers is broken up by a foreign company; and
>
> (2) If a new [distribution] route emerges to compete against the route of photographic material dealers, which is the core existing route in the distribution market.
>
> There may be very few observers who have a sense of crisis regarding (1) and (2) as realistic issues; however, they should now be considered as the most concrete and realistic problems.[32]

Based on these perceived problems, the Survey made the following policy recommendation:

> Given this situation, it is necessary to formulate measures before hand in order to minimize the anticipated disorder in the distribution market. This is why it is significant to rationalize and standardize transaction terms and to create an [established] order of distribution.[33]

[28]See section II.B.1.(d) (discussing the establishment of the Distribution Systemization Promotion Council, which produced the 1971 Basic Plan for the Systemization of Industry).

[29]Institute of Distribution Research, Fact-Finding Survey Report Pertaining to Transaction Terms: Actual Conditions of Transaction Practices in the Wholesale Industry, March 1969, US Ex. 15. The survey became the basis for MITI's July 1970 "Guidelines for the Standardization of Transaction Terms for the Photofilm Industry." See p. 3, US Ex. 70-4. According to the United States, in 1971, MITI republished an edited version of the survey under its own name. MITI Business Bureau, Actual Conditions of Transaction Terms in the Wholesale Industry, 21 August 1971, US Ex. 20.

[30]The parties disagree on the publication date of the 1969 Survey. According to the **United States**, the 1969 Survey was published in 1969 and re-published by MITI in 1971. **Japan** contends that in 1969, the Institute for Distribution Research submitted the survey to MITI and that is was published by MITI only in 1971.

[31]US Ex. 20, p. 7.

[32]US Ex. 15, p. 62.

[33]Ibid., p. 63.

(c) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film

2.17 In 1970, MITI's Transaction Terms Standardization Committee, published "Guidelines for Rationalizing Terms of Trade for Photographic Film" (1970 Guidelines)[34]. The Committee was set up by MITI to study the question of standardization of transaction terms in industry generally, and in light of capital liberalization, more specifically.[35]

2.18 According to the United States, the introduction of the 1970 Guidelines noted that, "[I]n order to prevent disruption of the established order of trade by foreign businesses with powerful capital strength, the standards for rational transaction terms must be clarified."[36]

2.19 The guidelines were as follows:

> "I. Transaction terms concerning sales contracts
>
> (1) Stocking method
>
> *Current situation*. The most commonly used stocking method for both the wholesalers (i.e., resalers) and retailers is purchasing.
>
> (2) Discounts
>
> *Current situation*. When we look at the current situation of the cash discount system (the system of discounting transaction price according to the length of the account payment period) mainly among the wholesalers, we see that a large number of businesses receive discounts for purchasing, and over half of the businesses use this system for selling as well. Furthermore, for the most of these, the criteria for discounting appear to be made clear in advance.
>
> Concerning the volume discount system (the system of discounting the transaction price according to the volume of a single order), the majority of wholesalers enjoy this system for purchasing, but only a few use it for sellers. The volume discount has generally come to be used less as the size of the transaction grows, because the burden on the seller is greater.
>
> *Problems and Direction of Corrective Measures*. Both the cash discount and volume discount systems are relatively systematized, but the discount amount is often paid at a fixed date such as at the end of a [certain] term after the completion of the transaction, this practice makes it difficult to differentiate from a rebate. It is best if the corresponding amount is discounted and settled at the time of account settlement since then the discount criteria is made clear in advance. A negative trend is seen for volume discounts, but it is desirable to move in the direction of using them in the photo film industry from the perspective of reducing distribution costs.
>
> (3) Rebates
>
> *Current situation*. For rebates (returning to the buyer a portion of the amount paid by the buyer) from the wholesales suppliers, most businesses receive rebates in much the same way as discounts. There are three ways to receive rebates: directly

[34]US Ex. 70-4, and Japan B-24.
[35]Ibid.
[36]Ibid., p. 2. This policy objective was reiterated in the 1971 Basic Plan. See section II.B.1.(d).

from the manufacturer, from the manufacturer through the tokuyakuten, and as the tokuyakuten's own rebate. The main types of rebates are a fixed-rate rebate, settlement rebate, and the goal achievement rebate; cumulative rebates are rare.

Approximately 30 percent of the wholesalers provide rebates to their purchasers, which is substantially lower than the percentage [of wholesalers] who receive rebates.

Problems and the Direction of Corrective Measures. In general, the rebate [system] depends on the seller's discretion. It is widely used, therefore, as a means of controlling the distribution process. When this is excessively done, however, this practice could be an unfair trade practice under the Antimonopoly Law. Even when it does not go that far, it can lead to substantial control of a distribution channel, and make it difficult for the recipient of the rebate to make clear management plans. Subsequently, this practice may cause the problem of preventing the merits [of the rebate system] from being passed on to the final price. Moreover, the rebate system has recently become so complicated that negative aspects such as an increased administrative burden have arisen. It is the principle of the discount system to pass on the advantages gained from large-volume transactions and the like to consumers. Although we recognize that rebates have a supplemental role in other price policies, this should be kept to a minimum.

II. Transaction terms for the delivery of goods

(1) Frequency of delivery of goods

Current situation. The frequency of goods delivery to purchasers by wholesalers ranges from daily and once every two weeks or more to no delivery. A noteworthy point is that as many as 30 percent of all businesses make deliveries every day to all of their purchasers. This is thought to be due to the importance of delivery as an element of the wholesale function and also due to the fact that orders are taken and market information is gathered at the delivery. Over half of the wholesalers expressed negative opinions about setting regular delivery dates and charging fees for deliveries made on the other days.

Problems and Direction of Corrective Measures. As mentioned above, delivery frequency is highly regarded as one important function of wholesaling, and its frequency is not really regarded as a problem. It is believed, however, that the changes in the economic environment surrounding the distribution sector such as labour shortages and the worsening traffic situation will not allow this custom to continue indefinitely. Therefore, it is recommended that, in principle, wholesalers make deliveries twice a week for the time being, and impose charges for special services.

(2) Arrangements for minimum orders per delivery

Current Situation. Although wholesalers will make deliveries even every day if there's sufficient quantity, they are willing to set minimum delivery requirements. At present, however, almost no such arrangements are being made. Approximately half [of the wholesalers] want to implement minimum delivery requirement arrangements and believe it to be feasible.

Problems and the Direction of Corrective Measures. Due to the nature of the product, demand is less diversified compared to other products. It is necessary to set a minimum delivery requirement to reduce distribution costs.

(3) Returned goods

Current situation. Generally, there are not many returns. In particular, returned goods from wholesalers (tokuyakuten and resalers) are rare. The number of returned goods from retailers to wholesalers is also low.

III. Transaction terms for account settlement

Current situation. The collection method of wholesalers is generally "collection on a specific date after the due date", but "collection on delivery" is also relatively frequently used.

Collection on a specific date includes both collection of the full amount and collection of the partial amount; it is determined by the size of the retailer and its cash flow. Cash collection is more frequent in most cases compared with the collection of notes. The most common sight of a note is between 61 to 70 days.

A common payment method of the wholesalers is "payment of the full amount on a specific date after the due date". Although cash payment is more commonly used than notes, the percentage of note payments made by the wholesalers is higher than that of the collections made from the retailers. The most common sight [credit] of a note is approximately 60 days.

Problems and Corrective Measures. In both payment and collection mainly by wholesalers, cash settlement is predominant and the sight [credit] notes are shorter compared with those of other products. The practice of partial payment is particularly prevalent among retailers; leaving the balance on credit destabilized the term-end book closing. Consequently, it makes the entire transaction uncertain, thus, inhibiting the - promotion of reasonable terms of trade such as a discount system. Therefore, the account should be settled in full with cash and a promissory note. Also, while still only few in number, there are promissory notes with unusually long sight. For such promissory notes, appropriate interest should be charged on the same principle as the cash discount system.

IV. Dispatched employees

Current Situation. Dispatched employees are rarely seen at general photography materials retailers. There are dispatched employees in the DPE departments of large retailers; however, few are systematized practices and the dispatch is made only in special cases".

(d) 1971 Basic Plan of the Distribution Systemization Promotion Council

2.20 The United States notes that in its Seventh Interim Report, the Distribution Committee proposed the creation of the Distribution Systemization Promotion Council in order to "set the basic direction for systemizing distribution activities". In 1970, MITI established the Council and in 1971, the Council published the "Basic Plan for the Systemization of Distribution" (the "Basic Plan").[37] The Council described the Basic Plan as representing "the result of government and the private sector joining forces to consider the basic direction and goals for the systemization of distribution in Japan, and the means

[37]US Ex. 71-10 and Japan Ex. B-18.

of realizing these goals, with the year 1975 set as the tentative target date for completion."[38] The Council affirmed the "government and the private sector will make a wholehearted effort to realize this basic plan."[39]

2.21 According to the United States, MITI's introduction to the Basic Plan stated that among the various problems facing the trade and industrial policy in the 1970s, "the modernization of Japanese distribution is urgent from the standpoint of achieving balanced development of the Japanese economy, as well as from the standpoint of consumer price "(counter)measures" and capital liberalization "(counter)measures".[40] The introduction further acknowledged that the Japanese economy had grown tremendously, and the question of how best to supply consumers with goods produced in large quantities was still an issue. Consequently, the Basic Plan acknowledged that the role of distribution, which connects production with consumption, was very important. The Basic Plan noted that since distribution activity involves numerous enterprises, the close interconnections between these enterprises must be given careful attention. As a result, it was necessary to regard the entire distribution process from production to consumption as a single system, and to effect a comprehensive increase in the efficiency of this system. The Committee which produced the Basic Plan indicated that with this plan, MITI had decided to make every effort toward the fulfilment of distribution systemization policies.

2.22 The United States further notes that the Basic Plan determined that there was a need for standardizing transaction terms to secure effective and fair competition and to reorganize market conditions generally, but also more specifically in connection with capital liberalization to "prevent disruption of the [established] order of trade by foreign capital-affiliated firms, which have enormous strength."[41]

(e) 1975 Manual of the Distribution Systemization Development Centre

2.23 The United States notes that the Distribution Systemization Development Center[42] was established with MITI funding in 1972 in order to facilitate the work of the Distribution Systemization Promotion Council and was delegated the task of working with industry to produce various "Systemization Manuals" for specific industries. The Center was created pursuant to the Distribution Systemization Promotion Council's 1971 Basic Plan. In 1975, it published the "Manual for Systemization of Distribution by Industry: Camera and Film" (the 1975 "Manual").[43]

2.24 The 1975 Manual was prepared in collaboration with industry groups, camera manufacturers, film manufacturers, camera and film wholesalers, camera and film retailers, and camera and film industry publishers. The Center acknowledged that as the economic environment grew worse as a result of inflation and liberalization, the systemization of distribution activities had become an issue of critical importance.

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[38]Foreword of the Basic Plan, US Ex. 71-10. **Japan** translates this quote from the foreword as follows: "the result of an investigation of the public and private sectors for the purpose of realizing a means to achieving the goal of pointing our national economy in the direction of distribution systemization by the target year of 1975." Foreword of the Basic Plan, Japan Ex. B-18.

[39]Foreword of the Basic Plan, US Ex. 71-10. **Japan** translates this quote from the foreword as follows: "public and private sectors put forth their combined effort to realize this basic plan." Foreword of the Basic Plan, Japan Ex. B-18.

[40]Basic Plan, Cover Note by Enterprise Bureau Chief, MITI, August 1971. US Ex. 71-10. **Japan** translates this quote from the cover note as follows: "… [were] urgent issues from balanced regional economic development to measures to deal with high prices for consumers, to measures for capital liberalization." Basic Plan, Cover Note by Business Bureau Chief, MITI, August 1971, Japan Ex. B-18.

[41]US Ex. 71-10, p. 10.

[42]Japan translates the name of this institute as "Distribution System Research Institute".

[43]Manual for the Systemization of Distribution by Industry, US Ex. 75-5. **Japan** contends that the Institute submitted the 1975 Manual to MITI only for internal use of MITI.

> "Although Japan has a monopolistic position in high-quality cameras, the future camera and film industries must not be complacent with their monopolistic or oligopolistic position within Japan.
>
> Therefore, strengthening the constitution of the camera and film industry is a serious issue that must be addressed immediately against the background of today's chronic inflation and intensifying conditions of international competition."[44]

The Center indicated that the development of this Manual was one part of MITI's policy to actively develop effective policies related to the systemization of distribution activities. The Manual indicated that distribution systemization is not grounded in the independent profit notions of manufacturers, wholesalers and retailers engaged in distribution activities, but must emphasize the establishment of an integrated system designed to reduce the overall distribution cost required for products to reach the final consumer.

2.25 Thereafter, the Photosensitive Materials Committee of the Distribution System Promotion Council was established for the Systemization of Distribution by Industry (Camera-Film). The Committee was charged with the responsibility of promoting information ties and physical integration of distribution facilities. The membership included representatives from all levels of Japanese photographic film and paper distribution (each of the four domestic manufacturers, the photospecialty wholesalers association, the photofinishing laboratory association, and the photospecialty retailers association), an official from the Distribution System Development Center. An official from the MITI Chemical Industry Division observed the Committee's proceedings. The Committee produced the "Distribution Facilities Basic Plan,"[45] which was intended to improve distribution in response to "liberalization" and outlined measures to promote joint distribution facilities between Japanese manufacturers and distributors.

(f) Large Stores Law

2.26 A principal focus of the US complaint is the Large Scale Retail Store Law ("Large Stores Law") which was passed by the Japanese Diet on 1 October 1973 and entered into force on 1 March 1974.[46] The provisions of the Large Stores Law and its evolution over time are discussed in detail in Section V.B. This law was preceded by the Department Stores Law (1956),[47] which required retailers wanting to open a large store with floor space in excess of 1,500 square meters, and retailers with such stores wanting to open a new store regardless of floor size, to obtain a permit from MITI. Because the Department Store Law process allowed retailers to circumvent its restrictions by creating legal identities for separate sales floors that were below that law's threshold, the Large Stores Law was enacted close the loophole. The Large Stores Law regulates the opening of all large store structures (where more than one retailer may operate) and the opening and operation of all retailers (e.g., grocery stores, discount stores, and department stores) operating in such structures, through a notification system. When originally enacted, it only regulated stores with floor space in excess of 1,500 square meters.

2.27 The Large Stores Law was revised in 1979 (amended on 15 November 1978 with an effective date of 14 May 1979).[48] Through these amendments, two main changes were effected: (1) the threshold for stores covered by the Law was lowered from 1,500 square meters to 500 square meters, and (2) large stores were divided into two classes: Class I stores (1,500 square meters and above) under MITI's jurisdiction, and Class II stores (500 up to 1,500 square meters) under the jurisdiction of prefectural

[44]1975 Manual, pp. 27-28, US Ex. 75-5.
[45]US Ex. 76-2.
[46]US Ex. 74-4 and Japan C-1.
[47]US Ex. 56-2 and Japan Ex. C-3.
[48]US Ex. 78-1.

governors. This dividing line has been moved up to 3,000 square meters (or 6,000 square meters in designated large cities) since 1992.

2.28 The Large Stores Law currently includes the following procedures: parties intending to build or open a large scale retail store must submit a notification including the proposed floor area of the store and planned opening date at least 12 months before the proposed completion and opening of the new store or expanded retail store to the appropriate authority (MITI or prefectural governor) (Article 3 notification). The appropriate authority will then issue a notice as to whether the store will be subject to the procedures under the Large Stores Law. The retailer may not commence business until seven months after this notice. Within four months after filing this initial notification, the plans must be explained to MITI and prefectural authorities, the local Chamber of Commerce and Industry, (or Commerce and Industry Association) and local retailers or their associations and consumers ("local explanation"/"public briefing"[49]). At least five months before the opening of the store, the retailer must submit a notification (Article 5 notification) to the appropriate authority, who will determine whether the proposed store poses a probability of a significant effect on nearby small and medium business retail activities, (since 1994, stores with retail space of no more than 1,000 square meters in principle have been deemed to have no such probability), and may recommend that the store reduce its sales floor space, and/or delay its opening date. If the appropriate authority determines that elements of the proposed plan pose a probability of significant effect, it refers the items to the national (in the case of Class I stores) or prefectural (in the case of Class II stores) Large Store Council, which is an official advisory body to MITI and the prefectural governors, respectively. The Council must submit the results of its deliberations to the appropriate authority. After receiving the Large Store Council's views, the appropriate authority may submit recommendations to the persons proposing the large scale store, among other things, delay the store's opening or reduce its floor space. If the store does not follow the recommendation, MITI or the prefectural governors may order it to do so.

2.29 In 1982 MITI instituted, through Directive No. 36,[50] a "prior explanation" requirement to precede the builder's Article 3 Notification, which obligated the notifier to provide local retailers with an explanation before submitting its Article 3 Notification. This directive was revoked in 1992.

(g) Japan Development Bank and the Small and Medium-Sized Enterprise Agency

2.30 The Japan Development Bank (JDB) is a quasi-governmental financial institution, and the Small and Medium-Sized Enterprise Agency (SMEA) is one of the agencies of MITI.[51] The JDB and SMEA provide subsidized financing to industry.[52] For example, JDB provided funding for Konica to establish joint distribution facilities with several independent wholesalers.

3. JFTC

2.31 The US submissions also focus attention on the Japan Fair Trade Commission (JFTC). The JFTC is an independent Japanese Government agency. The JFTC has responsibility for enforcement of the Antimonopoly Law and the Premiums Law. For purposes of this dispute, the most important provisions of those laws and measures taken under them are the following:

[49]See translation issue 14.

[50]Japan C-16 and US Ex. 82-2.

[51]US Ex. 67-11, US Ex. 12, and US Ex. 70.

[52]Takashi Yokokura, Chapter 20 Small and Medium Enterprise, Industry Policy of Japan Edited by Ryutaro Komiya, Masahiro Okuni, and Kotaro Suzumura, 1988, p. 521 (US Ex. 59) and Chapter 11: The Development of New Policy Measures, MITI History, Volume 15, 31 May 1991, pp. 1-2, US Ex. 70.

(a) Antimonopoly Law

(i) JFTC Rule No. 1 under Article 6 of the Antimonopoly Law

2.32 Article 6 of the Antimonopoly Law of 1947[53] provides:

> "(1) No entrepreneur shall enter into an international agreement or an international contract which contains such matters as constitute unreasonable restraint of trade or unfair trade practices.
>
> (2) An entrepreneur who has entered into an international agreement or an international contract (limited to only such an agreement or contract that belongs to the types which are prescribed by the rules of the [JFTC] as tending to contain such matters as constitute unreasonable restraint of trade or unfair trade practices) shall, in accordance with the Rules of the [JFTC], file a notification thereof with the [JFTC], accompanied by a copy of the said agreement or contract (in the case of an oral agreement or contract, a document describing the contents thereof), within thirty days as from the conclusion of such agreement or contract".

2.33 JFTC Rule No. 1[54] under Antimonopoly Law Article 6.2 requires notification to the JFTC of the conclusion of an international agreement or an international contract in certain specified areas, including "comprehensive sales agreements"[55] or "sole distributorship contracts"[56]. A bill to repeal the international contract notification requirement was introduced in March 1997 to the Diet. **Japan** submits that the bill was enacted in June 1997, amending Article 6(2) of the Antimonopoly Law, and simultaneously abolishing JFTC Rule No. 1.

(ii) JFTC Notification 34 of 1971 (open lotteries)

2.34 JFTC Notification 34 of the JFTC on Unfair Trade Practices Offering Economic Benefits by Means of Advertising Lotteries, etc. of 2 July 1971 ("JFTC Notification 34 of 1971"), also referred to as notification on "open" prizes.[57] This Notification designates, inter alia, the following as unfair trade practices pursuant to Article 2, paragraph 7, of the Antimonopoly Law when offering economic benefits by means of advertising lotteries, etc. :

> "Activities in which businesses who produce … or sell the products listed in attached Table 1 … , as a means to attract consumers, select people from among general consumers through advertisements and offer them excessive amounts of cash, goods or other kinds of economic benefits in light of normal business practices …".[58]

According to the **United States**, Table 1 attached to this Notification includes "photosensitive materials". Photosensitive materials were among a number of products explicitly identified by the JFTC as subject to this notification. Secretary General Directive No. 5 of 2 July 1971 provides for "Guidelines Pertaining to the Designation of Unfair Trade Practices Offering Economic Benefits by Means of Advertising Lotteries, etc". These guidelines provide, inter alia, that:

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[53]The Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade Law No. 88 of 1947, US Ex. 47-1.

[54]US Ex. 71-6.

[55]US translation.

[56]Japanese translation.

[57]Antimonopoly Law: related Laws and Regulations, 28 June 1995, pp. 85-88, exhibit submitted by the United States by letter to the Panel of 6 August 1997.

[58]Ibid., provisional translation, p. 85.

> "Excessive amounts of cash, goods, or other kinds of economic benefits in light of normal business practices' (hereafter referred to as "excessive economic benefits") stipulated by [JFTC Notification 34 of 1971] should be dealt with in the following manner:
>
> …
>
> c. An economic benefit exceeding 1,000,000 yen … is considered to be an excessive benefit".[59]

Japan submits that as of 1 April 1996, this ceiling of 1,000,000 yen has been increased to 10,000,000 yen and that no limit has ever been set to the total amount of prizes.

(iii) JFTC Notification 15 of 1982

2.35 Antimonopoly Law Article 2.9 sets forth categories of "unfair trade practices" and authorizes the JFTC to designate impermissible practices under the law. In 1982, the JFTC issued Notification No. 15, which revised and expanded the categories of unfair trade practices from twelve to sixteen. The following is prohibited pursuant to the respective designations:

> Unjust Low Price Sales:
> 6. Without proper justification, supplying a commodity or service continuously at a price which is excessively below cost incurred in the said supply, or otherwise unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties to the business activities of other businesses.
>
> …
>
> Deceptive Customer Inducement:
> 8. Unjustly inducing customers of a competitor to deal with oneself by causing them to misunderstand that the substance of a commodity or service supplied by oneself, or terms of the transaction, or other matters relating to such transaction are much better or much more favourable than the actual one or than those relating to the competitor.
>
> Customer Inducement by Unjust Benefits:
> 9. Inducing customers of a competitor to deal with oneself by offering unjust benefits in the light of normal business practices.

(b) Premiums Law

2.36 Pursuant to Articles 3 and 4 of the Premiums Law[60], the JFTC issues notifications interpreting the Premiums Law in respect of unlawful premiums and representations. The United States lists Notifications 5, 17 and 34 (open lotteries) as specific measures that it is challenging in this dispute. It also refers in its submissions to Notifications 3 and 34 (origin). Under Article 10(1) of the Premiums Law, the JFTC may approve fair competition codes for specific industries. The 1987 Retailers Code, discussed in Section II.B.4.(b) below, is an example of such a code.

2.37 The JFTC has explained that, as used in its notifications, "premiums … refer to products, cash, marketable securities, entertainment, or other economic benefits which are given in connection with

[59]Ibid., pp. 86-87.
[60]US Ex. 62-6; Japan Ex. D-1.

a transaction involving a commodity or service.[61] Article 3 of the Premiums Law gives the criteria for restrictions on premiums. It provides:

> "The JFTC may, when it finds that it is necessary to prevent unfair inducement of customers, limit either the maximum value of a premium or the aggregate amount of premiums, the kind of premiums or methods of offering of premium or any other matter relating thereto, or may prohibit the offering of a premium".

2.38 Article 2 of the Premiums Law defines "representations" to mean "advertisements or any other representations which a business makes or uses as means of inducement of customers, with respect to the substance of the commodity or service which he supplies or the terms of the sale or any other matter concerning the transaction, and which are designated by the Fair Trade Commission as such". Article 4 of the Premiums Law proscribes the use of

> (i) "any representation by which the quality, standard or any other matter relating to the substance of a commodity or service *shall lead the general consumer to believe that it is*[62] much better than the actual one or than that of other businesses who are in a competitive relationship with the business concerned, and thereby which is found likely to induce customers unjustly and to impede fair competition;" or
>
> (ii) "any representation by which price or any other terms of transaction of a commodity or service will be misunderstood by consumers in general to be much more favourable to the customer than the actual one or than those of other businesses who are in a competitive relationship with the business concerned, and thereby which is found likely to induce customers unjustly and to impede fair competition."

2.39 Article 6 of the Premiums Law authorizes the JFTC to instruct violators to "cease and desist" or to "take the measures necessary to prevent the recurrence of the said act." Article 9 of the Premiums Law gives the prefectural governments enforcement authority, including the power to instruct violators to "cease and desist" and to publish findings of violations.

2.40 Article 10 of the Premiums Law, dealing with fair competition codes, provides:

> "(1) Businesses or a trade association may, upon obtaining authorization from the Fair Trade Commission in accordance with the Rules of the Fair Trade Commission, with respect to matters relating to premiums or representations, conclude or establish an agreement or a code, aiming at prevention of unjust inducement of customers and maintaining fair competition. The same shall apply in the event alterations thereto are attempted.
>
> (2) The Fair Trade Commission, unless it finds that an agreement or a code under the preceding section (hereinafter referred to as "fair competition code") meets each of the following paragraphs, shall not grant authorization under the preceding subsection:
>
> (i) That it is appropriate to prevent unjust inducement of customers and to maintain fair competition;
>
> (ii) That it is not likely unreasonably to impede the interests of some consumers in general or the related businesses;

[61] FTC/Japan, Views: Information and Opinion from the Fair Trade Commission, No.2, April 1988, US Ex. 88-3, p. 15.

[62] **Japan** translates the *italicized* words above as "will be misunderstood by consumers in general to be". See Annex on Translation Problems, translation issue 16 and the appendix thereto.

(iii) That it is not unjustly discriminatory; and

(iv) That it does not restrict unreasonably the participation in or withdrawal from the fair competition code".

…

(5) The provisions of Section 48 [recommendation, recommendation decision] and Section 49 [initiation of hearing procedures], Section 67(1) [urgent injunction] and Section 73 [accusation] of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade shall not apply to the fair competition code that has been authorized under Subsection (1), and to such acts of entrepreneurs or a trade association as have been done in accordance therewith".

(i) JFTC Notification of 1965

2.41 The JFTC issued a Notification on 15 October 1965 entitled "Restrictions on Premium Offers in the Camera Industry." The notification provided that "[t]hose who engage in the manufacture or sale of cameras or related products cannot offer premiums to general consumers" or "to those who engage in the sale of cameras and related products."[63]

(ii) JFTC Notification 17 of 1967

2.42 JFTC Notification 17 on Restriction on Premium Offers to Businesses of 10 May 1967 ("JFTC Notification 17").[64] This Notification was made in accordance with Article 3 of the Premiums Law. It provides essentially the following:

"Businesses … who manufacture (including process, hereinafter the same) the products listed in the attached table or businesses who sell such products shall not offer premiums to businesses who purchase and sell the products involved in such manufacture or sale, or who use the products to supply services to general consumers (hereinafter referred to as "other party business"), as a means of inducing the other party business to begin to transact such products, or on the condition that the other party business' s transaction amount or such other transaction condition satisfy certain criteria which the [first] business has established. Provided, however, that the preceding provisions shall not apply to cases of premium offers which are within the annual limit of 100,000 yen or less per one other party business, and which are found reasonable in the light of normal business practices".

The table attached to this Notification includes "photographic materials". The parties agree that Notification 17 was abolished in April 1996. However, according to the **United States**, premiums from manufacturers to wholesalers are still subject to JFTC Designation 9 of JFTC Notification 15 of 1982.[65] This provision governs the use of "unjust inducements" under the Antimonopoly Law and prohibits premium offers in excess of "normal business practice". **Japan** contends that Designation 9 has not been listed in the US panel request and thus is not properly before the Panel.

[63]Otsuka Noritami, Japan Fair Trade Commission, Trade Department, Recent Activities Concerning Premiums Law, Kosei Torihiki, No. 182, November 1965, p. 15-18, US Ex. 65-5.

[64]US Ex. 67-4, Japan Ex. D-42 (provisional translation).

[65]US Ex. 82-6.

(iii) JFTC Notification 34 of 1973 (origin)

2.43 JFTC Notification 34 on Misleading Representations Concerning Country of Origin of Goods of 16 October 1973 ("JFTC Notification 34 of 1973").[66] This Notification was made in accordance with Article 4 of the Premiums Law. It provides essentially the following:

> "Representations provided for in the following sections which, when applied to domestically made goods, are found to make it difficult for general consumers to distinguish the goods as domestically made:
>
> (i) Representations comprising the name of a foreign country, the name of a place in a foreign country, the flag or crest of a foreign country, or any other similar representations;
> (ii) Representations comprising a full name, title, or trade mark of any foreign business or designer; or
> (iii) Representations in which all or a principal part of the literal description is made in foreign letters.
>
> Representations provided for in the following sections which, when applied to foreign-made goods, are found to make it difficult for general consumers to distinguish the goods as made in the foreign country in question:
>
> (i) Representations comprising the name of a country, the name of a place in a country, a flag or crest of a country other than the country of origin of the goods, or other similar representations;
> (ii) Representations comprising a full name, title, or trade mark of a business or designer in a country other than the country of origin of the goods;
> (iii) Representations in which all or a principal part of the literal description is made in Japanese letters".

According to the **United States**, the JFTC Application Standards for "Misleading Representations Concerning Country of Origin of Goods" of 16 October 1973 provide JFTC interpretation of the provisions of Notification 34 on origin of goods.[67] The United States placed particular emphasis on the following aspects of the guidelines: Paragraph two permits representations referring to foreign nations or places to be made in connection with Japanese products if it is "obviously understood" that the business involved is a Japanese firm. Paragraph three provides that domestic products may be identified with a foreign name, e.g., "French bread," if "clearly not to imply that the country of origin of the goods in question is a foreign country." Paragraph six allows domestic products to use:

> (i) Representations comprising the name of or trade mark of a Japanese business written in foreign letters (including Romanized Japanese), which are found to be clearly distinguished by general consumers as those which are applied to domestically made goods;
> (ii) Representations which are allowed by law to be used as descriptions for general consumers instead of Japanese (e.g., "All Wool," "Stainless Steel," etc.);
> (iii) Representations which are accepted by general consumers as Japanese by virtue of general business practices (e.g., "size," "price," etc.); and
> (iv) Representations which comprise foreign letters, but where it is obvious that the said letters are used only as patterns, ornaments and the like, and will not

[66]US Ex. 73-5, Japan Ex. D-53 (provisional translation).
[67]See US Ex. 73-5.

> imply that the country of origin of the goods is a foreign country (e.g., the c[l]ippings from English-language magazines used as patterns on carrier bags).

According to the United States, paragraph seven provides several ways that goods may indicate that they were made in Japan, including simply identifying the name of the manufacturer in Japanese or identifying the name of the manufacturer in another language with the location of production.

(iv) JFTC Notification 3 of 1977

2.44 JFTC Notification 3 on Restriction on Premium Offers by Prize Competition of 1 March 1977 ("JFTC Notification 3"), also referred to as notification on "closed" prizes.[68] This Notification was made in accordance with Article 3 of the Premiums Law. It provides essentially the following:

> "2. The maximum value of premiums offered by prize competition shall not exceed the value in accordance with each category provided for in the following paragraphs:
>
> (i) In the case where the transaction value involved in the premium offer by prize competition is less than 500 yen: 20 times of the transactions value;
> (ii) In the case where the transaction value is not less than 500 yen and below 50,000 yen: 10,000 yen;
> (iii) In the case where the transaction value is not less than 50,000 yen and below 100,000 yen: 30,000 yen; or
> (iv) In the case where the transaction value is not less than 100,000 yen: 50,000 yen.
>
> 3. The aggregate of the premiums offered by prize competition in one scheme shall not exceed 2 per cent of the estimated total amount of transactions involved in that scheme.
>
> 4. Irrespective of the preceding two Clauses, in any one of the cases provided for in the following sections, the maximum value offered by prize competition may amount to 200,000 yen and the aggregate of the premiums offered by prize competition in one scheme may amount to 3 percent of the estimated total value of transactions involved in that scheme. However, these limits will not be applied to the case where they unjustly constrain the participation of other businesses:
>
> (i) In the case where a considerable number of retailers or service suppliers in a certain district carry out a joint scheme;
> (ii) In the case where a considerable number of retailers or service suppliers located in a shopping area carry out premium offers in a joint scheme; However, the foregoing shall apply only to cases where the premium offers are carried out during the seasons such as "chugen" [midyear] and end of year, three times a year at most and below the period of 70 days in total a year; or
> (iii) In the case where a considerable number of businesses in a certain industry within a certain district carry out a scheme jointly".

On 16 February 1996, the JFTC amended JFTC Notification 3 as follows:

> "Section 2 of the Notification is amended as follows:

[68]US Ex. 77-1, Japan Ex. D-33 (provisional translation).

> 2. The maximum amount of premiums offered by prizes shall not exceed twenty times of the amount of transaction to which the premium offer is related, provided that when the amount exceeds 100,000 yen, it will be limited to 100,000 yen.
>
> In Section [4], the "200,000 yen" shall be replaced by "300,000 yen".[69]

(v) JFTC Notification 5 of 1977

2.45 JFTC Notification 5 on Restriction on Premium Offers to General Consumers of 1 March 1977 ("JFTC Notification 5").[70] This Notification was made in accordance with Article 3 of the Premiums Law. It has been amended by JFTC Notification 2 of 16 February 1996 (which removed the ceiling of 50,000 yen for premiums to all purchasers). It provides essentially the following:

> "1. The value of a premium offered to general consumers, excluding those by lotteries or prize competition …, shall be within 10 percent of the transaction value involved in the premium offer (provided that if the amount is less than 100 yen, the limit shall be 100 yen), and which is found reasonable in the light of normal business practices".

(c) JFTC guidance

(i) 1981 JFTC guidance on dispatched employees

2.46 Guidance provided by the JFTC in recommending the establishment of rules on the use of dispatched employees reflected in an article by Kosugi Misao (an official of the Executive Office of the JFTC) entitled "The Status of Distribution of Cameras" ("JFTC guidance on the use of dispatched employees").[71] The relevant part of the article by Kosugi Misao states the following regarding personnel dispatched to specified volume sales stores:

> "The JFTC is issuing guidance to the camera, photographic accessories, colour photo laboratories and related industries to examine the use of self-regulating measures with respect to the permanent dispatch of sales people so as not to go too far as manufacturers' sales promotion methods or as acts based on the buying power of volume sales stores".[72]

(ii) 1983 JFTC guidance on advertising rules

2.47 Guidance provided by the JFTC in recommending the establishment of rules on dumping and loss-leader advertising reflected in an article in Zenren Tsuho of May 1983 quoting from a conference speech given by Yamada Akio (Director of the Premiums and Representations Guidance Division of the JFTC).[73] Yamaka Akio is stated to have said, inter alia, the following:

> "In any case, it goes without saying that rule abiding sales practices and fair competition must be established. Fortunately, the photo industry has its "self-regulating standards for normalizing trade". Nevertheless, it is of critical importance to develop rules one by one against dumping and loss-leader advertising. With the regard to loss-leader

[69]JFTC Notification 1, Kanpo (Official Gazette) of 16 February 1996, translation, Japan Ex. D-30, p. 2.
[70]Japan Ex. D-32 (provisional translation).
[71]Kosei Torihiki, March 1982, No. 377, p.45-49, translation, US Ex. 82-3.
[72]Ibid., p. 8.
[73]Zenren Tsuho, May 1983, pp. 14 ff, translation, US Ex. 83-9.

advertising, if the photo industry will clarify what the problems are, how we should apply the law will become clear".[74]

4. COUNCILS AND ASSOCIATIONS

(a) Fair Trade Promotion Council

2.48 The Fair Trade Promotion Council was established by the national photographic industry on 23 December 1982.[75] According to the Articles of Association of the Fair Trade Promotion Council, the Council, inter alia, establishes fair transaction order in the photography industry and promotes and enforces the 1982 Self-Regulating Measures described below. It also enacted the 1984 Self-Regulating Standards, described below.

(i) 1982 Self-Regulation Measures (dispatch of employees and promotional money)

2.49 Self-Regulating Measures Regarding Making Business Dealings with Trading Partners Fair, enacted by the photographic industry and published on 22 June 1982 ("1982 Self-Regulating Measures").[76] For the US claim, the relevant parts thereof relate to self-regulating standards concerning the dispatch of employees by manufacturers or wholesalers to retailers for the purpose of sales promotion or other sales activities and the extent to which suppliers may contribute to retail marketing campaigns:

> [1] Self-regulating standards concerning the dispatch of employees:
>
> "(1-1) It may be proper to dispatch employees in the following cases which would directly help to promote the sales of the goods handled by the supplier and contribute to his or her profit:
> …
> Accordingly, the following shall not occur:
>
> Causing the dispatched employee to be mainly engaged in the sales promotion, physical inventory, or other activities that pertain to goods other than those handled by the supplier.
>
> (1-2) Other general retailers shall not be treated in a discriminatory manner.
>
> (1-3) The employee shall be dispatched under mutual agreement.
>
> Accordingly, the following things shall not occur:
>
> [1] The supplier shall not dispatch his or her employees out of the necessity of continuing trade with the retailer.
> [2] Retailers shall not coerce suppliers to dispatch the employees by recourse to words or actions akin to a refusal to deal.
> [3] Retailers shall not supplement an employee shortage with dispatched employees (permanent dispatch).
> …

[74]Ibid., p. 2. **Japan** contested the correctness of this translation. See translation issue 22.
[75]Articles of Association, 23 December 1982, Section 2 "Responsibilities", US Ex. 83-3, pp. 2 ff.
[76]Camera Times, 22 June 1982, pp.3 ff., US Ex. 82-8, see translation issue 23.

(1-4) Employees shall be dispatched in those other cases where approval from the Fair Trade Promotion Council has been obtained".[77]

[2] Self-regulating standards on promotional money and contribution:

(2-1) It may be proper to make a contribution to activities which directly assist the sales promotion of the goods handled by the supplier and that would contribute to his or her profit.

Accordingly, the following shall not occur:

[1] [The retailer] shall not demand a contribution for expenses that are not directly related to the sales promotion, brand advertisement, etc. of the goods handled by the supplier.

(2-2) It may be proper to make a contribution if other general retailers are not treated in a discriminatory manner.

(2-3) It may be proper to make a contribution if mutual agreement is reached.

Accordingly, the following shall not occur:

[1] [Retailers] shall not demand contribution without prior agreement as to the basis and use of the contribution even if the contemplated activity is considered to contribute to the profit of the supplier.

[2] [Retailers] shall not change the amount or use of the contribution unilaterally without the consent of the supplier.

[3] [Retailers] shall not unilaterally offset the supplier's account receivable against the contribution without the consent of the supplier.[78]

(ii) 1984 Self-Regulating Standards (developing fees)

2.50 The Self-Regulating Standards Regarding Representation of Developing Fees for Colour Negative Film were enacted by the Fair Trade Promotion Council on 15 May 1984 ("1984 Self-Regulating Standards").[79] The representation standard is defined as follows:

> "… businesses should properly list fees such as the developing fee of colour film and should not make representations that might mislead the general consumer or possibly lead them to have excessive expectations. This standard should not be used to limit or restrain businesses freedom to set fees".[80]

The 1984 Self-Regulating Standards also set out the method of representation for printing fees, developing fees and finishing time. They also provide that the Fair Trade Promotion Council shall conduct investigations and provide guidance on the operation of the standards if necessary.[81]

[77]Ibid., translation, US Ex. 82-8, pp. 1-2.
[78]Camera Times, 22 June 1982, pp. 3 ff., US Ex. 82-8, see translation issue 23.
[79]Translation, US Ex. 84-4.
[80]Ibid., p. 2.
[81]Ibid., p. 3.

(b) Retailers Council and 1987 Retailers Code

2.51 On 31 March 1987, acting pursuant to Article 10(1) of the Premiums Law, the JFTC approved the Fair Competition Code Regarding Representations in the Camera and Related Products[82]/Camera Category[83] Retailers Industry ("1987 Retailers Code") and its enforcement body the Cameras and Related Products/Camera Category Retailers Industry Fair Trade Council ("Retailers Council").[84] The objective of the 1987 Retailers Code is "to protect the general consumers' appropriate product selection, prevent the unfair inducement of customers, and thereby to secure fair competition".[85] The Code, inter alia, provides for requisite representations for store fronts and in fliers, including identification of the country of origin of imported goods; it imposes standards for the representation of dual prices, for the use of special expressions and comparative representations; and prohibits misleading representation and loss-leader advertisement. The Code also identifies the powers of the Council with respect to investigating suspected violations of the provisions of the Code and the penalties that may be imposed for such violations.

(c) Chambers of Commerce and Industry

2.52 According to the United States, Japanese Chambers of Commerce and Industry are established pursuant to the Chamber of Commerce and Industry Law, which allows for the creation of local bodies under the control and oversight of MITI. Chambers of Commerce and Industry are delegated the responsibility to "conduct administrative matters commissioned by administrative agencies", such as MITI.[86] MITI also has the authority to "investigate" the on-going activities of the Chambers of Commerce and Industry.[87]

[82]US translation of "kamera-rui". See translation issue 17.

[83]Japan's translation of "kamera-rui". See translation issue 17.

[84]Kanpo (Official Gazette), 11 April 1987, pp. 1-3, translation, US Ex. 87-1, Japan Ex. D-66.

[85]Id., p. 1.

[86]Article 9-17 of the Chamber of Commerce Law, Law No. 143, 1 August 1953.

[87]The investigatory activity is defined in the Chamber of Commerce Law to include requiring the submission of an annual financial statement to MITI (Article 57), and MITI authority to audit the Chambers of Commerce (Article 58), as well as to dissolve a Chamber of Commerce (Article 59 of the Chamber of Commerce Law). MITI has the authority over Chambers of Commerce to accept or deny the permit of a new Chamber. Article 5-19 of the MITI Establishment Law, US Ex. 52-2.

III. SUMMARY OF CLAIMS AND PROCEDURAL OBJECTIONS

A. EVOLUTION OF THE US CLAIMS

3.1 This section details the evolution of the US claims, using where appropriate the short titles of the various measures as defined in the foregoing section. The US request for consultations identified the following Japanese measures as being at issue:

a. liberalization countermeasures;[88]
b. distribution guidelines and related measures;
c. the Large Stores Law;
d. the Premiums Law;
e. measures regarding dispatched employees;
f. the application of the Law to Promote Business Reform for Specified Industries;
g. the Ministry of International Trade and Industry Establishment Law;
h. and related legislation, regulations, and administrative measures.

3.2 The US request for the establishment of a panel identified the following Japanese measures as being at issue:

a. liberalization countermeasures;
b. distribution measures, such as, but not limited to, the cabinet decision, administrative guidance, and other measures listed in Attachment A;
c. i. the Large Stores Law;
   ii. Special Measures for the Adjustment of Retail Business; No. 155 of 1959 (*Shocho Ho*);
d. the Premiums Law;
e. measures regarding dispatched employees pursuant to the Antimonopoly Law;
f. the Law Concerning Enterprise Reform for Specified Industries, No. 61 of 1995;
g. the Ministry of International Trade and Industry Establishment Law, No. 275 of 1952;
h. and related measures.

Attachment A contained the following list of distribution measures:

i. MITI, "Administrative Guidance to Promote Rationalization of Distribution System", 1966;
ii. 1967 Cabinet Decision;
iii. Distribution Committee Seventh Interim Report;
iv. 1969 Survey;
v. 1970 Guidelines;
vi. MITI, "Business Bureau Report on Film Prices", 1970;
vii. 1971 Basic Plan;
viii. 1975 Manual;
ix. 1990 Guidelines;
x. MITI and the Small and Medium Enterprises Agency, "Distribution Vision for the 21st Century", 1995 (and earlier versions for the 1970s, 1980s, and 1990s);
xi. Photo Industry Distribution Information Systemization Council [Kyogikai], "Comprehensive Manual for Photo Distribution Industry Distribution Information Systemization", 1996 (and 1989, 1990, 1991, and 1992 versions);
xii. Other related measures, including guidelines.

[88] **Japan** disagrees with this translation of the Japanese word *taisaku*. See translation issue 1.

3.3 In response to a question by the Panel at the first substantive meeting, the United States submitted the following list of specific "liberalization countermeasures" which are subject to claims under Articles III, X:1 and XXIII:1(b) of GATT. The list is divided into three categories: distribution countermeasures; large stores law; and promotion countermeasures.

3.4 The following measures were included in the list of distribution countermeasures:

(1) 1967 Cabinet Decision
(2)* JFTC Notification 17
(3)* Distribution Committee Sixth Interim Report
(4) Distribution Committee Seventh Interim Report
(5) 1969 Survey on Transaction Terms
(6) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film
(7)* International Contract Notification under the Antimonopoly Law and JFTC Rule 1
(8) 1971 Basic Plan
(9) 1975 Manual
(10)* 1976 JDB funding for Konica's wholesalers
(11)* 1977 SMEA funding for photoprocessing laboratories.

3.5 The following measures were included under the heading "Large Stores Law":

(12) Large Stores Law and related regulations and administrative measures, including related local measures;
(13) 1979 Diet amendment to Large Stores Law

3.6 In addition to items (1) and (2) above, the following measures were included under the heading "Premiums Law/promotion countermeasures":

(14)* 1971 JFTC Notification 34
(15)* 1977 JFTC Notification 5
(16) 1981 JFTC guidance on dispatched employees
(17) 1982 Self-Regulating Rules
(18) 1982 Establishment of Fair Trade Promotion Council
(19)* 1983 JFTC guidance on advertising rules
(20) 1984 Self-Regulating Standards
(21) JFTC approval of the 1987 Retailers Code and its enforcement body, the Retailers Fair Trade Council.

3.7 In response to another Panel question, the United States indicated that in respect of its claims under Article III:4, Article X:1 and Article XXIII:1(b) of GATT:

a. The measures alleged to be inconsistent with Article III:4 are the "Distribution Countermeasures" listed in paragraph 3.4.

b. The measures alleged to be inconsistent with Article X:1 are (i) unpublished enforcement actions by the JFTC and fair trade councils under the Premiums Law and relevant fair competition codes that establish or modify criteria applicable in future cases; and (ii) unpublished guidance through which the Japanese Government makes applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review.

c. The measures alleged to nullify or impair benefits within the meaning of Article XXIII:1(b) of GATT are the "Distribution Countermeasures", "Large Stores Law," and "Premiums Law/Promotion Countermeasures" listed in paragraphs 3.4-3.6.

3.8 In response to that Panel question the United States also indicated the extent to which it claimed that the individual measures listed above should be considered in conjunction with each other in determining whether Articles III and X have been violated and whether there has been a nullification or impairment of benefits under GATT within the meaning of Article XXIII:1(b). According to the United States, the distribution countermeasures work together as an organic whole to violate Article III and nullify or impair benefits within the meaning of Article XXIII:1(b). In addition, the United States takes the position that the Large Stores Law and related measures should be considered as an important measure in Japan's overall efforts to create and support manufacturer-dominated, vertically aligned distribution in Japan under the distribution countermeasures. Thus, it claims that the Large Stores Law and related measures and the distribution countermeasures in combination nullify or impair benefits under Article XXIII:1(b). The United States also claims that the promotion countermeasures as a set by themselves have nullified or impaired benefits under Article XXIII:1(b). Finally, the United States claims that the distribution countermeasures, the Large Stores Law and related measures and the promotion countermeasures, taken as three sets of measures, have also operated in combination so as to nullify or impair benefits within the meaning of Article XXIII:1(b). See Section D of Part IV and Section F of Part V for a detailed discussion of the combined effects of the three sets of measures acting in combination.

3.9 **Japan** contends that the US case is highly unusual in commencing its legal argument with "non-violation nullification or impairment" claims because such claims normally would be considered subsidiary to violation claims. To the extent that the same alleged measure gives rise to both violation and non-violation claims, panels normally do not consider non-violation issues until the alleged violations have been addressed.[89] The US allegations regarding so-called "distribution countermeasures" - i.e., alleged measures taken by the Japanese Government in the 1960s and '70s to encourage the establishment of an exclusionary market structure that impedes market access for imported film and paper - form the centrepiece of the US non-violation claims. At the same time, the US argues that these "distribution countermeasures" constitute violations of Article III national treatment obligations.[90]

3.10 Japan emphasizes that only the specific measures mentioned in the foregoing US responses need to be evaluated by the Panel. In Japan's view, measures not mentioned in the US responses are outside the scope of the dispute, and need not be considered further.

B. PROCEDURAL OBJECTIONS

3.11 **Japan** requests the panel to dismiss the US claims marked with an asterisk in paragraphs 3.4-3.6 above because these "measures" were raised by the United States for the first time in its initial submission to the Panel, and had not been identified specifically in the request for the establishment of the panel.[91] Japan originally objected to nine items, but the United States did not include two of them - certain

[89]In prior panel decisions addressing non-violation allegations, the panels first addressed the violation claims, and then addressed non-violation claims. See e.g., Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseed, and Related Animal Feed Products* (*"EEC - Oilseeds"*), adopted on 25 January 1990, BISD 37S/86, 126, para. 142. See also, *Working Party Report on the Australian Subsidy on Ammonium Sulphate* (*"Australia - Ammonium Sulphate"*), GATT/CP.4/39, adopted on 3 April 1950, BISD II/188, 192, paras. I, 12.

[90]Japan notes that the US also makes Article X violation claims with respect to the Large Scale Retail Store Law and the Premiums Law.

[91]Japan pointed out that it had listed only those items which appeared in the "legal argument" section of the first US submission, although, in Japan's view, there were other items which are raised for the first time in the "factual background" section of the first US submission. It was Japan's understanding that those items not specifically mentioned in the "legal argument" section are not part of the US legal claims in the proceeding.

countermeasures by the Photosensitive Materials Committee of the Distribution Systemization Promotion Council and directives to strengthen the Department Stores Law - in its response to the Panel's request that it specify the measures subject to US claims. Japan later objected to an additional tenth item - 1983 Guidance on advertising rules - which the United States included in its response to the Panel's request, but which Japan contends was neither specifically identified in the panel request nor raised in the consultations. In Japan's view, the items that were not specified in the panel request should be dismissed as not being properly before this panel and vague reference to "measures, such as, but not limited to," "related measures," and "other related measures, including guidelines" in the panel request are inconsistent with Article 6.2 of the DSU, which requires the complaining party to identify the "specific measures at issue." In Japan's view, the US requests for consultations and the establishment of a panel insufficiently identified the measures in dispute. In particular, the US panel request failed to meet the specificity requirements of Article 6.2 of the DSU.

1. THE REQUEST FOR CONSULTATIONS AND THE CONSULTATIONS

3.12 Article 4.4 of the DSU reads:

> "Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint".

3.13 Japan emphasizes that it is particularly important in this case for the United States to have specifically identified the "measures" in its panel request, because the request for consultations was overly broad and vague, and did not "identify" the measures for the purposes of Article 4.4 of the DSU, which requires the complaining party to include "identification of the matter at issue". Japan points out that the consultations themselves in this case also did not identify the specific measures. According to Japan, proper consultations are fundamental to the operation of the WTO dispute settlement procedures and the United States has often stressed the importance of matters being raised in the consultation stages prior to the panel request, e.g., arguments raised by the United States led the panel in *Norwegian Salmon* to explain that "for a claim to be properly before the panel, it had to be within the Panel's terms of reference and it had to have been identified during prior stages of the dispute settlement process".[92] In *United States - Measures Affecting Alcoholic and Malt Beverages ("United States - Alcoholic Beverages"),* the United States summarized the policy rationale as:

> "… consultations provide the parties an opportunity to reach a satisfactory solution to the dispute before proceeding to a panel. The party complained against might modify its practice or, alternatively, convince the complaining party of the GATT consistency of its measure, in either case avoiding the need for a panel. Furthermore, in those situations where resolution is not possible without recourse to a panel, consultations provide the defending party notice of the measure(s) complained of and the consequent opportunity to prepare adequately for the issue. Such basic due process is a fundamental element of all equitable adjudicatory systems".[93]

3.14 The **United States** submits that consultation requests and panel requests share one common purpose, i.e., to give notice. The notice given should be increasingly more specific at each stage and the degree of specificity required should be proportional to what notice is needed to ensure the parties' meaningful participation at each stage. Article 4.4 of the DSU requires that requests for consultations include "identification of the measures at issue and an indication of the legal basis for the complaint."

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[92]Panel Report on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway ("United States - Norwegian Salmon"),* adopted on 26 April 1994, ADP/87, 100, para. 338.

[93]Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages ("United States - Alcoholic Beverages"),* adopted on 19 June 1992, BISD 39S/206, 226, para. 3.2 (summary of US argument).

The specificity of the notice given by the complaining party to the responding party must be sufficient for the responding party to understand the nature of the matter alleged by the complaining party, and to prepare for the consultations so that they will be meaningful.

3.15 The United States argues that the DSU does not prescribe the specificity with which a matter must be raised and discussed in consultations. The complaining party's description of the matter should include a description of how the measures it understands to be related to the matter operate and a description of how those measures are inconsistent with the relevant WTO agreements. It is not unfair for the responding party to bear responsibility for knowing about its own interpretations or applications of its measures, particularly since those rulings and interpretations would be made under its own legal system in its own language. But the discussions should be specific enough to serve the purpose of the consultations, i.e., to give the complaining party an opportunity to explain the matter complained of, to give the responding party the opportunity to explain the basis for maintaining the measures and to provide the opportunity for the parties to reach a satisfactory adjustment of the matter before proceeding to a panel.

3.16 The United States explains as a general matter, if a party complains about the operation and effect of a given law or measure, it should not be required to discover and present in the consultations every potentially relevant amendment, regulation, directive, notice, administrative action, or judicial decision interpreting and applying that law or measure. In many countries, including the United States, the full panoply of regulations, administrative rulings, and judicial decisions regarding a particular law could fill an entire wall of bookshelves. The approach advocated by Japan would compel a complaining party to research every last volume on the shelves before requesting consultations to be sure that it could identify and mention in the consultations each ruling and interpretation that might possibly be relevant in a panel submission. Such an approach would compel the complaining party to become as knowledgeable about the measures as the responding party that promulgated and administers the measures before requesting consultations. Placing such a difficult and unnecessary burden on complaining parties would discourage Members from requesting consultations unless they had already written their first submission to the panel. Such a heavy burden is not reflected in the DSU and would impair the settlement of disputes.

3.17 **Japan** responds that the fundamental reason behind Japan's request for the dismissal of certain US claims is that the measures were not even specifically mentioned in the US panel request. Japan further explains that the DSU does not require that every interpretation or application of a measure be identified, but that it rather requires the complaining party to identify the specific measures at issue. It is Japan's view that in this case the United States, e.g., complains against certain specific notifications under the Premiums Law, such as the issue of representations, but did not disclose those specific notifications until its first submission.

3.18 The **United States** maintains that each of the measures which are subject to Japan's procedural objections was within the scope of the measures identified and described by the United States in the consultations as reflected in the statement that the United States delivered at the consultations and the US delegation's notes of the dialogue between the parties. During the consultations, the United States presented a detailed and coherent picture of the means and results of Japan's liberalization countermeasures. Japan was apprised in great detail of all the measures at issue, the factual basis for the dispute, the exact nature of the US assertions and the legal arguments that the United States considered applicable.

3.19 In **Japan's** view, the United States' argument that it presented in the consultation "a detailed coherent picture of the means and results of Japan's liberalization countermeasures" does not justify the US failure to meet the requirement under Article 6.2 of the DSU to identify the "specific measures at issue." Japan argues that the United States appears to misunderstand the notice requirement of

Article 6.2 which provides that the panel request "shall … identify the *specific measures* at issue" and thus it requires greater specificity and detail in the request.

3.20 The **United States** contends that it has no obligation to "discover and present in the consultations every potentially relevant amendment, regulation, directive, notice, administrative action, or judicial decision interpreting and applying that law or measure."

3.21 **Japan** responds that the United States has misunderstood the Japanese argument. First, the fundamental reason behind Japan's request for the dismissal of certain US claims is that the measures were not even specifically mentioned in the US panel request. Second, the DSU does not require that every interpretation or application of a measure be identified; rather, it requires the complaining party to identify the specific measures at issue. In this case, e.g., the United States complains against certain specific notifications under the Premiums Law, such as the issue of representations, yet did not disclose those specific notifications until its first submission.

3.22 More specifically, the **United States** insists that seven of the nine measures referred to by Japan under its procedural objections form part of the broader group of government actions and policy processes that the United States categorizes as "distribution countermeasures":

(1) Distribution Committee Sixth Interim Report;
(2) Japan Development Bank (JDB) financing to Konica;
(3) Small and Medium Enterprise Agency (SMEA) financing to photofinishing laboratories
(4) Countermeasures by the Photosensitive Materials Committee of the Distribution Systemization Promotion Council;
(5) Directives to strengthen the Department Stores Law;
(6) International Contract Notification under the Antimonopoly Law and JFTC Rule 1;
(7) JFTC Notification 17.

Moreover, the United States contends that three of the nine measures referred to by Japan under its procedural objections are interpretations or applications of the Premiums Law. In addition to the just-mentioned Notification 17, these are namely:

(8) JFTC Notification 34;
(9) JFTC Notification 5.

The United States discusses each of these measures in turn.

3.23 (1) *Distribution Committee Sixth Interim Report*: The United States submits that this report was one of a series of studies by the Council that formed the basis for distribution policy in Japan, reflecting an analysis and consensus-building process between government and the private sector. In the consultations, the United States specifically identified and described this process by the Industrial Structure Council and its series of reports. The United States stated that MITI charged the Distribution Committee of the Industrial Structure Council with devising measures for consolidating and strengthening the distribution system in anticipation of market liberalization and that MITI's instructions on how to consolidate the distribution system were set forth in a series of reports and guidelines to industry in the late 1960s and early 1970s. The United States mentioned examples of Distribution Committee reports and therefore, Japan had sufficient notice of the US concern about all of the Distribution Committee reports. The United States maintains that the Sixth Interim Report is within the scope of the "series of reports and guidelines to industry in the late 1960s and early 1970s", and "[actions by the Distribution Committee of the Industrial Structure Council … for consolidating and strengthening the distribution system" discussed by the United States in the consultations.

(2)-(3) *JDB and SMEA Financing*: In respect of the US claims related to the JDB financing given to Konica to establish common distribution facilities with its wholesalers and the SMEA financing given to photofinishing laboratories to help align them with domestic manufacturers, in the US view, Japan was on full notice from the consultations that the United States was concerned about government financing to assist the consolidation of distributors under the domination of Japanese manufacturers. Specifically, the United States noted that the 1971 Basic Plan set forth objectives and a process for the Japanese industry to accomplish those objectives under the "systemization" policy. The United States pointed out that the Basic Plan did not rely on voluntary efforts alone, but looked for financial incentives to achieve *keiretsu*-nization [of distribution]. The United States emphasized several provisions of the Basic Plan to support this point, including the statement in the Basic Plan that "*positive support and guidance from the government will be necessary*" to carry out systemization. Based on these discussions, the United States argues that Japan had reason to expect that the United States would continue pursuing the specific ways in which Japan gave its "positive support" for wholesalers and laboratories (which also act as wholesalers) to establish or strengthen their exclusive ties with Japanese manufacturers.

(4) *"Countermeasures" by the Photosensitive Materials Committee*: The United States further contends that actions by the Photosensitive Materials Committee (Committee) of the Distribution Systemization Promotion Council (Council) also fit within the confines of the distribution countermeasures discussed by the United States in the consultations. The United States addressed in detail the actions of the Committee's parent, the Council, which authored the 1971 Basic Plan. The United States described how the Basic Plan called for the "support and guidance" of the Japanese Government to accomplish the systemization goals. The United States specifically stated that over the next several years following the Basic Plan, the Japanese Government followed up with further studies to see how its plans were being implemented and to add to or refine its guidance for consolidating the distribution structure. Such follow-up and further guidance is exactly what the Committee did and it played an important role in ensuring that Konica received subsidized financing from the Japan Development Bank to establish a joint distribution facility with its wholesalers.

(5) *Directives under the Department Stores Law*: The United States does not include the MITI directives issued between 1968 and 1971 under the Department Stores Law as measures that violate Article III or X or that nullify or impair benefits under Article XXIII:1(b). However, these directives form part of the factual context in which Japan carried out the restructuring of its distribution sector for photographic film and paper. The 1969 MITI-commissioned survey of transaction terms in the photographic film sector specifically described the growth of large stores, along with the competitive challenge of Kodak, as the two greatest threats to maintaining the oligopoly of Fuji and Konica. In the consultations, the United States mentioned that Japan saw the need to revise the Department Store Law and replace it with the more comprehensive Large Stores Law as part of the overall effort to insulate the distribution system from foreign control following capital liberalization.

(6) *International Contract Notification*: The United States alleges that the international contract notification provisions of the Antimonopoly Law have played an important role in protecting the exclusive distribution system fostered by Japanese Government policy. The international contract notification provisions require each contract between foreign manufacturer and a Japanese wholesaler to be reported to the JFTC. Once transaction terms are standardized, the JFTC more easily can find that transaction terms departing from the standard are unfair trade practices. In the consultations, the United States discussed Japan's policy of standardizing transaction terms and the rationale for this policy, including that standardized transaction terms would help to protect Japanese manufacturers against foreign competition. The United States referred to the following passage in the 1970 Guidelines: "In order to prevent foreign corporations with huge investment capacity from disrupting the trade order,

reasonable terms of trade must be clearly stated". The United States also quoted a passage[94] from an industry journal which explained the purpose of the guidelines that standardizing transaction terms would facilitate application of the Antimonopoly Law to non-standard practices. The United States also quoted from a report by the Foreign Investment Council, the companion government-industry committee to the Industrial Structure Council. This report[95] emphasized that the Antimonopoly Law could be used to help check the competitive advance of foreign suppliers. The United States underscores that Japan had clear notice of the US concern with standardized transaction terms as a means of blunting the competitive abilities of foreign firms, and its use of the Antimonopoly Law to support these policies. The United States maintains that Japan cannot be surprised that the first US submission described more precisely the mechanisms under the Antimonopoly Law that helped to force standardized terms upon foreign manufacturers.

(7) *JFTC Notification 17*: The United States asserts that JFTC Notification 17 was a tool employed by Japan to blunt the ability of foreign firms to make competitive offers to Japanese distributors. It essentially ruled out all manner of premiums from manufacturers to wholesalers, except those of token value that could be considered reasonable in light of normal business practice. Notification 17 reinforced the standardized transaction terms and the systemization policies which the United States discussed at length with Japan in the consultations and Japan thus cannot claim surprise that the first submission of the United States discusses Notification 17. In addition to being within the scope of the consultations on "distribution countermeasures", the United States submits that Notification 17 is also an interpretation or application of the Premiums Law which it considers as forming part of the "promotion countermeasures".

(8)-(9) *JFTC Notifications 5 and 34*: The United States maintains with respect to two other such interpretations or applications of the Premiums Law that it discussed the Premiums Law at length with Japan in the consultations. It stressed in particular the intent and effect of the Premiums Law in blunting the ability of foreign manufacturers to apply their competitive strengths in Japan. The United States quoted a passage from a report of the Foreign Investment Council[96] and emphasized that the limitations on competition under the Premiums Law worked to the disadvantage of companies who are not the dominant suppliers. In the US view, Notifications 5, 17 and 34 are cornerstone applications of the Premiums Law that impose substantial limits on the ability of foreign film manufacturers to offer meaningful premiums in connection with products sold in Japan. The substantial discussion of the Premiums Law during the consultations gave Japan more than adequate notice that its particular interpretations and applications of the law restricting competition were within the scope of this dispute.

3.24 **Japan** reiterates that the request for consultations in this case was overly broad and vague, and did not "identify" the measures for the purposes of Article 4.4 of the DSU, which requires the complaining party to include an "identification of the matter at issue". According to Japan, the

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[94]"In the case of the photographic sector, … the reduction in tariffs and the capital liberalization, etc., makes the inroads Kodak is gaining a problem that it [the industry] faces. The Ministry of International Trade and Industry's guidelines for normalizing transaction conditions is what may be called an 'immunization'. … [B]ecause of the fear of confusion of transaction order due to the development of liberalization, it [the Guidelines] embodies the idea of 'immunizing' the distribution system as a whole by rationalizing and clarifying the transaction condition of rebates and discounts … . The guidelines may be described as an attempt to equalize the conditions of competition. For instance, standard rebates were adopted so that the use of non-standard rebates by foreign capital may be checked by the application of the Antimonopoly Law." Draft Standard Contract for Film with Criteria for Standardization on Transaction Terms, Zenren Tsuho, August 1971, US Ex. 71-11.

[95]"For the application of the Antimonopoly Law, while it may not be possible to specifically select foreign capital enterprises for differential treatment, foreign capital enterprises nevertheless have the strong capital and technical background of the parent company and are usually in an economically strong position. Consequently, it is believed that they often will become the object of the regulation of the Antimonopoly Law." US Ex. 67-5, pp. 76-78.

[96]When foreign capital is brought into Japan, it is possible for a parent company to use vast amounts of capital to engage in dumping, offer premiums, and conduct large-scale advertising and public relations. Therefore … it is necessary to fully study whether these actions qualify as unfair business practices as defined in Article 2 of the Antimonopoly Law and can be regulated pursuant to Article 19 of the Antimonopoly Law or under the Premiums Law.

consultations themselves in this case also did not identify these specific measures and the United States admitted as much during the first meeting with the panel. While the United States purports to demonstrate how "measures" were discussed in the preceding paragraph, in fact the discussion shows just the opposite. In Japan's view, the United States is forced to make rather strained arguments for each measure.

2. THE REQUEST FOR THE ESTABLISHMENT OF THE PANEL

3.25 Article 6.2 of the DSU provides:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

3.26 Japan submits that Article 6.2 of the DSU requires the complaining party to identify all alleged measures at issue in its request for the establishment of a panel, as well as the legal basis for its claims relating to those measures. Given that Article 4.4 of the DSU provides that a request for consultations includes "identification of the measure at issue", whereas Article 6.2 of the DSU requires that the panel request "identify the specific measures at issue", Japan argues that in the panel request greater specificity and detail is required than in the request for consultations. This requirement serves the important purposes of both providing notice to the parties complained against and third parties, and defining precisely what the panel should consider. Without a specific indication of the measures being challenged, the parties complained against cannot defend themselves adequately and third parties cannot judge whether they need to participate in the panel proceedings.

3.27 The **United States** explains that Article 6.2 of the DSU requires the complaining party to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The panel request then becomes the primary document defining the panel's terms of reference which "fulfil an important due process objective, i.e., giving the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case".[97] While the DSU requires greater specificity in the panel request than in the request for consultations, the United States argues that the panel request need not restate the consultations nor summarize the complaining party's first submission.

3.28 **Japan** further submits that Article 6.2 of the DSU reflects past panel practice, which consistently has interpreted the terms of reference narrowly. In *Canada - Administration of the Foreign Investment Review Act*, the panel declined to consider any measures related to "manufacture" of goods because of its terms of reference "which only refer to the purchase of goods in Canada and/or the export of goods from Canada."[98] The panel in *Norwegian Salmon* summarized the policy rationale for panels to confine themselves to the examination of matters identified in their terms of reference:

> "[T]erms of reference served two purposes: definition of the scope of a panel proceeding, and provision of notice to the defending Party and other Parties that could be affected by the panel decision and the outcome of the dispute. The notice function of terms of reference was particularly important in providing the basis for each Party to determine how its interests might be effected and whether it would wish to exercise its right to participate in a dispute as an interested third party. The panel observed

[97]Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut* ("*Brazil - Desiccated Coconut*"), adopted on 20 March 1997, WT/DS22/AB/R, p. 22.

[98]Panel Report on *Canada - Administration of the Foreign Investment Review Act ("Canada - FIRA")*, adopted on 7 February 1984, BISD 30S/140, 158, para. 5.3.

> that terms of reference often were standard terms of reference . . . in which the definition of the matter had been supplied by a written statement prepared entirely by the complaining party. In the light of these considerations, the Panel concluded that a matter, including each claim composing that matter, could not be examined by a panel under the Agreement unless that same matter was within the scope of, and had been identified in, the written statement or statements referred to or contained in its terms of reference …"[99].

3.29 According to the **United States**, only two panel reports have considered the question of whether a "measure" should be considered within the panel's terms of reference.[100] A number of prior panel reports have considered the related, but different, question of whether "matters" or "claims" are within the panel's terms of reference.[101] In the United States view, these prior decisions demonstrate that panels have excluded only those measures, claims, and matters that fall outside the parameters of the dispute as it was understood by the parties at the time the panel's terms of reference were established.

3.30 **Japan** submits that the outer limits of a panel's jurisdiction are defined by its terms of reference which in this case refer to the matter specified in the panel request. Panels should thus focus on the exact wording of the terms of reference to define precisely their mandate. Claims with respect to items raised by the United States in its first submission that had not been mentioned in its panel request should be dismissed at the outset as outside the scope of the Panel's terms of reference.

3.31 The **United States** contends that its request for the establishment of this Panel does not differ greatly from other WTO panel requests in the degree of detail provided. The panel request in the case concerning the *European Communities - Regime for the Importation, Sale and Distribution of Bananas ("EC - Bananas")* of April 1996 just described that the regime was established by an EC regulation, and subsequent legislation, regulations and administrative measures and that the regime and related measures appear to be inconsistent with the provisions of the WTO Agreements. The United States takes the position that in view of the nature of Japan's distribution measures in the consumer photographic film and paper market, it was necessary for the United States to describe those measures in similar terms.

3.32 **Japan** explains its position with regard to the differences between the issues for this case and those for the *EC - Bananas* case. Contrary to the US claims, in Japan's view, the panel request in this case differs greatly from the panel request for the *EC - Bananas* case. The panel request for the *EC - Bananas* case did apparently identify the basic EC regulation at issue which established the banana "regime" and referred to "the subsequent EC legislation, regulations and administrative measures that further define and implement the basic regulation." By contrast, in the present case, the cores of the

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[99]*United States - Norwegian Salmon*, ADP/87, 99, para. 336. Although this panel involved a dispute under the Antidumping Code, in Japan's view, the policy rationale is equally compelling in the present case.

[100]In *Japan - Alcoholic Beverages* the panel ruled against the proposed inclusion of a new measure, the Taxation Special Measures Law, that was unrelated to the measure that had been discussed in consultations and named in the panel request, the Japan Liquor Tax Law. Panel Report on *Japan - Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/R, para. 6.5. In *United States - Alcoholic Beverages*, the panel adopted an agreement of the parties as to the scope of the measures to be considered, but rejected Canada's request to include in the terms of reference "any new measure which may come into effect during the Panel's deliberations." BISD 39S/206, 227, para. 3.5.

[101]See, e.g., Panel Report on *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear From Brazil*, adopted on 19 June 1992, BISD 39S/128, 148, para 6.2 (rejecting two new "issues" under Article X and XXIII:1(b)); Panel Report on *United States - Restrictions on Imports of Sugar*, adopted on 7 November 1990, BISD 37S/228, 237, para. 3.19 (rejecting attempt to include new Article XIII "matter"); and *United States - Norwegian Salmon*, ADP/87, 99, para. 336 (rejecting attempt to include a new Article III "claim" where existing claims related to the Antidumping Agreement). Cf. Panel Report on *United States - Section 377 of the Tariff Act of 1930*, adopted on BISD 36S/345, 383, para. 5.5 (accepting two new EEC arguments relating to "legal procedures").

measures in question themselves are presented with such unclear expressions as "liberalization countermeasures," a phrase created by the United States, and many of the alleged measures are not the kind of measures which "further define and implement the basic regulation," but are presented with vague and undefined expressions like "but not limited to" and "other related measures including guidelines."

3.33 Japan further argues that although the panel on the *EC - Bananas* case states that "the DSU must be interpreted so as to promote the prompt settlement of disputes, without adopting a reading of DSU provisions that would prolong disputes unnecessarily," undue emphasis on the promptness of the settlement without taking due account of the defending party's burden may invite abuse of the dispute settlement system and could cause serious damage to the proper operation of the system. Japan submits that the DSU must be interpreted so as to serve the purpose of the fair settlement of disputes.

3.34 The **United States** urges the Panel to include the measures subject to Japan's procedural objections within its terms of reference

(1) because Japan was on adequate notice of the measures implicated in the US request;
(2) because Japan has not complained that any of the measures are not "related" to measures that were discussed at the consultation and named in the panel request; and
(3) because of the nature of the measures themselves.

(a) Adequate notice

3.35 From the standpoint of the object and purpose of Article 6.2, the **United States** argues that its panel request was more than sufficient in view of the Appellate Body's finding in its report in the *Brazil - Desiccated Coconut* dispute that "terms of reference fulfil an important due process objective - they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case".[102]

3.36 In the current dispute, the United States claims that Japan was not denied "an opportunity to respond to the [US] case". As its first submission demonstrates, Japan did not lack an understanding of the problem the United States was complaining about. Japan had six weeks to respond to the first US submission which is double the maximum amount of time in the DSU's proposed timetable for panel work. If there were any prejudice caused to Japan by the inclusion in first US submission of the nine measures which are subject to Japan's procedural objections, the United States argues that prejudice has been cured by the extraordinarily long period of time that Japan had to prepare its first submission.

3.37 **Japan** responds that even if it had more time to prepare its first submission that would not excuse the violation of Article 6.2 of the DSU. Moreover, disclosure after the panel request does nothing to remedy the harm suffered by third parties who might have made different decisions about whether or not to participate based on the specific items raised in the panel request. Japan further submits the following four points. First, a written submission does not substitute for the notice function required by Article 6.2 of the DSU. For another, the lack of specificity in the panel request requires extensive work on the defending party for the preparation of its defense, which could be avoided if the panel request were sufficiently specific. Making the defending party engage in what may eventually turn out to be unnecessary work, and in view of the limited amount of resources and time available, constraining their ability to defend adequately is prejudicial and unfair. Thirdly, the first US submission included such measures as international contract notification, SMEA financing, and JDB loan, the inclusion of which Japan was not able to foresee even after extensive preparation. Finally, the US

[102]*Brazil - Desiccated Coconut*, WT/DS22/AB/R, p. 22. See also *United States - Norwegian Salmon*, ADP/87, 99, para. 336.

first submission itself still did not clarify which measures are complained against. Even the list of the "measures" submitted by the United States in response to a question by the Panel at the first substantive meeting included vague expressions, such as "related regulations and administrative measures, including related local measures."

3.38 The **United States** contends that all the measures in question are elements of Japan's liberalization countermeasures plan; six are "distribution measures, such as, but not limited to" the measures identified in the body and Attachment A of the US panel request; and three are notifications made by the JFTC pursuant to the Premiums Law or the Antimonopoly Law identified in the body of the US panel request. According to the United States, its panel request stated explicitly and clearly the problem that the United States was asking the panel to address and gave Japan and third parties sufficient information concerning the claims at issue in the dispute for them to respond fully to the United States.

(b) Related measures

3.39 According to the United States, in the current dispute, the measures that Japan would have the Panel exclude from consideration are an integral part of the corpus of the distribution and premiums countermeasures, they were discussed in detail during the consultations and thus do not fall outside the parameters of the dispute as the parties understood it.

3.40 **Japan** requests the Panel to exclude the vague and overly inclusive expressions used by the United States in the panel request as inconsistent with Article 6.2 of the DSU. Only "measures" specifically mentioned in the panel request should be deemed to be brought properly before the Panel. At the DSB meeting of 16 October 1996, when the Panel was established, Japan expressed its serious concerns about the procedural problems of the US request for the establishment of the panel in light of the DSU, and reserved its rights to request the Panel to make a ruling on the matter.[103]

3.41 In particular, in Japan's view, "liberalization countermeasures", to which the United States refers in its panel request, are not a set of concrete measures, but rather a generic term, and are too general and ambiguous to be regarded as "specific measures" in the sense of Article 6.2. Attachment A, in which the United States listed what it believes to be "distribution measures", contains a measure which Japan is unable to identify, namely the "Administrative Guidance to Promote Rationalization of Distribution System, 1966".

3.42 The **United States** submits that it used the term "distribution measures" in its panel request to refer to the series of measures used to implement Japan's policy of restructuring the distribution system for photographic materials into exclusionary distribution channels. The United States included Attachment A in its panel request to indicate the types of measures that were included in the term "distribution measures", even though, in the US view, Japan would have fully understood the meaning of that term based on the consultations between the parties.

3.43 **Japan** claims that there are other references in the panel request which imply that the United States has not yet identified specific measures at issue, e.g., expressions such as, "but not limited to", "other related measures, including guidelines", which appear in Attachment A, as well as "related measures" which is found at the end of the first paragraph of the panel request.

3.44 The **United States** responds that the phrases "measures, such as, but not limited to" in line 4 of the first paragraph and "other related measures, including guidelines" at the end of Attachment A indicate that Attachment A is an illustrative, not exhaustive, list of the distribution measures that Japan used to close the primary Japanese distribution channels to imported film and paper. The phrase "and

[103]WT/DSB/M/24.

related measures" at the end of the first paragraph refers to amendments, regulations, administrative guidance, notifications, and surveys, that Japan implemented with respect to

(a) the Large Stores Law;
(b) Special Measures for the Adjustment of Retail Business;
(c) the Premiums Law;
(d) measures regarding dispatched employees pursuant to the Antimonopoly Law;
(e) the Law Concerning Enterprise Reform for Specified Industries;
(f) the Ministry of International Trade and Industry Establishment Law.

3.45 **Japan** points out that the United States continues to use vague expressions in its response to the Panel question for clarification of its claims. The response included expressions such as "including related actions to implement recommendations in the Guidelines"; "including actions to implement recommendations"; and "related regulations and administrative measures, including related local measures". Since these expressions hardly indicate "specific measures", Japan criticizes that the United States continues not to clarify the scope of its claims and emphasizes that a complaining party should not be allowed continually to raise additional items in a panel proceeding.

3.46 Given that, according to the **United States**, Japan does not dispute that the measures with respect to which it raises procedural objections are "related to" the measures that the United States specifically named in its panel request, the Panel should consider these related measures to be within its terms of reference.

3.47 **Japan** contests that the nine items identified against which it has raised procedural objections as well as rules on loss leader advertising, are not "related" to those that are properly before the Panel. With respect to the US argument that Japan had not early enough objected to the "relatedness", Japan responds that, since the United States first made this argument in the first substantive meeting of the Panel, Japan could not respond until that time. Japan further argues that the United States should bear the burden of establishing the "relatedness" of these measures not specifically mentioned in the panel request. Japan should not bear the burden of proving the converse. While the United States has made general claims about these items, Japan takes the position that the United States has not identified the measures properly before the Panel to which these measures are "related".

3.48 Specially, Japan contends that several of these measures which are subject to its procedural objections bear no meaningful relationship to the US claims regarding Japanese policies on distribution, large stores, or sales promotions. In particular, Japan submits that:

(2-3) *SMEA and JDB Financing*: Japan recalls that the US defense is that the mere phrase "positive support" in the 1971 Basic Plan should have been sufficient to place Japan on notice about the SMEA and JDB financing programs. With respect to the US allegation that during the consultations it pointed out that the 1971 Basic Plan looked to "financial incentives", Japan notes that according to its record and recollection, this point was never raised in the consultations. Japan declares that the United States is looking for isolated phrases in documents to excuse its failure to specify what measures were to be at issue in this dispute. In Japan's view, the phrase "positive support" is too vague to constitute any meaningful notice to Japan or to establish any relationship between the measures identified in the panel request and the measures ultimately attacked by the United States.

(4-5) *"Measures" by the Photosensitive Committee and Directives under the Department Stores Law*: Japan notes that the United States itself dropped these items from those it requests the Panel to consider.

(6) *International Contract Notification*: Japan notes that in the US panel request the only item mentioned with respect to the Antimonopoly Law was "measures regarding dispatched employees", an issue unrelated to the international contract notification requirement under the Law.

3.49 Japan concludes that the Panel should exclude vague and overly inclusive expressions from the scope of the terms of reference and only those "measures" specifically mentioned in the panel request for the establishment of the Panel should be deemed properly before the panel. Otherwise the scope of the panel request and thus the terms of reference themselves would be rendered meaningless. If the United States needed more time to translate or evaluate Japanese language materials, it could simply have waited to make its panel request. When the complaining party reaches the stage of a panel proceeding, it must be ready to identify specific measures as the basis of its claim. Japan insists that US efforts to include vague "catch-all" phrases are contrary to the basic principles of the WTO dispute settlement process.

(c) Nature of the measures

3.50 The **United States** further submits that Japan was aware that the United States is complaining about a collection of measures, not a single measure, that resulted in the creation of an exclusionary distribution system for consumer photographic materials. Had Japan implemented its distribution policies through transparent laws and regulations, the United States would not have needed to go to such great lengths to describe the distribution measures in its panel request. Therefore, United States asserts that the means selected by it to describe these measures are necessitated by the nature of the measures themselves. It had taken the United States years to fully understand Japan's labyrinth of liberalization countermeasures and it continues to learn every day, including the names and applications of other related measures that constitute individual bricks in Japan's protectionist wall. In the US view, Japan has used an extraordinary array of measures which have been difficult to identify and fitting the pieces of this puzzle together has been an extremely difficult task. To dismiss the measures in question as being beyond the Panel's terms of reference would reward Japan for its nontransparent approach to protectionism and would give responding parties an incentive for withholding information in consultations, and would prevent the United States from obtaining complete relief from a problem that is well understood by Japan. The United States submits that such a dismissal would not be within the letter or the spirit of the DSU.

3.51 **Japan** rebuts that the US allegations concerning the nature of the measures are undermined by the breadth and detail of the US submission given that in the thousands of pages in the appendix to its submission, the United States has provided translated copies of the reports and other items it considers relevant to Japan's various policies. The policies have all been published and are publicly available, and thus these supposedly opaque policies are actually easily accessible to the public. Japan points out that the United States had no problem identifying everything with perfect specificity just several weeks after drafting its panel request. The fact that the United States did not review these materials earlier in no way means the United States could not have done so. Japan asserts that the US complaint essentially seems to be "we should not have to wait to request a panel until we know what we are complaining about". Japan emphasizes that Article 6.2 of the DSU requires the United States to wait until it can precisely identify the specific measures involved in a dispute.

IV. SUMMARY OF ARGUMENTS

4.1 The claims raised by the United States concern three broad categories of measures: (1) distribution measures, which allegedly encouraged and facilitated the creation of market structures for film and paper in which imports are excluded from traditional distribution channels; (2) the Large Stores Law, which allegedly restricts the growth of an alternative distribution channel for film; and (3) restrictions on premiums and misleading representations under the Premiums Law, which allegedly disadvantage imports by restricting sales promotions.

A. DISTRIBUTION "COUNTERMEASURES"

4.2 The **United States** argues essentially that at the beginning of the Kennedy Round in 1963, foreign and domestic manufacturers distributed photographic film and paper through Japan's primary wholesalers who, in turn, sold to other wholesalers or retailers. Photographic material manufacturers competed against one another to market their products to the same wholesalers. Foreign as well as Japanese manufacturers did business with many of Japan's distributors. By the mid-1970's, however, when many formal market barriers had fallen, the Japanese Government had fundamentally altered relationships between manufacturers and wholesalers. By then, all of the leading wholesalers in Japan exclusively handled Japanese products. The United States claims that so far no foreign firm has succeeded in penetrating these closed distribution channels.

4.3 According to the United States, when the liberalization of international trading conditions became imminent, MITI and Japanese manufacturing interests recognized that foreign firms in many instances were not only positioned to offer competitive products, but also to deploy superior resources and managerial expertise in distribution and marketing. MITI foresaw that these foreign advantages could create serious competition for Japanese manufacturers and their products and that foreign enterprises would be able to displace domestic manufacturers at the wholesale and retail levels. MITI officials and Japanese manufacturers therefore jointly devised a plan to streamline Japan's distribution system while at the same time bringing it under the control of domestic producers. Under this policy, which was referred to as the "systemization of distribution", MITI sought to strengthen vertical distribution channels from manufacturer to wholesaler to retailer in order to establish distribution chains of wholesalers and retailers that would exclusively handle the products of a particular domestic manufacturer.

4.4 The United States alleges that MITI targeted three ways to tie distributors more closely to domestic manufacturers:

> First, MITI promoted the use of transaction terms that would result in a distributor selling the products of just one domestic manufacturer: volume discounts, rebates and standardized and shortened payment terms. Discounts and rebates encouraged wholesalers to purchase greater volume from fewer suppliers. The standardized and shortened payment terms limited the opportunities for wholesalers to seek better credit rates from other suppliers. This left wholesalers more dependent on and vulnerable to the credit terms offered by the manufacturer with whom they primarily did business.
>
> Second, MITI urged the photographic materials industry to rely upon shared facilities and operations, such as joint warehouses and distribution routes. The government offered subsidies, expertise, and other benefits to induce businesses to enter into more cooperative arrangements.
>
> Third, MITI determined that common information and computer links would forge closer relationships among a particular Japanese manufacturer and its downline wholesalers and retailers. MITI therefore guided manufacturers and wholesalers to use standardized data bases, commercial orders and financial information.

4.5 The United States further claims that at the same time MITI sought to tighten the bonds among horizontal elements of the distribution system. MITI attempted to join retailers into "voluntary chains" that would do business with affiliated Japanese manufacturers. The principal result would be the consolidation of previously independent photo finishing laboratories within newly-formed groups of Japanese retailers or wholesalers, or in a consortium doing business with a single Japanese manufacturer.

4.6 **Japan** responds that the aim of MITI's distribution policies was not to block imports but to modernize the Japanese distribution industry and help it to meet the foreign competitive challenge that would be unleashed by liberalization. Nothing in MITI's distribution policies or any other so-called "liberalization countermeasures" did anything to encourage or facilitate the creation of an exclusionary market structure that discriminates against imported film or paper. Since the MITI policies in question actually say nothing about encouraging single-brand distribution of film, the United States struggles to establish some connection between MITI's policies and the market structure that is the main target of its complaints. Japan asserts that when confronted with the actual facts of this market, however, the US arguments about "distribution countermeasures" collapse.

4.7 Japan further responds that MITI's concern with modernizing the Japanese distribution sector has existed continuously for over 30 years, including the periods before and after capital liberalization. According to Japan, MITI had diverse rationales for encouraging distribution modernization. Originally, MITI sought to improve the relatively low productivity of the distribution sector, thereby alleviating a growing labour shortage and the continuing increase in consumer prices in the late 1960s. To the extent that MITI's distribution modernization policies were a response to capital liberalization, MITI's concern was to improve the efficiency and competitiveness of a relatively backward distribution sector. The objective was to compete more effectively with new foreign entrants. MITI was not trying to prevent imports from enjoying the allegedly unique advantages of traditional distribution channels. To the contrary, MITI viewed traditional distribution channels as competitively disadvantaged and sought to remedy their defects.

4.8 Japan explains more specifically that MITI's distribution policies in the 1960s and '70s pursued modernization through both rationalization and systemization policies. As to the rationalization policies, the objective was to eliminate traditional outmoded business practices considered to be economically irrational. In the film sector, MITI's issued the 1970 Guidelines for Rationalization of Transaction Terms which explicitly discouraged the use of rebates and did not call for shorter payment terms. Thus, in Japan's view, they were unrelated and inimical to the establishment of single-brand distribution.

4.9 Moreover, Japan argues that the US theory has intractable timing problems. Three of Fuji's four major primary wholesalers were already single-brand distributors by 1968, two years before the guidelines were issued. While Fuji's fourth primary wholesaler did not become a single-brand distributor until after the issuance of the Guidelines, it only made this private business decision after Kodak explicitly refused to deal with the primary wholesalers directly. As to the other domestic manufacturer, Konica, all of its primary wholesalers had been single-brand distributors by 1955. There was thus no causal connection between the 1970 Guidelines and the development of single-brand wholesale distribution in the film sector.

4.10 Japan further explains that the second objective of MITI's distribution modernization policies was systemization.[104] These policies encouraged the adoption of standardized forms and procedures, and the increased use of computer technology. In the film sector, a study group in a MITI-commissioned public corporation issued a manual along these lines in 1975. According to Japan, systemization of distribution was believed to facilitate, not exclude or discourage, entrance of foreign companies, because

[104]As discussed below, Japan argues that MITI distinguished between rationalization and systemization policies. The United States uses the single term "systemization" to cover both concepts.

standardization would alleviate the burden of having to adjust to hundreds or thousands of individualized ways of doing business.

4.11 Japan points out that the US allegations ignore the timing of the alleged measures and what actually happened in the market. According to Japan, single-brand distribution occurred as an industry trend before the alleged measures were implemented. Also Fuji did not establish its first on-line connection with a primary wholesaler until 1989, 14 years after the alleged government action was taken. There was simply no causal connection between MITI's systemization policies, and the decisions by primary wholesalers about which film brands to carry.

4.12 Japan further contends that there is nothing at all unusual about the Japanese market structures for film and paper. Single-brand wholesale distribution of film is a common business practice which prevails in every major market in the world. Likewise, affiliations between photosensitive materials manufacturers and photofinishing laboratories prevail worldwide. The consistent prevalence of these market structures around the world is due to market factors, not government measures.

4.13 Japan notes MITI's efforts to promote distribution organization continue to this day. To this end, in 1990 MITI issued distribution guidelines that once again addressed the same kinds of "irrational" distribution practices that had been targeted by the 1970 Guidelines, e.g., unclear rebates, liberal returns, and dispatched employees to customers. Now, however, *encouraging* imports was one of the guiding purposes for targeting these practices. For its part, the United States has strongly endorsed the 1990 Guidelines. As recently as November 1996, during the pendency of this proceeding, the United States specifically urged MITI to "maintain and report an adherence by the Japanese business community" to these Guidelines. In Japan's view, the internal inconsistency of the US position is remarkable because the United States is simultaneously urging Japanese business to follow the current administrative guidance on rationalizing distribution practices *and* arguing before this Panel that similar guidance 20 years earlier was part of an anti-import conspiracy.

B. LARGE STORES LAW

4.14 The **United States** argues that large retail stores remain one potentially significant alternative distribution channel despite the Japanese Government's reorganization of wholesale operations in the photographic materials sector. In the late 1960's, the number of supermarkets and other "self-service stores" was growing rapidly and, in the US view, such large retailers offered foreign manufacturers, foreclosed from the primary distribution network, a partial alternative to wholesalers. The United States claims that large stores have carried imported products, including film, more frequently than small stores and have been less susceptible to pressure by domestic manufacturers. If such stores were permitted to proliferate across Japan, wholesalers would become less significant and foreign manufacturers could circumvent the bottle-necked distribution system. In response to this threat, the United States submits, in 1967 and 1968 Japan began to impose controls on the expansion of large stores and finally enacted the Large Stores Law in 1973. This law imposed a burdensome process on the opening and expansion of large retail stores.

4.15 **Japan** explains that the Large Stores Law reflects longstanding Japanese policy--dating back to the enactment of the Department Store Law in 1956--of regulating large stores to preserve a diversity of small, medium and large retailing competitors, a policy found in other countries as well. Japan contends that the law does not concern products generally, or film in particular. The law does not regulate which products large retailers can carry, nor does it take into account which products a retailer sells when determining whether and what adjustments are necessary. Accordingly, in Japan's view, the Large Scale Retail Store Law is incapable of adversely modifying competitive conditions for any imported products, including film. As to the US argument that large stores are more likely to carry imports, in Japan's view, retailers, whether large or small, choose the brands they carry to maximize profit; there is no reason to believe that the size of stores in any way changes the profitability of a

particular product. Thus, there is no difference between them in choosing the products they carry. Further, there is in fact no correlation between a store's size and its likelihood of carrying foreign film brands, although a competitive relationship cannot be deduced from market survey results. Japan also notes that the law has been significantly liberalized in recent years and is more favourable to imports now than at the time of any of the relevant tariff concessions.

C. PROMOTION "COUNTERMEASURES"

4.16 The **United States** argues that Japan has reinforced the distribution countermeasures not only through legal restrictions on retail stores but also through a system of measures limiting how photographic material manufacturers, wholesalers and retailers may promote their products in order to expand their sales of photographic film and paper in the Japanese market by means of economic inducements and aggressive advertising. The United States claims that "promotion countermeasures" have disadvantaged foreign manufacturers of film and paper by constraining their ability to use certain discounts, gifts, coupons, and other inducements, or to rely upon innovative advertising campaigns, particularly where price or price comparisons are discussed. The United States argues that Japan has implemented these promotion countermeasures through the Premiums Law and certain regulations issued by the JFTC under the Antimonopoly Law. Although these measures also apply to domestic film and paper producers, the United States contends that Japan has imposed them with the intention of striking against two aspects of international competition by foreign imports following trade liberalization, i.e., (i) the strong capitalization and cost competitiveness of foreign manufacturers and (ii) their ability to convert these resources into potent marketing strategies and aggressive promotional competition.

4.17 **Japan** responds that the Premiums Law imposes restrictions only on excessive premiums and regulates only misleading representations. In the interest of consumer protection, the Premiums Law is designed to effectively deal with unfair trade practices and encourage manufacturers to compete principally on the basis of price and quality, not unfair inducements or deceptive and misleading representations. Japan emphasizes that the law makes no distinctions between imported or domestic products. Japan further argues that the Premiums Law does not hinder vigorous price and promotional competition. Low price offers are not only permitted, but are, in Japan's view, facilitated by the law and a broad range of promotional practices are consistent with the law. All companies, both domestic and foreign, have been and continue to be free to spend as much money as they want on advertising. Companies are free to use any expressions they wish, so long as they do not deceive or mislead consumers. Japan also submits that no businesses have ever been restricted from offering promotional gifts or prizes by lotteries and competition, so long as they are in line with the standards set in accordance with the law to protect consumers. In Japan's view, these standards are no more rigid than those set by similar laws in many other countries. Japan also contends that in some respects, the standards are actually less rigid than those of the United States because certain types of lotteries and prize competitions prohibited in the United States have been allowed in Japan.

4.18 The **United States** points out that enforcement actions under the Premiums Law may be taken by the JFTC and the 47 prefectural governments. In addition, the JFTC has given its official sanction to so-called "fair competition codes" promulgated by private sector "fair trade councils". The United States also argues that the "fair trade councils" have authority to discipline members who violate the codes, often employing methods of coercion and monetary penalties. The United States further claims that the standards established by the councils in their codes typically are adopted by the JFTC, which then applies the same rules to "outsiders". According to the United States, the Premiums Law expressly exempts the cartel-like practices of the councils from antitrust enforcement.

4.19 **Japan** responds that private "fair competition codes", and the "fair trade councils" are not relevant to this case because no "code" or "council" covers photographic film and paper. The Retailers Council is merely responsible for the observance of the code against misleading representations and has no authority to enforce the Premiums Law nor may it restrict low price offers in any way.

D. THE COMBINED EFFECT OF THE THREE SETS OF MEASURES

4.20 *Distribution countermeasures:* The **United States** claims that the distribution countermeasures operate as a set, i.e., the distribution countermeasures acting in combination, on the one hand, violate Article III:4 and, on the other, nullify or impair benefits under the GATT within the meaning of Article XXIII:1(b).

4.21 *Distribution countermeasures in combination with the Large Stores Law:* The United States further claims that the Large Stores Law and related measures and the distribution countermeasures *in combination* nullify or impair benefits under the General Agreement within the meaning of Article XXIII:1(b).

4.22 *Restrictions on large stores*: The United States also claims that the Large Stores Law and related measures *by themselves*, in the context of a closed distribution system, nullify or impair benefits under the General Agreement within the meaning of Article XXIII:1(b), in addition to the position stated above regarding the Large Stores Law acting in combination with the distribution countermeasures.

4.23 *Promotion countermeasures:* A further US claim is that the promotion countermeasures as a set *by themselves* have nullified or impaired benefits under Article XXIII:1(b), given that in the current market structure in Japan foreign manufacturers effectively had no access to the primary wholesaler channels.

4.24 *Promotion measures, distribution measures and restrictions on large stores:* The United States further claims that the promotion countermeasures as a set have operated *in combination* with Japanese Government efforts to restructure the distribution system through the distribution countermeasures and restrictions on large stores to nullify or impair benefits under the GATT within the meaning of Article XXIII:1(b).

4.25 **Japan** contends that the US claims against the three categories of measures acting in combination with each other are factually and logically flawed. According to Japan, the United States did not submit credible evidence that the measures were intended to and in fact acted in combination. In Japan's view, the distribution policies, the Large Stores Law and the promotion measures pursue very different policy objectives, and were not intended to work together.

4.26 *In summary,* the **United States** alleges:

a. The distribution countermeasures, Large Stores Law and related measures, and promotion countermeasures in combination nullify or impair benefits within the meaning of Article XXIII:1(b).

b. The distribution countermeasures, as a set, also
   i. violate Article III:4 and
   ii. nullify or impair benefits within the meaning of Article XXIII:1(b).

c. The Large Stores Law and related measures also nullify or impair benefits within the meaning of Article XXIII:1(b), in the context of the restrictive distribution structure in Japan.

d. The promotions countermeasures, as a set, nullify or impair benefits within the meaning of Article XXIII:1(b), in the context of the restrictive distribution structure in Japan.

e. The specific failures to publish the fair trade councils' and JFTC enforcement actions as well as guidance by MITI, prefectural and local authorities under the Large Stores Law

or related local regulations, that establish or modify criteria applicable in future cases, each constitute a violation of Article X:1.

4.27 **Japan** rejects all these US claims with respect to the various individual allegations since, in its view, none of the alleged measures individually adversely affect imported products or alter the conditions of competition facing imported products. Japan emphasizes that even when the distribution policies, large store laws and the promotion measures are considered as "sets of measures" with combined effects, they do not in any way disadvantage imports because combining nothing with nothing still produces nothing.

4.28 For a detailed discussion of the parties' arguments with respect to the allegations concerning the three sets of measures acting in combination, see Section VI.F. below.

V. FACTUAL ARGUMENTS OF THE PARTIES

A. DISTRIBUTION "COUNTERMEASURES"

1. OVERVIEW

5.1 The **United States** argues that at the beginning of the Kennedy Round in 1963, foreign and domestic manufacturers distributed photographic film and paper through Japan's primary wholesalers who, in turn, sold to other wholesalers or retailers. Photographic material manufacturers competed against one another to market their products to the same wholesalers. Like Japanese manufacturers, foreign manufacturers did business with many of Japan's distributors. By the mid-1970's, however, when many formal market barriers had fallen, the Japanese Government had fundamentally altered relationships between manufacturers and wholesalers. By then, all of the leading wholesalers in Japan exclusively handled Japanese products. The US conclusion is that to this day, no foreign firm has succeeded in penetrating these closed distribution channels.

5.2 The United States claims that, starting with the Kennedy Round tariff concessions, Japan imposed laws, regulations and administrative actions to strengthen the dominant position of domestic consumer photographic materials manufactures and curtail opportunities for imports that would otherwise be available. While many of these measures do not bear the typical characteristics of protection, i.e. the measures are not facially discriminatory against imports, when they are seen in their totality they reflect a unique system of distribution and marketing management that has pervasively disadvantaged imported photographic materials.

5.3 In particular, the United States argues that as trade and investment liberalization approached in the late 1960's, the Japanese Government and industry began to work together to create the distribution structure that remains in place today. The US argument is that this situation in the Japanese photographic materials market is not as a result of market forces, but by deliberate manipulation by the Japanese government. This was done to offset the possible effects of liberalization and the resultant competition from foreign firms with better expertise in distribution and marketing. As a result, MITI and Japanese manufacturers jointly began streamlining Japan's distribution system and at the same time bringing it under the control of domestic producers - a policy which became known as "systemization of distribution". Japan accomplished this in three ways -

(i) MITI promoted the use of transaction terms that would result in a distributor selling products of just one domestic manufacturer - volume discounts, rebates, and standardized shortened payment terms. Discounts and rebates encouraged wholesalers to purchase greater volume from fewer suppliers. Standardized and shortened payment terms limited the opportunity for wholesalers to seek better credit rates from other suppliers.

(ii) MITI urged the photographic materials industry to rely upon shared facilities, and the government offered subsidies, expertise, and other benefits to induce businesses to enter into more cooperative arrangements.

(iii) MITI determined that common information and computer links would forge closer relationships among a particular Japanese manufacturer and its own downline wholesalers and retailers.

5.4 **Japan** responds that the aim of MITI's distribution policies was not to block imports but to modernize the Japanese distribution industry and help it to meet the foreign competitive challenge that would be unleashed by liberalization. Nothing in MITI's distribution policies or any other so-called "liberalization countermeasures" did anything to encourage or facilitate the creation of an exclusionary

market structure that discriminates against imported film or paper. Since the MITI policies in question actually say nothing about encouraging single-brand distribution of film, the United States struggles to establish some connection between MITI's policies and the market structure that is the main target of its complaints. Japan asserts that when confronted with the actual facts of this market, however, the US arguments about "distribution countermeasures" collapse.

5.5 Japan notes that MITI's concern with modernizing the Japanese distribution sector has existed continuously for over 30 years, including the periods before and after capital liberalization. Throughout this period, MITI has had diverse rationales for encouraging distribution modernization. Originally, MITI sought to improve the relatively low productivity of the distribution sector, thereby alleviating a growing labour shortage and the continuing increase in consumer prices. These policy goals had nothing to do with alleged efforts to block imports.

5.6 Japan argues that concerns with capital liberalization were simply added to the broader set of preexisting policy concerns about the need for modernization in the late 1960's. To the extent that MITI's distribution modernization policies were a response to capital liberalization, MITI's concern was to improve the efficiency and competitiveness of a relatively backward distribution sector, not to hinder imports' access to this sector. The objective was to compete more effectively with new foreign entrants. MITI was not trying to prevent imports from enjoying the allegedly unique advantages of traditional distribution channels. To the contrary, MITI viewed traditional distribution channels as competitively disadvantaged and sought to remedy their defects. Japan further argues that MITI's distribution policies in the 1960's and 1970's pursued modernization through both rationalization and systemization policies. As to the rationalization policies, the objective was to eliminate traditional outmoded business practices considered to be economically irrational.

5.7 The **United States** provides three rebuttals to Japan's argument that the purpose of the distribution countermeasures was not to block imports but rather to modernize the distribution sector. First, the MITI measures at issue clearly and repeatedly distinguish between the goal of efficiency and the goal of responding to liberalization. Indeed, the Seventh Interim Report emphasized that to the extent fostering efficiency became inconsistent with protection against foreign competition, the latter goal should win out: "the Japanese Government should instead emphasize preventing the immense impact that would be felt if foreign capital took the lead in systemizing Japan's distribution activities, and quickly develop a system sufficiently capable of resisting the rational systems introduced by foreign capital."[105] Second, these same MITI documents repeatedly note the threat that foreign access to *distribution* would have on Japanese *producers*. The policy concern was not, therefore, purely the effect of foreign competition on the distributors themselves but included concerns over the effect on the domestic producers' market share.[106] Third, the United States notes that Japan itself acknowledges that Japan was concerned about Kodak's competitive strength and therefore implemented policies to ensure that Japan's domestic manufacturers were not exposed to full competition from Kodak.

2. DEVELOPMENT OF THE JAPANESE FILM MARKET

5.8 According to the United States, in the early 1960's, Japanese film manufacturers operated under protection from foreign competition. Japan imposed quantitative restrictions and 40 percent tariffs on film imports. The Japanese Government also tightly restricted investment through the 1949 Foreign Exchange and Foreign Trade Control Law, which allowed the Ministry of Finance to control virtually all foreign exchange transactions, and the 1950 Foreign Investment Law, which gave the Japanese Government authority to regulate all equity investment and technology transfer. As a result of these

[105]Seventh Interim Report, p. 7, US Ex. 69-4.

[106]See the 1967 Cabinet Decision, p. 6 (para 2.9 above; US Ex. 67-6), the Sixth Interim Report (para. 2.14 above; US Ex. 68-8), the Seventh Interim Report (para. 2.15 above; US Ex. 69-4), the Basic Plan, p. 10 (para. 2.20-2.22 above; US Ex. 71-10), the 1975 Manual, pp. 121-122 (para. 2.23-2.25 above; US Ex. 75-5).

laws, the Government of Japan substantially limited foreign investment in manufacturing, distribution, and retail facilities in Japan.

5.9 The United States argues that, using these investment laws, the Government of Japan pressured Kodak into abandoning its corporate charter in Japan in 1957, forcing Kodak to abandon its own distribution facilities. Afterwards, Kodak shifted to relying on 15 Japanese wholesalers to import and distribute its products in Japan. In 1960, to ease implementation of its film import quantitative restrictions, the Japanese Government required Kodak to select one Japanese firm to serve as its sole import agent. Kodak selected Nagase Industries, an import-export trading company that specialized in chemical products, with which Kodak had ties dating back to 1923. As a result of the Japanese requirement, all wholesalers distributing Kodak products had to purchase them from Nagase, and Kodak had to rely on Nagase to establish and maintain its commercial network in Japan.

5.10 The United States further argues that, after joining the Organization of Economic Cooperation and Development (OECD) in 1964, Japan slowly liberalized its investment restrictions. Foreign photographic materials manufacturers were prohibited from forming a limited or equal partnership (50-50) joint venture until 1971. However, a like-industry clause adopted in 1971 limited such investments except in ventures between direct competitors (e.g. Kodak or Agfa investment in Fuji or Konica). Photographic materials manufacturers were not permitted to own 100 percent of a new enterprise until 1976. Not until 1979 were foreign photographic materials manufacturers finally permitted to acquire a controlling interest in existing Japanese enterprises. However, foreign firms in the photographic materials sector continued to be subject to MITI and Ministry of Finance notification requirements for investments in existing Japanese enterprises until July 1, 1985. In short, although investment restrictions in the photographic materials sector have been lifted, foreign film producers continue to suffer the after-effects of their hitherto existence. Delays in capital liberalization in the film sector prevented foreign firms from making investments until it was too late.

5.11 **Japan** counters by arguing that it is not correct that capital restrictions prevented all investment in securing better distribution channels for imported products. According to Japan, during the period before capital liberalization, if Kodak had wanted to use investments to establish and build relationships with any single-brand primary wholesalers it could have done so. Moreover, Kodak's exclusive importer Nagase could and did invest in distribution by buying two primary wholesalers; it could legally have made equity investments in Fujifilm's primary wholesalers if it had wanted to. The fact that Kodak did not exercise all its legal options -- indeed, Kodak itself exercised virtually none of its legal options -- demonstrates that the presence of capital restrictions was not interfering with any Kodak business plans at the time. Secondly, for Japan the US argument makes no sense in light of the actual record of foreign investments in the Japanese market after capital investments were lifted. According to Japan, Kodak instead of investing did nothing but use the fear of direct investment to create pressure to accelerate cuts in tariff rates. In Japan's view, Kodak opted to treat Japan as an export market rather than as a target for investment.

5.12 Further, Japan argues that the US argument is at odds with assessment by industry experts, including Kodak officials, to move faster in establishing its own distribution channels. Even Kodak executives recognized their error. In a 1988 interview, the then President of Kodak Japan, Mr. Albert Sieg, stated:

> "The glaring mistake was waiting so long to take aggressive action in this market. We should have been here with this approach ten years ago. Clearly, the momentum of our local competitors got a strong forward thrust, and our task will be much, much more difficult."[107]

[107]Taking on Japan (Look Japan Ltd., ed.) (1988), p. 38, Japan Ex. B-45.

Japan concludes, therefore, that the timing of capital liberalization for photographic materials had absolutely no impact on Kodak's investment plans during the 1970's for the simple reason that Kodak had no investment plans.[108]

5.13 The **United States** responds that Kodak could not have had investment plans prior to 1976, because investment was barred by statute. Less than a year after these statutory restrictions were lifted, Kodak established a sales subsidiary.

5.14 According to **Japan**, the so-called "like industries" clause did not prevent joint ventures between manufacturers and distributors. This clause simply required that joint venture partners in Japan were in the same industry as the joint venture itself. This requirement was not applied to foreign companies which formed such a joint venture. Thus, a 50-50 joint venture such as Kodak Nagase in 1986 could have been established as early as 1971. Moreover, a 100 percent wholly-owned subsidiary in the wholesaling sector could have been established after 1973. For whatever reason, Kodak made a decision not to take advantage of these options, and had no intention of exploiting the opportunities it had to develop new distribution channels. Moreover, from 1976 until 1979, a foreign enterprise could purchase existing enterprises outright with the consent of the enterprise being purchased. Such a purchase could occur in the wholesaling sector beginning in 1973 and the photographic materials manufacturing sector beginning in 1976.

5.15 According to the **United States**, Fuji, under the guidance and support of MITI, developed exclusive relationships with its four primary photospecialty wholesalers by 1975 and pressed its exclusive control further down the distribution chain. Fuji, which currently holds a 68-percent market share in Japan, also undertook a successful program, supported by the Japanese Government, to build exclusive relationships with a vast network of photofinishing laboratories. The other Japanese manufacturer, Konica, had exclusive relationships with four long- established primary wholesalers since 1967. Konica "internalized" these wholesalers through acquisition completed in 1987. Konica currently holds a 19-percent market share in Japan.

5.16 The United States argues that, before 1975, Kodak relied heavily on the primary photospecialty wholesalers to distribute its products. In 1975, however, Kodak lost the last of its relationships with a primary wholesaler, leaving Kodak to find other channels into the market outside those used by the Japanese photographic goods manufacturers. As a result, Kodak, which currently holds a 10-percent market share, sells nearly two-thirds of its film in Japan directly to retailers, one-quarter through affiliated photofinishing laboratories, and the rest to secondary wholesalers. Agfa re-entered the Japanese film market in 1990, after an absence of 15 years. The United States alleges that Agfa had left the Japanese market in 1975 in large part because of its inability to recover from its loss of access to the primary wholesale channels in 1968. Unable to use the primary wholesalers when it re-entered the Japanese market, Agfa adopted a strategy of selling directly to retailers, in particular large-scale retailers, in some cases allowing the retailers to market the film under the retailer's brand name (so-called "private brand"). Agfa resorted to private brand sales in an attempt to increase its sales to a limited segment of the market. Because retailers assume the cost of sales promotion for private brand film, Agfa also hoped to lower its distribution costs. Agfa, which currently holds a 3-percent market share - down

[108]Japan cites Professor Scherer who noted: "What is striking to this observer, but not pointed out explicitly, is that the events of 1973-75 reflected a colossal failure of intelligence (in the military sense) of Kodak. Kodak apparently had no employee in Japan at the time who could read contemporary Japanese trade press accounts of the Nagase-Asanuma dispute, understand the importance of securing Asanuma as a primary Kodak wholesaler, and intervene to override Nagase's self-serving actions. Not until 1977 did Kodak open a liaison office in Japan staffed by Kodak employees to oversee, inter alia, the activities of Nagase. In sharp contrast were the market opening efforts of Volkswagen and Toyota, who sent their own English-speaking personnel to the United States, first to assess market opportunities and then to implement their entry decisions." F.M. Scherer, Retail Distribution Channel Barriers to International Trade, October 1995, (working paper presented at a Columbia University Conference entitled "The Multilateral Trading System of the 21st Century"), Japan Ex. A-19.

from its 1995 peak of 4 percent - sells 90 percent of its film directly to several large retailers and the remainder through secondary wholesalers.

5.17 **Japan** notes the United States cites no support for its claim that Agfa had left the Japanese market in 1975 largely because of its inability to recover from its loss of access to the primary wholesale channel in 1968. Kodak had introduced a new colour negative process technology, and since Kodak has historically set industry standards, all rivals had to make a choice. Soon thereafter, the two Japanese manufacturers Fujifilm and Konica had matched Kodak's developing standard. Agfa, in contrast, chose to continue with its own standard. With three of the four major manufacturers operating off a compatible standard, Agfa's market position quickly became untenable. This story is well known in the industry. At the time Agfa reentered the market in 1987, the story was reported in the business press.[109]

5.18 According to the **United States**, the Japanese market structure was the result of actions by the Government of Japan. Following the 1967 Cabinet Decision discussed below, MITI concentrated its efforts, renewing its call for use of standardized trading terms, promoting the use of shared distribution facilities and computer ties among Japanese producers and distributors, and facilitating the systemization of photofinishing laboratories under domestic manufacturers. Japan's leading photographic material producers, Fuji and Konica, soon adopted such standardized terms with wholesalers. As intended by MITI, the resulting lack of competition among Japan's leading film and paper suppliers resulted in the financial deterioration of the photospecialty wholesalers. Eventually, all of the primary wholesalers agreed to handle products of domestic manufacturers on an exclusive basis.

5.19 The United States argues that before MITI's intervention, foreign manufacturers, though encumbered by quotas and high tariffs, had access to nearly all of Japan's photospecialty wholesalers. Under MITI's direction wholesale operators in the photographic materials sector were consolidated, creating narrow distribution channels under the control of domestic manufacturers. As a result, by the mid-1970's the leading photospecialty wholesalers handled only domestic film and paper, effectively excluding imports from the distribution system. Thus, by early 1975, however, the competitive situation in Japan's consumer photographic materials market had been completely transformed. As of that time, not one major distributor carried imported products. In the span of little more than a decade, foreign film and paper manufacturers had been excluded from the primary avenues of distribution.

5.20 The United States concludes that the result of this manipulation of the market is that today, Japan's materials market is supplied by four manufactures, two domestic and two foreign. The two domestic manufacturers, Fuji and Konica sell almost all their film through "primary" photospecialty wholesalers, which are spread throughout Japan. The primary wholesalers in turn distribute film directly to retail outlets, or through affiliated "secondary" wholesalers, which are smaller and regionally based. Unlike their domestic competitors, the two foreign manufacturers, Kodak and Agfa sell most of their film directly to retail outlets. For the last twenty-two years no primary wholesaler has distributed Kodak or Agfa film.

5.21 **Japan** responds that in these proceedings all that matters is whether there are government-imposed barriers that prevent that market penetration from improving. Japan maintains that there are no such barriers in Japan.

5.22 Japan emphasizes that the aim of MITI's distribution policies was not to block imports, but to modernize the Japanese distribution industry and help it to meet the foreign competitive challenge that would be unleashed by liberalization. Nothing in MITI's distribution policies or any other so-called "liberalization countermeasures" did anything to encourage or facilitate the creation of an exclusionary

[109]See, Japan Agfa Gevaert, Advances Into The Japanese Market After An Interval of 15 Years, Takes The Offensive Against Oligopolistic Film Market With Its Low Price, Nikkei Business, 5 December 1988; Top Three Film Makers Move to Cut Prices, Japan Economic Journal, April 16, 1988, p. 21, Japan Ex. B-33.

market structure that discriminates against imported film or paper. Since the MITI policies in question actually say nothing about encouraging single-brand distribution of film, the United States struggles to establish some connection between MITI's policies and the market structure that is the main target of its complaints. When confronted with the actual facts of this market, however, the US arguments about "distribution countermeasures" collapse.

5.23 Japan argues that in the end, the US claim boils down to an assertion that the current Japanese market structure for consumer photographic film and paper is exclusionary and closed, and that this abnormal situation must somehow be the result of government intervention. The fundamental premise of this argument is simply wrong. At the root of the US complaints is the fact that the various primary wholesalers in Japan each carry only a single brand of film. But single-brand wholesale distribution is a normal business practice; for film, this business practice is the norm in every major market in the world, including the United States. The Japanese market for consumer photographic film and paper reflects the outcome of normal market forces.

5.24 Furthermore, Japan asserts that the premise of the US argument that there are barriers, the so-called "distribution bottleneck," in the Japanese film market is wrong. Japan argues that a survey of the primary wholesalers' customers reveals that imports have already thoroughly penetrated these key accounts. Thus, customers accounting for 87.3 percent of the primary wholesalers' combined surveyed sales volume either already carry Kodak or else have ready access to Kodak through established business relationships.[110] In particular, the primary wholesalers' survey highlights imports' ability to distribute through multibrand secondary wholesalers in Japan. Of the 278 resellers included in the survey, 52.2 percent -- accounting for 66.4 percent of total surveyed sales volume to those customers -- already carry Kodak film.[111] Thus foreign brands of colour film are already present at the key levels of the distribution system. The US "distribution bottleneck" argument thus fails the most basic threshold empirical test. Since most of the primary wholesalers' customers already purchase Kodak film from other sources, the "distribution bottleneck" clearly does not exist.

5.25 Japan notes that if the Panel adopts the view that a key factor is the degree of imports' market penetration, foreign market share in fact increased after the introduction of the alleged measures that created the so-called bottleneck. According to Japan, it is clear that subsequent to 1975, when according to the United States the competitive situation in the Japanese film market had been completely transformed, the market share of foreign colour film actually continued to increase to a record 20.0 per cent in 1981. The market share for foreign black and white film increased even more dramatically, peaking at a record 41.4 per cent in 1985. This trend in foreign film market share directly undermines the US "bottleneck" theory.

5.26 On Japan's argument concerning market shares for black and white film, the **United States** responds that Japan's liberalization countermeasures were and are directed at *consumer* photographic film and paper, whether black and white, or colour. Until 1970-1972, black and white was the predominant consumer film (and paper) used in Japan, thereafter it was colour.[112] Accordingly, Japan's focus on recent market share data on black and white products is not relevant. Given that black and white film (and paper) was the dominant product at the time the Government of Japan began pursuing liberalization countermeasures, and that the Government recognized that colour would surpass black and white at some time in the near future, the Government directed the liberalization countermeasures at obstructing the distribution and sale of *consumer* photographic film and paper, whether black and white, or colour.

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[110]Fujifilm's Rebuttal Regarding the Alleged "Distribution Bottleneck," 21 December 1995, p. 5, 7, Japan Ex. A-16.

[111]Ibid., p. 25, Japan Ex. A-16.

[112]Until 1970-72, black and white film and paper were the predominant products used in Japan. Thereafter, the dominant products were colour film and paper. Today, colour film and paper account for 97 percent of Japan's total market for consumer photographic materials, with black and white film and paper accounting for only 3 percent.

5.27 **Japan** asserts that even at the current market share level of roughly 15 per cent for colour film, there is nothing unusual about the foreign market share for this industry. Japan notes that in markets outside the United States and Japan, Kodak and Fuji have comparable market shares but each has an almost equal and large share of its home market. In its view, ultimately, market shares reflect consumer preferences. Fuji's survey show that consumers perceive Fuji brand film to be of a higher quality, ranking it higher than Kodak on most qualitative measures.[113] Consequently, Fuji film enjoys very strong brand loyalty among Japanese consumers. Among American consumers the same general perceptions apply to Kodak film. In other words, the resulting market situation is not a result of any Japanese government policies. Finally, Japan notes that the domestic brands overwhelmingly outspend foreign brands in advertising expenditures in the Japanese market, another factor which has a significant impact on consumer and retailer preferences.

5.28 The **United States** responds that Japan's argument that Japanese domestic brands overwhelmingly outspend foreign brands in advertising expenses is flawed in three respects: (a) Japan adds Fuji's and Konica's expenditures, suggesting that Kodak should have outspent two companies combined; (b) Japan bases its calculations on total advertising figures, not weighted by sales, suggesting that a company with 10 percent of the market should match, yen-for-yen, the combined expenditures of two firms holding 87 percent of the market; and (c) Japan compares the advertising expenditures made by Fuji and Konica for all products to Kodak's advertising expenditures for film only. The Economist magazine estimates that Kodak's advertising expenditures were triple those of the Japanese manufacturers during the period cited by Japan.

5.29 **Japan** points out that the United States fails to take note of key distinctions between black and white and colour products. According to Japan, the foreign share of black and white film has been quite high, and has been growing over time. Over the past ten years, on a volume basis the foreign market share of black and white film has averaged 24 percent, ranging from 19 percent to 37 percent. Japan further contends that the foreign market share for black and white paper has also been quite high, ranging between 31 and 55 percent. Japan, therefore, argues that it is hard to reconcile this market reality with the United States' allegations. According to Japan, Japanese manufacturers sell their colour film and black and white film through the same primary wholesalers that comprise the supposed "bottleneck" facility for colour film. The alleged "bottleneck" apparently has not affected the ability of foreign brands to sell their black and white film, a factor which Japan contends fundamentally calls into question whether there is really any "bottleneck" at all.

5.30 The **United States** contends that the net effect of the liberalization countermeasures has been, as was intended, the creation of a market structure that impedes the sale of imports. The structure remains in place today. The United States further asserts that despite the elimination of quotas, tariffs, and investment restrictions, as well as significant efforts by foreign enterprises to compete in Japan, the market share for imported film and paper has been stagnant for the past decade. A succession of technological innovations and major investments by foreign manufacturers has yielded limited results. For example, Kodak has reduced its prices in the Japanese market by 56 percent since 1986 and has substantially undercut domestic wholesale prices, with virtually no effect on the market.

5.31 According to **Japan**, if Kodak in fact dropped its wholesale price by such large margins, with no appreciable effect on its market share, Kodak obviously has severe brand image problems in Japan. Japan asserts that retailers must believe that Japanese consumers are completely indifferent to Kodak; otherwise, such a huge gap in wholesale prices would give retailers an enormous incentive to cut the price of Kodak to stimulate demand, and increase the volume they would sell of the much more profitable product. In addition, Japan asserts that the United States must believe that Japanese consumers are completely irrational. In addition, for Japan it is noteworthy that for the past several years, Kodak's

[113]Annual Report on Consumer Image Survey, Japan Marketing Research, Japan Ex. A-3.

manufacturer's suggested retail prices for ISO 100 and ISO 400 consumers have generally been identical to Fuji's (on occasion they have been higher). Thus, for the past several years Kodak has been telling retailers that it would like Kodak film to have exactly the same price as Fuji film. This fact is inconsistent with the United States claim that Kodak has been stymied in its attempts to underprice Fuji film. Indeed, according to Japan, Kodak has publicly stated in the late 1980's and early 1990's that it does not want to compete on prices in Japan.

5.32 The **United States** counters that Kodak and retailers carrying Kodak products have been under pressure from the JFTC and JFTC-sanctioned councils to maintain stable retail prices. Discount initiatives have been suppressed.

3. NEED FOR PRIMARY WHOLESALERS IN THE JAPANESE FILM MARKET

(a) The US allegations about the market situation in the film distribution sector

5.33 According to the United States, there are 280,000 retailers selling photographic materials across Japan. This large number of retail outlets that sell film makes it difficult for any manufacturer to distribute film without access to the primary wholesalers. Direct sales to retailers can provide only limited access to a small portion of the market.

5.34 The United States asserts that one-half of all retail film sales by volume are through some 30,000 traditional photospecialty stores, whose primary, if not only, line of business is the sale of film, cameras, and accessories. Most of these photospecialty stores, which range from small "mom and pop" stores to somewhat larger stores with multiple outlets, do not carry imported film. The same primary wholesalers that distribute film to these specialty stores also supply them with cameras and other photographic products. Photospecialty retailers have close and longstanding relationships with the photospecialty wholesalers. Because these primary wholesalers do not carry imported film, the photospecialty stores cannot purchase imported film from these traditional suppliers. Nor are the photospecialty stores inclined to purchase imported film from an alternative source. Photospecialty retailers rely on the primary wholesalers for timely delivery of virtually all the store's products and are not likely to jeopardize that relationship by purchasing imported film from another distributor. The United States accordingly concludes that access to the primary wholesalers is critical for selling imported film to the photospecialty retailers.

5.35 The United States indicates that another third of film sales are through 70,000 general merchandise stores, including supermarkets and discount, department, drug, and convenience stores. It is the US view that the larger types of these stores are more likely than small stores to carry competing brands of film. Some of the largest of these retail outlets have their own distribution facilities, which reduces their dependence on wholesalers and allows them to deal directly with manufacturers.

5.36 The United States also notes that there are approximately 180,000 other retail outlets for film in Japan, including kiosks, tourist resorts, parks, and other small outlets. Their small size and geographic dispersion makes it highly inefficient to attempt to reach them except through the wholesalers currently serving them.

5.37 The United States argues that only the photospecialty wholesalers have the geographic presence, distribution infrastructure, sales networks, and personnel to reach and provide service to Japan's numerous retail outlets. In addition, because primary wholesalers carry a wide range of complementary products, they have high economies of scale in marketing and delivery functions. These wholesalers perform more than a logistical distribution function for manufacturers. The United States concludes that Fuji's exclusive access to Japan's largest primary photospecialty wholesalers provides it with an unfair edge over its foreign competitors.

5.38 The United States further argues that Japan's "secondary" photospecialty wholesalers are much smaller than the primary wholesalers and operate on a local or regional scale, and can, therefore, only provide limited geographic reach. Even if such wholesalers represented viable alternative distribution channels for film, many are not commercially independent from domestic photographic materials manufacturers. Several of the top secondary wholesalers have joint physical distribution and affiliated photofinishing laboratory operations with Japanese manufacturers or manufacturer-dominated primary wholesalers. These ties have impeded foreign manufacturers from gaining access to secondary-wholesaler channels as an alternative to primary wholesale channels.

5.39 According to the United States, photofinishing laboratories provide only a limited alternative to the primary wholesalers. Laboratories are, in the first instance, the primary market for photographic paper and photofinishing chemicals. However, they also can act as wholesalers for film and other products because they frequently and regularly make rounds to retailers in order to pick up exposed film and deliver processed prints. In the process of making these regular stops, the photoprocessing laboratories can distribute film and other photographic supplies to the retailers. In Japan, however, 84 percent[114] of the 1,700 photoprocessing laboratories deal exclusively in the film and paper of a Japanese producer.[115]

5.40 The United States alleges that experts on distribution and competition policy in Japan agree on the importance of access to the wholesale system for access to the market.[116] The leading history of Fuji also emphasizes that Fuji sees its four primary wholesalers not simply as a vehicle for delivering products to market, but as "a mechanism that would maintain high market shares".[117]

(b) No government obstacles to use or creation of primary wholesalers

5.41 **Japan**'s response is that in the first place, if a foreign manufacturer is dissatisfied with the quality of its distribution system for film and paper in Japan, there is nothing that would prevent it from taking steps to improve matters. There are no current government measures preventing the foreign manufacturer from hiring more sales people, offering lower prices, or spending more on advertising. Further, there are no current government measures preventing a foreign manufacturer from acquiring other distributors or photofinishing laboratories if they were for sale. And further, there are no current government measures of any kind that would in any way stop a foreign manufacturer from expanding or improving its distribution network.

5.42 Japan emphasizes that, in particular, there are no government measures that prevent foreign manufacturers from attempting to establish relationships with independent primary wholesalers that currently choose to carry only a single brand. According to Japan, the United States has not even attempted to identify any such government measures. In fact, there is no legal obstacle blocking such relationships. Japan asserts that Fuji's contracts with its primary wholesalers do not contain any provisions that prohibit or discourage the carrying of other brands.[118] Japan further asserts that some

[114]Japan challenges the conclusion that 84 percent of laboratories in Japan fall under the umbrella of a Japanese producer. According to the data given in Photo Market 1996, of the 753 amateur laboratories in the Japanese market, 292 laboratories (38.8 percent) are affiliated with Fuji, 124 laboratories (16.5 percent) are affiliated with Kodak, 216 laboratories (28.7 percent) are affiliated with Konica, and 121 laboratories (16.1 percent) have other affiliations.

[115]Photo Market 1996, US Ex. 96-1.

[116]Tajima Yoshihiro, Japan's Market and Distribution System: Japanese Distribution Channels, edited by Kikuchi Takeshi, (London: Hawath Press, 1994), p. 3, US Ex. 94-3.

[117]Arai Toru, Shisi No Honryo: Fuji Film (Characteristics of a Lion: Fuji Film), (Tokyo: BNT Books, Nikkan Kogyo Co., 27 January 1995), US Ex. 95-8.

[118]According to Japan, the contracts between Fuji and its primary wholesalers previously contained provisions requiring the wholesalers to seek Fuji's permission before carrying other brands. In 1981, Fuji voluntarily removed these provisions. Affidavit of Tanaka Takeshi, p. 3, Japan Ex. A-10.

of Fuji's primary wholesalers do currently sell Kodak products.[119] Those wholesalers decide to carry only Fuji film not because they are forced to do so by the Government of Japan, or even by Fuji, but because they believe a single-brand strategy serves their business interest. One of Fuji's four primary wholesalers, Asanuma, became a single-brand distributor after Kodak explicitly refused to deal with it directly.

5.43 In response, the **United States** explains that Japan has taken several recent steps to reinforce its distribution countermeasures. Some of these steps include "administrative guidance," and some include more formal measures. Moreover, the administrative guidance issued in the past remains in effect because Japan has not revoked or counteracted it, and Japanese industry continues to act in accordance with it. Specifically, Japan has not revoked or attempted to counteract its administrative guidance in favour of short payment terms, standardized transaction terms, rebates and volume discounts, and vertical information links between manufacturers, wholesalers, and retailers. To the contrary, Japan has issued recent administrative guidance making clear that its policies remain in place regarding each of these. Japan also has continued to apply formal measures to support the oligopolistic distribution system in the photographic film and paper industry.

5.44 In **Japan**'s view, Kodak has never seriously approached the single-brand primary wholesalers with a serious business proposal. Japan submitted affidavits from each of the four major primary wholesalers attesting that Kodak has not made serious business proposals.[120]

5.45 The **United States** argues that on several occasions in 1987-1991, 1995, and 1997 (in addition to earlier decades), Kodak approached the four primary wholesalers to seek a distribution arrangement, and was rebuffed. The United States understands that Agfa approached these wholesalers in recent years and was rebuffed as well. Japan's distribution countermeasures have limited the wholesalers' incentives and freedom to deal in foreign products. In addition, Kodak has also repeatedly approached secondary wholesalers to deal in its products, but frequently has been rebuffed. The secondary wholesalers do not have the scale or market coverage of the primary wholesalers, but full access to one or more of them would still increase the access to retail of imported film and reduce the relative cost of distributing it. However, the countermeasures have increased control or influence over the secondary wholesalers by the manufacturers/primary wholesalers and helped prevent the development of a significant relationship with Kodak or Agfa. Kodak has aggressively sought to expand film sales through the photofinishing laboratory channel, but is able to sell only about one-quarter of its film through this channel. Kodak faces constraints in further expanding its sales of paper to laboratories and distribution of film through laboratories because many laboratories have exclusive relationships with Japanese manufacturers.[121]

5.46 In considering Japan's recent formal and informal actions, the United States points out that it is important to recognize that the distribution structure set up by the measures beginning in the 1960s and 1970s is, to a large extent, self-sustaining. Once Japanese manufacturers achieved domination over the distribution system through implementation of short payment terms, rebates and discounts, vertical information links, and other measures advocated and implemented by the Japanese Government, the manufacturers' power allows them to maintain such domination, through the continuing use of these transaction terms and other mechanisms, with less need for support from the Japanese Government. A reduced need for support does not mean that the Government reversed its policy. To the contrary,

[119]Japan asserts that both Asanuma and Kashimura carry Kodak slide products. In addition, Japan asserts that Asanuma has a retail subsidiary in Tokyo that sells Kodak film. Affidavit of Takenosuke Katsuoka, p. 4, Japan Ex. A-11; Affidavit of Tomihiko Asada, p. 3, Japan Ex. A-12.

[120]See Affidavit of Takenosuke Katsuoka, Japan Ex. A-11; Affidavit of Tomihiko Asada, Japan Ex. A-12; Affidavit of Yukiyoshi Noro, Japan Ex. A-14; Affidavit of Kaoru Konno, Japan Ex. A-15. Japan also notes that Kodak film has actual access to secondary wholesalers and retailers. See Section V.A.3.(d), paras. 5.57-5.59.

[121]See Affidavits of Sumi Hiromichi, US Ex. 96-10, and William Jack, US Ex. 97-2.

Japan has continued to advocate short payment terms, rebates and discounts, and vertical information links, and Japanese manufacturers and wholesalers have continued to apply these practices to maintain the oligopolistic distribution system. Moreover, the Government of Japan has continued to suppress alternative channels and potential challenges to this system, such as large stores and independent photoprocessing laboratory networks, thereby shielding the oligopolistic distribution system from competitive pressures that could undermine it.

5.47 With this context in mind, the United States notes continuing actions by the Japanese Government to implement its transaction terms and vertical information links policies. For example, in the 1980's, Japan, *inter alia*: developed new business assistance programs to bolster the systemization of laboratories and exclude imports of both film and paper from this alternative channel; pressed forward with strengthening the informational ties between manufacturers and wholesalers; and continued to rely upon chambers of commerce in ongoing application of standard transaction terms. More recently, MITI's 1990 Guidelines affirmatively advocated the use of rebates: "[w]hen there are clear payment standards on rebates, this practice of rebate payment has its merit. …"[122] Similarly, in 1993, MITI's Small and Medium Enterprise Agency (SMEA) and a confederation of wholesalers trade associations, including the photospecialty wholesalers association, jointly conducted a study and published a report addressing issues raised in MITI's 1990 Distribution Guidelines.[123] Based on the report, SMEA drafted a model wholesaler's contract.[124] The 1993 SMEA Report notes that such practices "have been formed to facilitate the transaction relationship between businesses … and are thought to go on for a certain economic reason among the transacting parties and the industry that they belong to."[125] Nowhere does the report or the model contract mention any elimination of the use of rebates, or provide any instruction to follow up or implement the 1990 Guidelines' caution against the use of rebates for "maintaining a keiretsu-based relationship." Instead, only the 1990 Guidelines' favourable mention of rebates is reflected in 1993 SMEA Report and contract.

5.48 In addition, the United States points out that the 1993 SMEA Report and model contract demonstrate that Japan continues to support the standardization of transaction terms among photographic materials wholesalers which help maintain exclusive vertical relationships in the distribution system, established as a result of the liberalization countermeasures program. The report noted with approval that "retail industry associations and all industries are working in various ways to standardize business practices."[126] The report admonished, however, that "problems still remain unchanged" and "[t]he need for improvement is becoming stronger."[127] Later the report again stressed, "ways to clarify and

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[122]Guidelines for Improving Business Practices, p. 2, US Ex. 90-5.

[123]MITI, Small and Medium Enterprise Agency, Wholesale Industry - Current Status and Future Issues 1993, 20 September 1993 (1993 SMEA Report). Second Panel Questions and US Answers, US Ex. 1. The Confederation of Small- and Medium-Sized Wholesale Industry Related Trade Associations (SMEA Wholesalers' Confederation) was established in August 1990 as an informal advisory body to the Director-General of the Guidance Department of SMEA. Ibid., p. 6. The Federation of Photo Wholesalers (Shashoren) is a member of the confederation. Ibid., p. 8, see Tab 1. This process followed MITI's classic public-private sector cooperation method (Kanmin kyocho taisei) in which the government and industry jointly develop measures based on the concerted adjustment process. The United States points out that the government-private sector cooperation method establishes incentives and disincentives to ensure industry compliance with MITI's policy.

[124]The model contract calls for cash payment on a monthly basis. Article 8 of the SMEA Model Contract, reprinted in 1993 SMEA Report, p. 78. Second Panel Questions and US Answers, US Ex. 1. The model contract provides that in those cases where cash payment is not possible, notes should have a limited term and interest should be charged for late payment. This model contract demonstrates that MITI's policies and guidance remain unchanged regarding payment terms. SMEA drafted the model contract working with the Institute of Distribution Research (which drafted the March 1969 Survey of transaction terms, which provided the basis for the 1970 MITI Guidelines) and the Distribution System Development Center (which has played a critical role in the implementation of MITI's systemization policy). 1993 SMEA Report, p. 75. Second Panel Questions and US Answers, US Ex. 1.

[125]1993 SMEA Report, p. 4. Second Panel Questions and US Answers, US Ex. 1.

[126]Ibid., p. 5.

[127]Ibid.

standardize transaction terms should be studied. …"[128] In addition to these calls for standardization, the act of preparing and publishing a standard contract was in itself an act promoting standardization.

5.49 The United States also presents evidence to document that MITI, throughout the late 1970s and the entire 1980s, has continued to promote and resolve technological issues related to vertical information links. When Japan overcame the remaining technical hurdles in 1989, Fuji immediately created technical links up with its distributors. Japan has never revoked or worked to counteract its administrative guidance in favour of vertical information links between manufacturers, wholesalers, and retailers. Moreover, since 1989, Japan has continued to make clear that vertical electronic integration of distribution is official policy. For example, MITI's 1990 Guidelines advocated vertical information links between manufacturers, wholesalers, and retailers.[129] Fuji continues to be electronically linked to distributors, giving Fuji a wide variety of information over the distributors' activities and increasing Fuji's efficiency and its control of distribution. None of Fuji's competitors has access to the information network among the supposedly independent distributors in this chain.

5.50 According to the United States, in addition to maintaining its administrative guidance concerning transaction terms and information link policies, Japan also has continued to support the oligopolistic distribution structure in the photographic materials industry with formal measures. The most important of these is the Large Stores Law. Similarly, Japanese manufacturers continue to be the principal beneficiaries of SMEA subsidy programs for photoprocessing laboratories, because the bulk of such subsidies are provided to photoprocessing laboratories affiliated with domestic manufacturers.[130] Finally, the 1995 Business Reform Law opened the door for continued active government assistance to buttress the oligopolistic distribution structure in the photographic materials industry by providing Japan with a broad legal framework to assist "domestic production activities" and to implement MITI distribution policy.[131]

(c) The role of Nagase and Kodak Japan

5.51 **Japan** further asserts that the US argument ignores the existence of Kodak's primary wholesaler, Kodak Japan (formerly Nagase and then Kodak-Nagase). Japan argues that by collapsing Kodak, the manufacturer, with its wholesaler subsidiary, the United States creates the impression that the domestic manufacturers have access to a distribution channel (i.e., primary wholesalers) that imports lack. This impression, however, is not supported by the facts. Long ago Nagase, then Kodak's exclusive importer, sold film to some of the domestic manufacturers' primary wholesalers. However, Nagase also acted as a primary wholesaler itself, thereby competing with its own customers. This conflict intensified in 1967, when Nagase acquired a multibrand primary wholesaler, Kuwada, and transformed it into a single-brand Kodak distributor.

5.52 The **United States** responds that Kodak does business through its wholly-owned subsidiary, Kodak Japan, Ltd., which performs technical support, product development and marketing tasks. Lacking access to wholesale channels, Kodak Japan necessarily sells Kodak film directly to retail outlets. That fact does not render it a "wholesaler"; were that the case, arguably any subsidiary of a foreign company in Japan could be transformed into a "wholesaler" merely by excluding it from distribution channels.

[128]Ibid., p. 73.

[129]Guidelines for Improving Business Practices, p. 9, US Ex. 90-5.

[130]MITI Industrial Structure Division, Special Measures Law to Promote Business Reform for Specified Industrialists, Law No. 61 of 1995, Article 2, US Ex. 95-1.

[131]Ibid., Article 1, US Ex. 95-1.

5.53 **Japan** responds that Kodak itself has pointed out in other contexts[132] that Kodak Japan performs essentially the same functions as the primary wholesalers. Indeed, Kodak Japan sells to the same customers as Fujifilm's primary wholesalers and performs the same services for these customers as do the primary wholesalers. The history of Kodak's distribution in Japan also demonstrates Kodak Japan's role as a primary wholesaler. From the 1960s until 1977, Kodak relied exclusively on its import agent Nagase for distribution functions. Kodak clearly believed that Nagase, particularly after its acquisition of a primary wholesaler, Kuwada, was its wholesaler in Japan, and that Nagase was fully capable of performing the wholesaling function.[133]

(d) Single brand distribution does not impede access of imports

5.54 According to Japan, the US case rests critically on a false assumption about the distribution structure in Japan, i.e., that domestic manufacturers' relationships with primary wholesalers have created a "distribution bottleneck" that hinders imports' access to Japanese retailers. Japan argues that the United States assumes that because there are nearly 280,000 retail outlets that sell film in Japan, then it necessarily follows that direct distribution to all of these retailers is impractical and that access to these primary wholesalers' comprehensive distribution networks is, therefore, allegedly essential if imported film is to penetrate the Japanese market fully. Japan retorts that the US argument completely misunderstands how film is distributed in Japan, particularly the role of primary wholesalers. Moreover, the United States incorrectly calculates the availability of imported film at Japanese retailers.

5.55 Japan notes that since each of the three brands is sold by the manufacturer to single-brand primary wholesalers, it follows of necessity that the brands do not share primary wholesalers. This does not mean that imports lack access to the primary wholesaler distribution channel. Rather, the different brands simply utilize different primary wholesalers. Japan further asserts that in addition to ignoring import's access to the primary wholesale channel, the United States exaggerates the role of primary wholesalers. Although it is true that there are 280,000 retail outlets that sell film in Japan, all but 13,445 of the outlets buy their Fuji brand film not from the primary wholesalers, but from secondary wholesalers or laboratories. Fewer than 5,000 accounts collectively cover virtually the entire Japanese market. The United States offers no reason why Kodak's single-brand primary wholesaler, Kodak Japan, would be incapable of servicing these 5,000 key accounts.

5.56 The **United States** replies that even if this number were correct, Fuji needs four large primary wholesalers to service these 5,000 accounts. Because the foreign manufacturers have no access to the primary photospecialty wholesalers or to many of the secondary wholesalers that service these accounts for Fuji, they have to service these accounts directly. Direct distribution or other alternative channels created by foreign firms provide them with access to only a limited segment of the market, specifically in central neighbourhoods or large cities - areas where photospecialty outlets are relatively large and densely located.

5.57 **Japan** also notes that the same survey of the primary wholesalers' customers reveals that imports have already thoroughly penetrated these key accounts. Of all the accounts surveyed, 62.0 percent -- accounting for 77.3 percent of the primary wholesalers' combined surveyed sales volume -- currently carry Kodak brand film. Another 16 percent -- accounting for 10.0 percent of surveyed volume -- either buy other non-film products from Kodak or else conduct regular business with secondary wholesalers or photofinishers that sell Kodak products. Thus, customers accounting for 87.3 percent of the primary wholesalers' combined surveyed sales volume either already carry Kodak or else have

[132]See Exhibit 1 of Japan's June 1997 Presentation Materials for the second substantive meeting with the Panel (providing chart from Dewey Ballantine for Eastman Kodak Company, "Privatizing Protection," May 1995.)

[133]Japan notes the United States confuses Kodak Japan and Eastman Kodak Japan. Eastman Kodak Japan was originally established as "Kodak Japan" in 1977, but was later renamed in 1989. Although Eastman Kodak Japan performs both marketing and technical services, and is not a wholesaler, Kodak Japan functions as a primary wholesaler in the Japanese market.

ready access to Kodak through established business relationships. According to Japan, the United States concedes that Fuji and its primary wholesalers have more sales people than Kodak Japan. If Kodak wants to improve its distribution, however, there is no legal obstacle to hiring more sales people. The relative strength of Kodak's sales effort is entirely up to Kodak. Furthermore, Japan asserts that the United States has overstated the number of sales people at Fuji's primary wholesalers by approximately 50 percent.

5.58 Japan asserts that Kodak's own data prove the point. Japan points out that according to a survey of Japanese retailers commissioned by Kodak for the US Section 301 investigation, approximately 50 percent of photo shops surveyed carry Kodak.[134] Japan's position is that photo shops, which presently account for almost half of total film sales in Japan,[135] are the "traditional distribution channel" supposedly dominated by domestic manufacturers' primary wholesalers.

5.59 Japan therefore argues that the US "distribution bottleneck" argument thus fails the most basic threshold empirical test - if most of the retailers and secondary wholesalers that purchase film from Fujifilm's primary wholesalers did not carry imported film, then there would at least be an argument that the lack of a relationship between foreign manufacturers and those primary wholesalers was causing imports to lose sales. But since most of the primary wholesalers' customers already purchase Kodak film from other sources, the "distribution bottleneck" clearly does not exist. Kodak's own primary wholesaler, Kodak Japan, can and does sell film directly to the largest retail accounts. Kodak Japan can and does sell film to secondary wholesalers - not to mention its own affiliated photofinishing laboratories - which then distribute to smaller retailers. Therefore, there is no market barrier preventing imports' access to retailers.

5.60 The **United States** responds that an analysis of the survey from which the 90 percent figure is allegedly derived shows discrepancies between the actual survey results and the figures reported in Japan's submission. Inspection of the survey also reveals that it used biased survey and sampling techniques. Therefore, the United States urges the Panel to accept the Kodak survey, which shows that Kodak film is actually available in about 40 percent of the stores in Japan.

5.61 The United States argues that Japan's survey is flawed because the determination of whether a retailer carries foreign film is based on asking Fuji's four primary wholesalers to ask their customers whether they had access to foreign film. The United States points out that about one-third percent of the primary wholesalers' film sales are to other secondary wholesalers. Some of these wholesalers deal with a very large number of retail customers. According to the United States, Japan's own submissions to the Panel report that 278 of the secondary wholesalers sell to tens of thousands of retail customers. Accordingly, under Japan's survey, if one of those secondary wholesalers had purchased one roll of foreign film to sell to just one of those tens of thousands of retailers, Japan would conclude that foreign film had access to all of those tens of thousands of retailers. The United States argues that this methodology severely distorts the view of the market access situation.

5.62 The United States further points out that the above example of token dealings by wholesalers in Japan should not be considered an exaggeration. The GATT itself found, in its Trade Policy Review of Japan, that keiretsu manufacturers tend to discourage, but not always prevent, their wholesalers from dealing in a competitor's products.[136] Consistent with this finding, the four primary wholesalers have been known to occasionally engage in token dealings of foreign film. For example, in 1995, the four primary wholesalers together sold 295 rolls of Kodak film. The total sales of these four primary wholesalers that year were approximately 25 million rolls. Applying Japan's survey methodology,

[134]Japan Market Access Survey for Photographic Film, 20 March 1996, p. 2, Japan Ex. A-20. The same conclusion can be found in the Hester affidavit provided by the United States in this proceeding. US Ex. 97-9.

[135]Photo Market 1996, p. 130, Japan Ex. A-1.

[136]C/RM/S/57 p. 93.

it could be concluded that foreign film had access to 100 percent of Japan's retailers in 1995 because the four primary wholesalers reach 100 percent of the retail customers in Japan. Clearly, however, 295 rolls out of 25 million does not constitute access to the distribution system.

5.63 In the US view, the important question is how many retailers in Japan in fact carry foreign film, since it is the retailers who ultimately sell to the end users. According to the United States, Japan, however, did not analyze access to the retail market for the Panel. Responding to a question from the United States at the first Panel hearing, Japan did provide the raw data for one of its market access surveys. These data reveal that foreign film is available in 43 percent of the retail outlets in Japan. The United States believes this figure is high, since the sample of the survey was biased heavily toward major cities, where foreign film is more prevalent, and the study was otherwise infected with other sampling and methodological errors. Still, the 43 percent figure reveals substantially less market access than Japan claimed, and is close to the 40 percent figure found in the US study.

5.64 **Japan** responds that the United States attacks the survey sampling methodology, yet apparently forgets that the survey of wholesaler customers was not a sampling at all. Rather, over 95 percent of the customers, virtually the entire customer base, were surveyed. There can be no issue of "sampling bias" when the entire universe is surveyed.

(e) The market for paper

5.65 According to Japan, the United States claims that MITI's distribution policies served to encourage and facilitate primary wholesalers' switch from multibrand to single-brand wholesale distributors, thereby supposedly creating a distribution bottleneck and excluding imported film and photographic paper from access to the hundreds of thousands of Japanese film retailers. Japan asserts that this theory does not even address photographic paper. Japan maintains that although the US complaint supposedly pertains to photographic film *and* paper, the US theory has nothing to do with consumer photographic paper.

5.66 Japan further argues, that in addition, photographic paper is distributed through very different channels from those used for film. In particular, the domestic film manufacturers' primary wholesalers are not significant dealers of photographic paper.[137] Domestic manufacturers distribute their photographic paper through sales subsidiaries or other affiliated companies; these subsidiaries or affiliated companies in turn sell the photographic paper either directly or, in limited amounts, through secondary wholesalers, to the photofinishing laboratories and minilaboratories that use photographic paper to make prints. Accordingly, Japan concludes that, the US theory that the domestic manufacturers' primary film wholesalers create a "distribution bottleneck" is inapplicable to paper.

5.67 Japan further notes that, since the "distribution bottleneck" theory is inapplicable, the only United States argument with respect to paper is that domestic manufacturers' affiliations (through contracts or equity investments) with photofinishing laboratories have created a captive market that foreign paper producers are unable to penetrate. Japan points out that, however, Kodak operates through the same kinds of distribution channels as those used by domestic manufacturers. Japan's position is that the domestic paper manufacturers - Fujifilm, Konica, Mitsubishi, and Oriental - have longstanding networks of affiliated photofinishers that began back in the early 1960's, while Kodak has had a photofinishing presence in Japan for over 40 years: Toyo Genzosyo, an affiliate of Nagase, first began developing Kodak consumer photographic film in Japan in 1952. Until the 1980's, Kodak relied on Toyo's (later renamed Imagica) network of laboratories by establishing a joint venture company, Kodak-Imagica, with Imagica in 1987. According to Japan, today Kodak has affiliations with 124 amateur laboratories,[138] located all over Japan. Japan explains that in addition to affiliated laboratories, there

[137]Japan's assertion is that Fuji's primary wholesalers account for less than 10 percent of Fuji's total colour photographic paper sales. Affidavit of Tanaka Takeshi, p. 2, Japan Ex. A-10.

[138]Photo Market 1996, p. 198, Japan Ex. A-1.

are a number of non-affiliated minilaboratories. The minilaboratory sector occupies a large portion of the paper market: approximately 60 percent of total paper sales in Japan are to minilaboratories.[139] As is the case with film, Kodak sells paper through exactly the same distribution channels as domestic manufacturers. There is no "distribution bottleneck" for paper, either.

5.68 The **United States** responds that MITI recognized that foreign manufacturers could circumvent the distribution bottleneck for photographic materials through photoprocessing laboratories. The 1969 MITI-commissioned survey of transaction terms in the photographic sector notes as potential threats "if the oligopoly of the two domestic manufacturers is broken up by a foreign company," and "if a new [distribution] route emerges to compete against the route of photographic material dealers, which is the core existing route in the distribution market."[140] The survey further warned that "foreign companies have already provided financial assistance to the processing industry" and advocated taking steps "to minimize the anticipated disorder in the distribution market."

5.69 The United States further notes that among the recommended measures were, "subsidize the processing industry."[141] Subsidies would help tie the laboratories into exclusive relationships with the domestic Japanese photographic film and paper manufacturers and consequently impede the sale of imported paper.[142] A laboratory with one company's photoprocessing equipment is likely to purchase photoprocessing paper and chemicals from that same company, as well as its film, to ensure compatibility and to meet consumer expectations for consistency between the brand of film and paper used. Therefore, a laboratory that uses Fuji equipment often will use Fuji paper and chemicals, and if it distributes film, it likely will be Fuji, which in turn impeded the sale of imported paper.

5.70 According to the United States, in the late 1960s and early 1970s, SMEA provided approximately 160 million yen to assist Japanese film manufacturers in converting black and white to colour photo processing laboratories.[143] In July 1967, SMEA approved "colour film development and printing laboratories" as one of four sectors deemed eligible that year for subsidized loans. The Chairman of the All Japan Federation of Colour Laboratories Association, who also was the president of Fuji Colour Service,[144] stated that "the main purposes of the laboratory industry becoming designated industry are … as capital liberalization countermeasures, to modernize facilities and thereby solidify the foundations of businesses."[145] In 1968 the director of MITI's Small and Medium Enterprise Agency (SMEA) called for applying SMEA programs to improve the structure of medium and small businesses in light of "advancing capital liberalization" and as "protective countermeasures against the selling of oneself to foreign capital."[146] When the laboratories were designated as eligible for another SMEA subsidy program in 1973, the chairman of the laboratories association again stressed the need to respond to trade liberalization.[147]

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[139]Ibid., p. 173.

[140]Institute of Distribution Research, Fact-Finding Survey Report Pertaining to Transaction Terms: Actual Conditions of Transaction Practices in the Wholesale Industry, March 1969, pp. 1-21, 287-319, US Ex. 15.

[141]Ibid.

[142]Ibid.

[143]SMEA played a leading role in providing company-specific financing, consulting, guidance, and monitoring in support of Industrial Structure Council Distribution Committee's liberalization countermeasures. White Paper on Small and Medium Enterprises by the SMEA 1967, US Ex. 67-1.

[144]The United States notes that all chairmen of the All Japan Federation of Colour Lab Association (Lab Association) have been Fuji employees: Murakami Eiji (1965-1978), Koseki Yasuo (1978-1988), Takeuchi Hiroshi (1988-1992), and Miyata Hidenobu (1992-present).

[145]Murakami Eiji, The Decision on Joseiho [Assistant] Designated Industry, JCFA News, Special Issue, 1967, p. 4, US Ex. 9.

[146]Otsutake Kenzo, Main Points of Fiscal 1968 MITI Policy; New Policy Dealing With Capital Liberalization; Approach to Policy on Small and Medium Enterprises, Tsusan Journal, December 1967, Vol. 2 No. 2, pp. 10-15, US Ex. 12.

[147]Murakami Eiji, A Year of Trial, JCFA News, 1 January 1973, No. 34, p. 2, US Ex. 27.

(f) Other film markets

5.71 **Japan** argues that in other specialty film products, Kodak itself has experienced significant market success in spite of its reliance on single-brand distribution. In X-ray film, for example, Kodak has an approximately 20 percent share of the market, yet almost all its major wholesalers are exclusively single-brand distributors (the exception, Suzuken, will handle other brands upon request).[148] Fuji sells through Fuji Medical Systems to several distributors, in two of which Fuji has equity stakes. All of Fuji's major wholesalers are basically single-brand distributors, though they will occasionally sell other brands upon customer request. Konica sells through its affiliate, Konica Medical. As to the other major suppliers, Agfa's and DuPont's major wholesalers carry primarily the Agfa and DuPont brands. There is thus no significant sharing of distributors among the major producers.

5.72 Japan also argues that Kodak has a very strong position in the Japanese motion picture film market. In negative film, Kodak has an approximately 70 percent share, and Fuji has the remaining 30 percent.[149] In positive film, the situation is basically reversed: Fuji has a 60 percent share, and Kodak has around 40 percent. Agfa rounds out the market as a marginal supplier. Kodak has achieved its success by selling directly to users; Fuji employs independent single-brand distributors. Agfa, meanwhile, uses a single-brand wholesaler. Thus, the market realities for other film products are sharply at odds with the US theory of a distribution bottleneck in consumer film.

5.73 The **United States** explains that the US complaint specifically excludes various specialized films used by professional photographers for resale and various other specialty films (x-film, microfilm).

4. THE RESTRUCTURING OF THE JAPANESE FILM DISTRIBUTION SECTOR

(a) The origin of MITI's distribution policies in the early 1960s

5.74 According to **Japan**, MITI had many reasons to be encouraging greater efficiency in the distribution system during the 1960's and 1970's. The concern with distribution modernization arose initially from the productivity lag of the Japanese distribution sector relative to other sectors of the Japanese economy, and the implications of this inefficiency. Historically, the distribution sector in Japan was characterized by small "mom and pop" enterprises and traditional, personalized business practices. The service sector was viewed largely as a place to employ those people who could not find employment in the manufacturing sector.[150] Accordingly, while Japanese manufacturers had recorded great successes in recent years, the distribution sector lagged behind in productivity and competitiveness. In Japan's view, the United States thus completely mischaracterizes the origin of MITI distribution policies. The objective was not helping Japanese manufacturers, as the United States claims. Rather, the foundation was coping with distribution inefficiency itself, and the interrelated problems of inflation and labour shortages.

5.75 The **United States** argues that the transformation of the open and competitive distribution system of the early 1960's into the vertically-integrated, domestic manufacturer dominated system was not accidental. It was the result of the direct intervention in the market by the Government of Japan. The Government of Japan discerned that reorganizing distribution along vertically-integrated lines would protect domestic manufacturers from foreign competition after liberalization. The United States alleges that MITI was the nerve center for formulating and implementing distribution countermeasures policy.

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[148]Affidavit of Tanaka Takeshi, p. 5, Japan Ex. A-10.

[149]Ibid.

[150]See, Fumitake Kishida, The Direction of Commercial Structure Improvement in The New Development Of Distribution Policy, International Trade and Industry Study No. 142 (December 1966), p. 32, Japan Ex. B-8; see also, Shintaro Hayashi, Thinking and Dealing with Distribution Issues in The New Development of Distribution Policy, International Trade and Industry Study No. 142 (December 1966), p. 4, Japan Ex. B-9.

To this end MITI formed a Distribution Committee that published 12 "interim reports" from 1964-1977, covering every aspect of the distribution system. Each interim report reflected a progressively deeper recognition of the inefficiencies of the Japanese distribution system, its vulnerabilities to foreign investment, and the impact that foreign penetration of the distribution system would have on Japanese manufacturers.

5.76 According to the United States, the First Interim Report identified a central theme that would underlie MITI's distribution policy: the need to limit competition in distribution in order to create stability and high prices for the benefit of domestic manufacturers.[151] The Report described the Japanese distribution system as "extremely fractionalized" and characterized by "excess" competition, weak financial conditions, and inadequate management capability. The Report noted a trend toward vertical integration of distributors under the control of manufacturers, and observed that where there was vertical integration, it had improved the distribution structure and served to "secure and expand the [market] share of individual manufacturers."[152] Later reports and government policies would continue to stress the benefits to domestic manufacturers of vertical alignment of distribution.

5.77 The United States further notes that the Third and Fifth Interim Reports[153] developed another theme that would become important for reorganizing the distribution system: horizontal business cooperation. The Third Interim Report specifically advocated providing financing and tax incentives for retailers to strengthen their ties with each other and with wholesalers through the development of joint physical distribution facilities.[154] The Fifth Interim Report advocated greater horizontal cooperation among wholesalers and retailers through the formation of, for example, joint wholesale centres, as well as greater vertical cooperation between manufacturers, the wholesalers, and retailers.

5.78 The United States argues that the Second and Fifth Interim Reports sowed still another seed that would become instrumental in reorganizing distribution: revising transaction practices between manufacturers and wholesalers in a way that would facilitate "rational" business relations between manufacturers and wholesalers.[155] Such "rational" transaction terms became a means to encourage the alignment of distributors into exclusive, long-term relationships with a single domestic manufacturer and a means to help resist foreign penetration of the distribution sector.

5.79 The United States further argues that along with examining the distribution structure generally in the Distribution Committee, MITI worked closely with individual sectors to begin discussing their specific structural issues. In the photographic sector in 1963, MITI urged the four domestic photographic film and paper manufacturers to band together to discuss ways to meet foreign competition. In response, the companies formed the Natural Colour Photography Promotion Council (NCPPC). MITI officials, including the official responsible for the photosensitive materials sector, attended the Council's meetings, and MITI officials recommended specific policies to help the Council achieve its objectives. The primary focus of the NCPPC was on the steps the photosensitive materials sector needed to take to prepare to meet foreign competition, concentrating particularly on distribution and sales network.

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[151]Japan disagrees with this US interpretation of the First Interim Report. See translation issue 2.

[152]Industrial Structure Council Distribution Committee, Current Status and Problems of Distribution Mechanisms (First Interim Report), December 1964, reprinted in Tsubansho Koho, 8 January 1965. Japan disagrees with the US translation of *keiretsuka* in the US translation of the First Interim Report, US Ex. 64-6. See translation issue 4.

[153]Industrial Structure Council Distribution Committee, Concerning Improvement in Material Distribution (Fifth Interim Report), 19 October 1966, US Ex. 66-3.

[154]Industrial Structure Council Distribution Committee, The Promotion of Chain Stores - Industrial Structure Council (Third Interim Report), reprinted in Tsusansho Koho, 14 September 1965, US Ex. 65-4.

[155]Industrial Structure Council Distribution Committee, The Basic Direction of Policies on Distribution (Second Interim Report), reprinted in Tsusansho Koho, 24 April 1965. Japan disagrees with the translation of *keiretsuka* in the US translation of the Second Interim Report, US Ex. 65-2. See translation issue 4. Fifth Interim Report, US Ex. 66-3.

5.80 **Japan** admits that modernization of the distribution system has been an ongoing concern of the Government for more than three decades, including the periods both before and after the debate over capital liberalization. It notes, however, that the interim reports of the Distribution Committee are not official statements of the Government of Japan, and their issuance does not constitute "administrative guidance." Like the United States and other countries, the Government of Japan frequently organizes advisory bodies with members drawn from industry, academia, consumers, and the media, and charges them to study issues of public concern and issue recommendations for the Ministers.

5.81 Japan argues, however, that the aim of MITI's distribution policies was not to block imports but to modernize the Japanese distribution industry and help it to meet the foreign competitive challenge that would be unleashed by liberalization. Nothing in MITI's distribution policies or any other so-called "liberalization countermeasures" did anything to encourage or facilitate the creation of an exclusionary market structure that discriminates against imported film or paper. Japan's position is that since the MITI policies in question actually say nothing about encouraging single-brand distribution of film, the United States struggles to establish some connection between MITI's policies and the market structure that is the main target of its complaints. When confronted with the actual facts of this market, however, the United States' arguments about "distribution countermeasures" collapse.

5.82 Japan further argues that, in the end, the US claim boils down to an assertion that the current Japanese market structure for consumer photographic film and paper is exclusionary and closed, and that this abnormal situation must somehow be the result of government intervention. In Japan's view, the fundamental premise of this argument - that there is something abnormal about the distribution of film and paper in Japan - is simply wrong. At the root of the United States' complaints, Japan argues, is the fact that the various primary wholesalers in Japan each carry only a single brand of film. However, single-brand wholesale distribution is a normal business practice. In fact for film, this business practice is the norm in every major market in the world, including the United States. Consequently, the Japanese market for consumer photographic film and paper reflects the outcome of normal market forces.

5.83 Japan recalls the US argument that MITI's distribution policies during the 1960's and 1970's, i.e., the so-called "systemization" policies, formed the centrepiece of its alleged strategy to block imports of consumer photographic film and paper and to assist Japanese film manufacturers in gaining exclusive control over the "traditional" distribution channels for film, leaving imports without access to those channels. Japan argues that the US theory has nothing to do with the actual record of MITI's past or present distribution policies. MITI's policies sought more generally to rationalize and systemize Japan's wholesaling and retailing sectors, which were beset by low productivity. In particular, MITI encouraged the elimination of traditional outmoded business practices, the adoption of standardized forms and procedures, and the increased use of computer technology. Drawing on models from Western business practice, those business reforms were recommended across the board throughout the distribution sector, and were by no means specific to photographic film and paper.

5.84 The **United States** responds that contrary to Japan's assertions, the contents of the interim reports were implemented as administrative guidance. The United States recalls that in many instances, the Government of Japan directs the quasi-governmental policy entities such as the Distribution Committee of the Industrial Structure Council to undertake an investigation or survey, and the entity in response would complete that task and return a report to the Japanese Government. That report in turn is adopted, affirmed, or utilized by the Japanese Government as administrative guidance to direct the industry to alter its behaviour, thereby converting the "report" to measures.

5.85 The United States also contends that single-brand wholesaling of film is not common worldwide. Most photospecialty wholesalers in Europe and North America carry multiple brands of film as well as a wide range of other photographic products. Japan is confusing "single brand distribution" by

wholesalers with the common practices in Europe and North America of "direct-to-retail" sales by manufacturers.

5.86 In the US view, Japan's argument that its objective was only to modernize distribution channels, not block foreign entry, is undercut by its own submission to the Panel, which suggests that it held off foreign investment in the distribution sector in order to ensure that foreign manufacturers could not establish their own distribution networks in Japan until Japanese manufacturers had restructured their own distribution networks and made them more efficient. Moreover, if Japan intended only to promote distribution efficiency and not protect domestic manufacturers, it should have welcomed foreign investment in the distribution sector, because foreign distributors were four to seven times more efficient than domestic distributors.

(b) The 1967 Cabinet Decision

5.87 The United States notes that in 1966, MITI completed a survey that examined various problems domestic industries were likely to face because of liberalization. MITI identified Kodak and Agfa as foreign companies that were likely to enter the Japanese market for camera and photosensitive materials after capital liberalization. As a result of its survey, the United States asserts that MITI issued a policy statement on 17 April 1967, indicating that "liberalization countermeasures" were needed to defend the domestic firms from competition.[156]

5.88 The United States asserts that the 1967 Cabinet Decision was a watershed in the Government of Japan's efforts to restructure Japanese industry to resist imminent foreign competition.[157] This Decision formally endorsed the use of countermeasures to offset the effects of liberalization, making the protection of Japanese markets from foreign a competition a high national priority. The Decision emphasized that the distribution sector was a key area for renovation and improvement to support the production sector, using the concerted industry-government approach:

> "Modernization lags behind most in the distribution sector. Here the power of resistance against the inroad of foreign capital is weak, and the impact of foreign capital advancing into this sector will also pose significant impact on the production sector. It is necessary, therefore, to implement countermeasures in support of the efforts of industry with the objectives of modernizing the distribution structure, fundamentally strengthening the enterprises in this sector, and establishing a mass sales system."[158]

The United States argues that the language of the Cabinet Decision established a clear national priority to pursue distribution policies aimed at protecting domestic manufacturers from foreign competition.

5.89 **Japan** counters that as it began to dismantle trade and investment barriers in the 1960's, it was concerned generally about the ability of domestic industries to compete with foreign rivals in the new, less regulated business environment. The Cabinet Decision, which implemented the first stage of capital liberalization, was quite direct in expressing this concern. The United States, however, quotes selectively from this document to create a distorted impression of the Cabinet Decision. Contrary to US arguments, Japan sought to promote the efficiency and competitiveness of domestic industries, not block imports. In urging modernization of the distribution sector in anticipation of capital liberalization, the Cabinet Decision was simply applying to one sector a basic general policy for coping with liberalization:

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[156]MITI, Regarding Capital Liberalization, 17 April 1967, reprinted in Yoshido Fujio, Capital Liberalization and Foreign Investment Law, 30 October 1967, US Ex. 67-3.

[157]US Ex. 67-6.

[158]1967 Cabinet Decision, p. 6, US Ex. 67-6.

> "to guide and complement efforts by the private sector for example, bolstering future technological development, increasing owned capital and lowering interest rates, especially long-term interest rates, in order to create the basis on which our enterprises can compete against foreign capital on equal terms."[159]

Japan argues that distribution modernization, which initially served to promote efficiency and to cope with inflationary pressures would also help the Japanese distribution sector compete with foreign capital. The purpose was to secure effective competition in the domestic market through improving the efficiency of the domestic distribution sector.

5.90 According to Japan, the sweeping US assertion about a "clear national priority" of achieving protection from foreign competition has no support in the text of the Cabinet Decision. The Cabinet Decision notes only that foreign capital in the distribution sector will have a "significant impact" on the manufacturing sector, but that statement simply recognizes the obvious relationship between distribution and manufacturing in the economy, which would be affected by capital liberalization.[160] Japan argues that so long as foreign producers were competing in Japan by exporting, the backwardness of the distribution system was not a problem. Tariff reductions might make imported products more price-competitive, but they would provide no other marketing advantage. On the other hand, once foreign producers were allowed to establish their own sales subsidiaries in Japan, the relative backwardness of the distribution systems upon which the domestic producers had been relying would become a potentially acute disadvantage.

5.91 In Japan's view, there is no discussion in the Cabinet Decision of protecting domestic manufacturers from foreign competition at all, let alone a discussion of using distribution policies to protect manufacturing companies. The Cabinet Decision refers only to ways in which the government can help Japanese companies -- in both the distribution and manufacturing sectors -- prepare for the intensified competition that capital liberalization will bring.

(c) The 1968 Sixth Interim Report

5.92 The **United States** argues that it was the Distribution Committee that was charged with the task of determining how to convert the Cabinet's general decision into specific policies. The Distribution Committee came up with a policy to achieve the twin goals of enhancing efficiency and protecting against foreign competition - "systemization" of distribution.[161] The premise of distribution systemization was that even though foreign investment in distribution might enhance efficiency in the distribution sector, it would threaten Japanese manufacturers. The Sixth Interim Report analyzed ways that foreign manufacturers might gain control of Japan's distribution system,[162] and highlighted the concerns of such control:

> "1. There is a risk that growth sectors will fall under the monopolistic control of foreign capital, resulting from the difference in capital resources and the like.
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> 2. There is a risk that the process of sales expansion by foreign capital affiliated distribution enterprises will aggravate excessive competition and hinder the smooth implementation of distribution modernization plans, and the [established] order of trade will be disrupted.

[159]Ibid., p. 4, US Ex. 67-6.

[160]Ibid., p. 6, US Ex. 67-6.

[161]Japan notes that MITI distinguishes rationalization and systemization policies. The United States uses the single term, "systemization" to cover both concepts.

[162]Sixth Interim Report, p. 6, US Ex. 68-8.

> 3. There is a risk that the manufacturing sector will be dominated by controlling the sales routes, bringing about the international subcontracting of Japanese industry."[163]

5.93 According to **Japan**, in light of the 1967 Cabinet Decision, MITI and the various advisory committees renewed their focus on distribution modernization. The Sixth Interim Report indicated:

> "Today, the delay in modernizing distribution activities is often seen to prevent the effectiveness of economy and improvement of people's living. The necessity of improving the structure of the distribution industry is gradually increasing. In addition, the modernization of distribution activities is pressed by the following two viewpoints. First, liberalization of direct investment by foreign capital is drawing near. It is necessary to quickly establish [market] conditions in which domestic capital could compete with foreign capital. Second, improving productivity of distribution activities is considered an effective way to solve the consumer price issue."[164]

5.94 Japan further argues that the basic need for distribution modernization arose from the need for efficiency to improve the standard of living. A further rationale for distribution modernization continued to be concern about inflation. Coping with capital liberalization was added to these other rationales, but the report is clear in stating that coping meant competing more effectively with the new foreign entrants. This goal was to be achieved by promoting efficiency in the distribution sector.

5.95 In Japan's view, the US claims are untenable. MITI hardly regarded the existing distribution system as some sort of strategic "crown jewels" that imports must not be allowed to use. On the contrary, MITI saw the backwardness of the distribution system as an "Achilles' heel" that would render domestic manufacturers unable to compete with foreign producers. The concern was that domestic manufacturers would be stuck with existing distribution channels while foreign producers, freed from capital restrictions, would be able to construct their own modern (and exclusive) distribution channels. Japan cites the 1968 Sixth Interim Report which stated:

> "In the case of penetration for the purpose of selling the foreign manufacturers' own brand of products … (including cases in which foreigner producers actually control distribution), when the goods are superior, [the manufacturer] has highly developed sales techniques or large marketing funds, there probably will be a considerable impact on rival Japanese producers and the businesses that serve as distribution channels for domestic products."[165]

5.96 Japan's position is that while foreign producers would be able to choose between using existing Japanese distribution channels or importing their own systems, Japanese producers would have to sink or swim with their domestic distributors. Consequently, the purpose of MITI's distribution policies was to encourage the modernization of Japanese distribution practices, and thereby serve various policy goals including improving the competitiveness of Japanese industry.

(d) The 1969 Seventh Interim Report and the Distribution Systemization Promotion Council

5.97 The **United States** argues that the Japanese preoccupation with protection is further evidenced by the Seventh Interim Report of the Distribution Committee[166], which it asserts states that to the extent

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[163]Ibid., p. 8.

[164]Sixth Interim Report, Japan Ex. B-7.

[165]Ibid., p. 22.

[166]Industrial Structure Council Distribution Committee, Systemization of Distribution Activities (Seventh Interim Report), 22 July 1969, p. 6, US Ex. 69-4.

that fostering efficiency became inconsistent with protection against foreign competition, the latter goal should prevail. The relevant language in the Seventh Interim Report reads:

> "Today, amidst calls for the active promotion of capital liberalization in the distribution sector, we think that efforts to systemize distribution have a vital importance in strategic significance. … [T]he systems gap [between Japan and America] is expected to have a decisive effect on distribution activities in particular, the concerted efforts of the government and the private sector must be directed at systemization from the point of view of a capital liberalization countermeasure.
>
> [I]t is true that one effect of systemizing Japan's distribution system is the simplification of entry [into Japan's market] by foreign capital, [enterprises] which are more adept at systems methodology. [But] to make inroads, we should instead emphasize preventing the immense impact that would be felt if foreign capital took the lead in systemizing Japan's distribution activities, and quickly develop a system sufficiently capable of countering the rational systems introduced by foreign capital."[167]

5.98 The United States further argues that the premise of distribution systemization was to reorganize the Japanese distribution system along vertical and horizontal lines by -

(i) the formation and strengthening of product-specific vertical distribution ties between a Japanese manufacturer and various wholesalers, and between these wholesalers and retailers;

(ii) the creation of linkages among horizontal elements of the distribution system, which could be brought more easily into the "systemized" vertical arrangement.

5.99 According to the United States, under the Government of Japan's systemization plan, the nature of the links between companies in a "system" would include commercial transaction ties, physical ties, and informational ties. Each of these ties would become essential to ensuring that the system operated as a single and exclusive whole. Horizontal business cooperation among small retailers and other small scale entities in the distribution system would be "the most efficient way to realize profit from economies of scale."[168] Horizontal cooperation also would make the system more difficult for foreign firms to penetrate because many of the individual actors in the system would be bound together in a common distribution channel tied to and dominated by domestic manufacturers.

5.100 **Japan** responds that the Seventh Interim Report[169] outlined the basic direction of desirable systemization in all aspects of distribution, from management planning to business transactions to managing merchandise to finance:

(i) Management Planning: the report encouraged the use of computers to track sales trends to share information with suppliers and customers.

(ii) Business Transactions: the report encouraged the automation of materials handling, scheduled deliveries along set routes, and the establishment of distribution centers for joint use.

[167]Seventh Interim Report, p. 4, US Ex. 69-4.
[168]Sixth Interim Report, p. 11, US Ex. 68-8.
[169]Seventh Interim Report, US Ex. 69-4.

(iii) Managing Merchandise: the report encouraged the use of computers to maintain inventory at appropriate levels, the taking of orders by telephone using order books, and the use of automated ordering systems.

(iv) Finance: the report encouraged the use of computers to manage accounts receivable and accounts payable, automated invoicing and bank settlements, and computerized credit research.

5.101 The **United States** points to a recent book on distribution by a Japanese academic that summarized the objectives of the Japanese government's distribution systemization policies as liberalization approached. Commenting specifically on the Seventh Interim Report, he wrote that its basic purpose was to create vertically integrated systems:

> "Its intent was to build a huge pipe connecting production with consumption and to improve the effectiveness and efficiency of distribution by achieving effectiveness and efficiency in vertical operations. … [T]he distribution systemization ultimately encouraged vertical integration of distribution and caused giant enterprises' control over distribution to become even stronger."[170]

He emphasized that the Seventh Interim Report represented a transformation in the Government's policy from merely improving efficiency to ensuring manufacturer control of the market:

> "We must keep in mind that [Japan's] national distribution policy, aimed at building a mass distribution system sought by giant enterprises to be compatible with a mass production system, had been transformed into a reinforcement of marketing activities by giant enterprises whose goals were to control distribution and the market … . This characteristic of the distribution policy was further strengthened by the promotion of distribution systemization policy."[171]

Another Japanese academic expert, writing in 1974, also characterized the MITI-led distribution reforms of the period as aiming at excluding foreign companies:

> "[T]he major reasons why this type of distribution systemization has been particularly emphasized during the Showa 40's [1965-1974], especially the latter part of Showa 40's, [1970-1974] are because of the following:
>
> … while coping with capital liberalization and pushing forward the delayed rationalization of Japan's distribution industry, at the same time, the nation as one [will] build barriers to entry into the distribution system; which leave no margin for foreign companies to penetrate Japan's economy."[172]

5.102 The United States argues that the Seventh Interim Report called for joint government-industry cooperation to implement systemization, along with tax and financial incentives for projects that would promote systemization. To foster coordination between government and industry, the Report proposed the formation of another government-industry body, the Distribution Systemization Promotion Council, to promote and build consensus for systemization. The Report also cited the need for research and guidance for specific industries to carry out systemization according to their specific needs and circumstances.

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[170]Sasaki Yasuyuki, Distribution Policies in Japan and the West, 16 June 1995, US Ex. 95-12.

[171]Ibid.

[172]Shirahige Takeshi, Chapter 1, Development of Distribution Policies, Current Distribution Issues in Modern Japan [Gendai Nihon no Ryutsu], Ooya Junichiro (Publisher), Tokyo, 26 February 1974, p. 9, US Ex. 74-1.

5.103 The United States indicates that MITI formed the Distribution Systemization Promotion Council in 1970. The head of the Council described its efforts as uniting government and the private sector in a common purpose:

> "The Distribution Systemization Promotion Council was established … as a forum for promoting the systemization of distribution through the joint efforts of government and the private sector. … [O]ver a period of ten months, over 100 people from industry, academia and government have worked literally as one united body."[173]

(e) The 1971 Basic Plan

5.104 The United States further indicates that in 1971, the Council published its "Basic Plan for Distribution Systemization." Upon its publication, the chief of MITI's Business Bureau stated that the Plan was "urgent from the standpoint of … capital liberalization countermeasures," and that "[w]ith this plan, the Ministry of International Trade and Industry has decided to make every effort toward the fulfilment of distribution systemization policies."[174] The United States further indicates that the plan's authors expressed the intention that "government and private sector, working as one, will pursue concrete implementation [from now] until 1975, based on this policy"[175] and reiterated the view of systemization as vertical and horizontal integration:

> "The decisive approach here is to regard the entire process of distribution from production to consumption as a single system. … In particular, such systemization of distribution must be realized through various stages: vertically from the intra-firm level to the inter-firm level, horizontally on the inter-firm level to the national economic level … ."[176]

5.105 The United States notes that in dividing responsibility between government and industry for implementing systemization, the Plan stated that the manufacturers should assume primary responsibility for accomplishing vertical integration, with "positive support and guidance" from the government. In the area of horizontal cooperation, the government would "take positive action."[177]

5.106 **Japan** asserts that the 1971 Systemization report also determined that broad-based standardization was necessary for such goals to be achieved. Specifically, the report encouraged standardization of merchandise and trade codes, of invoice forms and accounting records, and of shipping containers. According to Japan, none of these ideas were particularly novel. Indeed, Japanese academics introduced ideas of systemization borrowed from the west, and the various interim reports noted the fact that foreign companies were already aggressively pursuing systemization to improve efficiency.

(f) Vertical integration

5.107 The **United States** argues that Japan's intent to promote vertical keiretsu in its systemization policy comes out clearly in the Seventh Interim Report[178], as well as in the Basic Plan for the

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[173]Distribution Systemization Promotion Council, The Basic Plan for Distribution Systemization, 28 July 1971, p. 3, US Ex. 71-10. Japan disagrees with the translation of *keiretsuka* in the US translation of the 1971 Basic Plan, Japan Ex. B-18.

[174]Ibid., Introduction, US Ex. 71-10.

[175]Ibid., Preface.

[176]Ibid., Foreword.

[177]Ibid., p. 9.

[178]Seventh Interim Report, p. 7, US Ex. 69-4.

Systemization of Distribution[179] in which it allegedly admitted the need to regard the entire process of distribution from production to consumption as a single system.

5.108 With respect to the US argument that both the rationalization polices and the systemization polices were intended to encourage vertical integration, **Japan** contends that the United States is compelled to make this argument because otherwise the actual terms of the various distribution policies are completely unexceptional, and have nothing to do with the US theory about a government-created "distribution bottleneck." According to Japan, vertical integration is the missing link in the US "bottleneck" theory.

5.109 In Japan's view, the US attempt to develop a logical link between MITI distribution policies and incentives to vertically integrate stems from a simple reason - the documents themselves do not talk directly about any intent to encourage vertical integration. According to Japan, there are no statements - either by MITI or by the various advisory councils - directly calling for vertical integration. To the contrary, to the extent there is any discussion of vertical integration at all, one finds in the various advisory council reports ambivalence at best and often hostility towards excessive vertical integration.

5.110 Japan contends that as mass manufacturing had emerged in Japan more swiftly than mass distribution, some manufacturers were integrating forward into distribution to facilitate the marketing of their products. Although this process may have been economically rational for manufacturing, those studying the distribution sector regarded it with concern. Japan concludes that this ambivalence about vertical integration goes back to the very beginning of systematic thinking about distribution policies. This explicit concern about the problem of vertical integration into distribution started before the debate over capital liberalization and continued after the debate began. As an example, Japan cites the Sixth Interim Report in 1968, which saw vertical integration as a problem.[180]

(g) Single-brand distribution

5.111 Japan suggests that in effect the United States is asking the Panel to infer government involvement in the Japanese photographic materials market because the market structure in this sector is so abnormal that it could not possibly be the result of private business decisions and market forces. However, according to Japan, single-brand distribution occurred as an industry trend before the alleged measures were implemented. Single-brand wholesale distribution is a common business practice and its advantages are quite familiar to economists and business people. Likewise, affiliations between photographic materials manufacturers and photofinishing laboratories also prevail worldwide. The consistent prevalence of these market structures around the world is due to market factors, not government measures. Japan argues that there are strong economic incentives that lead to vertical integration in this industry.

5.112 According to Japan, the economic efficiencies of integrating manufacturing and distribution - whether through outright ownership or contractual relationships - are well known. Integration is said to facilitate greater flexibility in responding to changing market conditions; it reduces incentives for opportunistic behaviour between manufacturer and distributor; it allows for better information flows through the distribution pipeline; and it generally ensures greater focus and effort on behalf of the manufacturer's brand. In Japan's view, it was a recognition of these advantages that led to the strong criticism of Kodak's long delay in establishing directly controlled distributors in the Japanese market. Therefore, there was simply no causal connection between MITI's systemization policies and the decisions by the primary wholesalers about which film brands to carry. Japan asserts that, there is nothing at all unusual about the Japanese market structures for film and paper. Single-brand wholesale distribution is a common business practice. According to Japan, single-brand wholesale distribution of film prevails

[179]1971 Basic Plan, p. 6, US Ex. 71-10.
[180]Sixth Interim Report, p. 10-11, Japan Ex. B-7.

in every major market in the world. Likewise, affiliations between photosensitive materials manufacturers and photofinishing laboratories prevail worldwide. Thus, concludes Japan, the consistent prevalence of these market structures around the world is due to market factors, not government measures.

5.113 Japan further shows that in the Japanese market, vertical integration by manufacturers into distribution resulted naturally from the fact that the production sector developed and modernized faster than the distribution sector. In light of this, it was a natural reaction by manufacturers to integrate forward into distribution to apply their superior resources to marketing their products.

5.114 Consequently, Japan is of the view that decisions by Fuji's wholesalers to become single-brand film distributors occurred in the context of a larger industry trend towards single-brand wholesale distribution. This trend was guided by market forces not government policy. Japan asserts that the United States tries to avoid this unavoidable conclusion by elevating deliberations of the Industrial Structure Council's Distribution Committee to the level of Japanese Government policy. In reality, Japan maintains that the United States had nothing to link actions taken by Fuji and Konica, regarding either single-brand distribution or transaction terms, to government action.

5.115 According to Japan, the US interpretation of events is at odds with the timing of Fujifilm's and Konica's evolving relationships with their primary wholesalers. Of the four major primary wholesalers that currently are single brand Fujifilm wholesalers, two of them, i.e., Kashimura and Ohmiya, have never carried Kodak film products since World War II. Both once carried Konica products; Kashimura terminated that relationship in 1963, and Ohmiya did the same the following year. Thus, these two distributors have been single-brand Fujifilm wholesalers for over three decades -- well before capital liberalization even began, and before MITI began to formulate and articulate its distribution modernization policies.

5.116 Japan notes that a third primary wholesaler, Misuzu, carried multiple brands, including Fujifilm, Kodak, Konica, Agfa, and the English brand Ilford, until 1968, when it became a single-brand Fujifilm distributor and withdrew from all other film brands. Actually, Misuzu terminated dealings with Kodak in April 1967, even earlier than its final decision to become a single-brand distributor. Here again, the move to single-brand wholesale distribution occurred before MITI issued its 1970 Guidelines for film and the termination of Kodak preceded both the 1967 Cabinet Decision and the 1970 Guidelines.

5.117 Japan further notes that only one of the major primary wholesalers, Asanuma, made the decision to carry only Fuji brand film after MITI's distribution policies had been developed and articulated. In 1973, Asanuma travelled to Rochester, New York to meet with top Kodak officials. Asanuma, which prior to 1960 had imported directly from Kodak, requested a resumption of direct dealings. Kodak refused, saying that it was satisfied with the job being done by Nagase, its exclusive importer and primary wholesaler.[181] If Asanuma wanted to carry Kodak film, it would have to continue to go through Nagase.[182] Two years later, Asanuma gave up on a product line in which it was forced to buy from a competing distributor, and announced that it would carry only Fuji brand film.[183] Government measures played no role in pressuring Asanuma into dropping Kodak. Japan argues that the US claims about the alleged effects of governmental policies are simply not credible.

5.118 According to Japan, even Kodak has built highly effective single-brand distribution networks all over the world. Japan argues that Kodak's marketing strategy in Japan during the 1960's and 1970's

[181]Japan notes that the United States provided affidavits from Albert Sieg and William Jack to respond to this inconvenient history. Japan argues that a close reading of the affidavits, however, reveals that neither person denies the claims made by Asanuma. See US Ex. 97-1 and US Ex. 97-2.

[182]Affidavit of Takenosuke Katsuoka, p. 2-4, Japan Ex. A-11.

[183]According to Japan, although Asanuma does not carry Kodak film, it does carry Kodak slide projectors, CCD cameras and digital lab tools. See Affidavit of Takenosuke Katsuoka, p. 4, Japan Ex. A-11.

became increasingly oriented toward single-brand wholesale distribution. Prior to 1960, Kodak exported directly to several Japanese importers, including Asanuma. In 1960, however, Kodak made Nagase its exclusive importer. Nagase then resold film to multibrand wholesalers, who in turn distributed Kodak products directly to both retailers and through secondary wholesalers. Japan also alleges that in the 1960's Nagase began to build up its own direct distribution capacity through acquisition. Thus, according to Japan, Kodak based its marketing strategy in Japan during the 1960's and 1970's on its exclusive relationship with Nagase. Nagase in turn began to acquire primary wholesalers to develop its own single-brand wholesale distribution system for Kodak products.

5.119 Japan alleges that Kodak's exclusive reliance on Nagase and its single-brand wholesale distribution network continued in the 1980's, when Kodak after long delay decided to increase its commitment to the Japanese market. In 1986, Nagase's Kodak products division was spun off into a 50-50 joint venture between Kodak and Nagase. A few years later Kodak increased its stake to 70 percent, and in 1996 finally bought out Nagase's remaining interest. In fact, Japan argues that Kodak is more vertically integrated into distribution than Fuji, in the sense that Kodak owns its primary wholesaler.

5.120 The **United States** argues that the Japanese film and photographic paper market is not identical to other markets around the world, but is completely unique. Nowhere else has the government engineered the distribution system to thwart foreign competitors. In addition, the United States disputes Japan's assertion that single-brand wholesale distribution of film "prevails in every major market in the world." In fact, most wholesalers in North America and Europe carry multiple film brands. Japan appears to be confusing manufacturers' "direct-to-retail" film distribution, which is common outside Japan, with Japanese wholesalers' exclusive dealing relationships with the domestic manufacturers. Prior to 1960, Kodak exported directly to several Japanese importers, including Asanuma, but in 1960 it made Nagase its exclusive importer. This action was undertaken not as a strategic decision but because in 1960, at the request of the Japanese Government, Kodak was required to select one import firm as its sole import agent, thus facilitating the implementation of Japan's quantitative import restrictions.[184] Kodak Japan, a wholly-owned subsidiary of Eastman Kodak, is not a wholesaler. It distributes directly to Japanese retailers because of its inability to gain access to the main Japanese distribution channels for photographic products.

5.121 The United States notes that the European Communities also disputes Japan's position with respect to single-brand distribution. It states that it is standard practice all over the world for photographic producers to have one subsidiary per country representing their interests in selling their products to wholesalers, retailers, dealers or consumers. The extraordinary situation in Japan, which has no known parallel anywhere else, is the existence of four tokuyakuten distributing exclusively the same products of only one company, the major domestic producer. A subsidiary of a European company in Japan is in the same situation as the Japanese producers themselves. It must find means to enter the market, which includes the four tokuyakuten, already serving the large majority of retailers. As long as these four refuse to purchase any film other than that produced by Fuji, market access for imported film will be impaired.

5. THE STANDARDIZATION OF TRANSACTION TERMS

(a) Introduction

5.122 In the view of the United States, the implementation of rational transaction terms was a central focus of the plan towards vertical integration. The transaction terms requiring rationalization included such terms as discounts, rebates, delivery conditions, price, and dispatched employees. The rationalization of transaction terms was designed to -

[184]Ueno Akira, The Story of Kodak (Kodakku Monogatari), 1989, p. 152, US Ex. 89-2, and Affidavit of Albert Sieg, US Ex. 97-1.

(i) foster the commercial alignment of wholesalers with a particular domestic manufacturer, and of retailers with a particular wholesaler;

(ii) limit the ability of foreign firms to use their competitive strength to attract distributors away from domestic suppliers.

5.123 The United States argues that to this end MITI established the Transaction Terms Standardization Committee to determine on a sector-by-sector basis, the transaction terms among manufacturers and distributors that were needed to "systemize" distribution and prevent foreign penetration of the market. The committee specifically called for the use of cumulative rebates and tightened payment terms, which would make retailers more dependent on domestic manufacturers, to the exclusion of foreign enterprises:

> "The standards for standardizing transaction terms considered desirable by MITI are as follows:
>
> 2) In order to promote high-volume sales, volume discounts and cash discounts should be given. In addition, rebates should be progressive rebates.
>
> 3) To reduce finance costs, the following principles should be applied: 5 percent discount for cash settlement, no discount provided if paid with 60-day notes, and appropriate interest charged for notes over 60-days."[185]

5.124 The United States notes that the Transaction Terms Standardization Committee correctly recognized that these transaction terms would tend to exclude foreign companies in industries like film and photographic paper where domestic firms already enjoyed dominant market shares and foreign firms' access was strictly limited by tariffs and quotas. Using volume discounts and cumulative rebates would promote systemization by encouraging exclusive relationships between a manufacturer and its distributors and retailers. Volume discounts and cumulative rebates reduce the average price of a manufacturer's product to the distributor if the distributor purchases a certain quantity of that product. These savings encourage the distributor to purchase as much of that product as possible from a single manufacturer. The same holds true with respect to rebates from the wholesaler to the retailer.

5.125 According to the United States, a government-coordinated effort to shorten the payment terms would successfully shift the financing burden from manufacturers to distributors or retailers. Wholesalers throughout the film sector typically carried large cash balances and paid for their goods over extended periods. Therefore, shortening payment terms meant that wholesalers would no longer benefit from what amounted to easy credit from the manufacturers, a change that would substantially erode their bottom lines and, by weakening them, open them to greater control from the dominant domestic manufacturers. Among other things, in a weakened financial state, the wholesaler or retailer became more dependent upon obtaining the rebate to make the difference between profit and loss.

5.126 In the US view, prior to standardization, wholesalers were able to "shop around" different manufacturers for the best transaction terms, and extended credits were a common business practice. MITI reduced such competition in the distribution sector by limiting opportunities for the wholesalers to "shop around". The result was to offer stable, long-term relationships among the players in the distribution system.

5.127 **Japan** responds that, MITI has consistently been concerned with rationalization of trading terms in the distribution sector since the 1960's. In Japan's view, concerns in the late 1960's initiated a process of encouraging ongoing rationalization to improve the efficiency of the distribution sector. Japan points

[185]Film Purchases from Manufacturers: Supermarket and Chain Store Trade Terms, Zenren Tsuho, November 1969, US Ex. 69-5.

out that although the initial efforts were in the 1960's and 1970's, this push for rationalization later received a new impetus in the 1990's as part of the United States-Japan Structural Impediments Initiative ("SII") talks.

5.128 In Japan's view, this concern with "irrational" traditional business practices goes back to at least 1965 and the Second Interim Report, more than two years prior to the 1967 Cabinet Decision announcing the first stage of capital liberalization. The common problem underlying these various traditional business practices is that they all interfere with the swift and transparent transmission of market information up and down the distribution chain. Thus, with long payment terms and liberal return policies, there need not be tight coordination between what a retailer is buying and what it is actually selling; a manufacturer might think it had sold 100 units, only to find at the end of a period that 25 units were being returned. Unclear discounts and rebates make it impossible for a retailer to know its true costs and whether particular retail prices are actually profitable.

5.129 According to Japan, the Sixth Interim Report concluded that such business practices are "economically irrational" and that they "harm the stability of enterprise management, increase[s] distribution cost, and lead to the shifting of the burden to consumers."[186] Accordingly, Japan argues, the report concluded that "it is necessary to establish standard transactions terms in the direction that will contribute to the improvement of distribution functions, and to strive for their widespread adoption."[187] By recommending the adoption of new standard practices to replace traditional terms of trade, the report sought to rationalize the distribution sector's coordination of supply and demand by improving information flows.

5.130 Japan notes that as a follow-up to the Sixth Interim Report, MITI commissioned surveys of the actual trading conditions in a number of different industries, including one on photographic film. These surveys, conducted by the Institute of Distribution Research, sought to understand how these general problems affected specific industries. The surveys examined business practices in the following areas: (1) sales contracts, including discount and rebate policies; (2) deliveries and returns; (3) settlement of accounts; and (4) promotional practices, including dispatched employees and rebates.

5.131 Japan argues that, having identified problems in various industrial sectors, MITI began the process of issuing guidelines to address these problems. Over the 1970 to 1972 period, MITI issued rationalization guidelines to 15 different industries that had been surveyed earlier: cotton and chemical textiles, stationery and paper products, glassware, umbrellas, rubber footwear, photographic film, instant coffee, household cleaners, small tools, publications, kimono fabrics, pharmaceuticals, knitted underwear, cameras, and ceramics. The guidelines issued by MITI to each of the 15 industries addressed the same issues and made basically the same suggestions.[188] According to Japan, for industry after industry,[189] MITI:

(i) suggested greater use of cash discounts;

(ii) suggested greater use of volume discounts;

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[186]Sixth Interim Report, p. 17, Japan Ex. B-7.

[187]Ibid., p. 17.

[188]Japan argues that these guidelines were offered to some industries for which import competition was irrelevant and was therefore not even mentioned in the underlying survey, such as kimono fabrics and publications. This fact, together with the similarity of the suggestions in the guidelines, confirms that the purpose of the rationalization guidelines -- for film as well as other guidelines -- was in fact modernization, not import protection.

[189]Torihiki Jouken no Tekiseika Shishin (Guidelines for Rationalizing Terms of Trade), Tsusansho Kouhou, June 14, 1972, Section 2, pp. 11-30, Japan Ex. B-21.

(iii) suggested the disclosure of the basis or conditions upon which cash and volume discounts were granted;

(iv) suggested the use of rebates to be minimized;

(v) suggested that the frequency of deliveries be reduced to improve efficiency;

(vi) suggested the adoption of minimum orders;

(vii) suggested that the merchandise be returned only if it was defective or damaged

(viii) suggested that accounts be settled in full either by cash or by promissory note and that interest be charged on notes with exceedingly long periods;

(ix) suggested the elimination of the practice of dispatching employees with the exception of when the sale of a product requires specialized knowledge.

In Japan's view, none of the measures above indicate any anti-foreign bias.

5.132 According to the **United States**, it was also a central focus of the 1971 Basic Plan to implement rational transaction terms in the distribution sector "in order to prevent disruption of the [established] order by foreign capital-affiliated firms, which have enormous capital strength."[190]

5.133 **Japan** responds that the United States takes a single sentence from this report and then jumps to the conclusion that "a central focus" of the plan was to prevent foreign firms from disrupting the "order of trade." This sentence is but one of four reasons for rationalizing such traditional trade practices. More importantly, Japan notes that the United States takes this sentence out of proper context. This sentence refers back to the introductory paragraph of this section, which identifies traditional "irrational" practices. There is nothing at all improper about a concern that dominant firms -- whether they are domestic or foreign firms expected to enter the market -- not abuse their market power. The Foreword makes clear that the overall thrust of the report was:

> "an urgent need to improve distribution functions in response to the shift toward an information society and a consumer-oriented economy, and also to save labour and improve productivity in response to the worsening labour shortages."[191]

For Japan, it is clear that the push for systemization served a number of policy objectives. In fact, the vast bulk of the report focuses on a broad range of issues completely unrelated to this quotation cited by the United States out of context.

(b) 1970 Guidelines

5.134 The **United States** argues that in 1970, the Japanese Government cemented its efforts on transaction terms by issuing the "Guidelines for Standardization of Transaction Terms for Photographic Film".[192] The Guidelines strengthened the transaction terms, and the net effect was to shift the financial burden from wholesalers to retailers, making the latter vulnerable to control from dominant suppliers. The Guidelines noted potential concerns with rebates under the Antimonopoly Law but at the same time recognized their value. The Guidelines reiterated the call for toughened transaction terms. They noted that wholesalers generally had been repaying outstanding balances in full within 60 days (whereas

[190]1971 Basic Plan, p. 10, US Ex. 71-10.
[191]1971 Basic Plan, p. 4, Japan Ex. B-18.
[192]US Ex. 70-4.

previously payment terms had been 210 days), but that problems still existed with the retailers. Specifically, retailers continued to rely heavily on credit and enjoyed unusually long payment terms. The United States asserts that the Guidelines called for strict tightening of these terms, stating that accounts should be settled in full in cash or promissory notes with appropriate interest. This tightening of transaction terms amounted to again shifting the financial burden, this time from wholesalers onto retailers, making the latter vulnerable to control from dominant supplies through such means as the use of rebates.

5.135 According to the United States, the domestic photographic industry understood that MITI viewed the use of rebates as a means to systemize distribution in the face of foreign competition. The United States points to an article on liberalization in a leading photo industry journal, which stated that "MITI's guidelines for standardizing transaction terms are what might be called an 'immunization'." The article noted that it was important to "clarify and rationalize transaction terms . . . out of concern that, as liberalization moves forward, the trading system would be disrupted." The article elaborated that "the Guidelines themselves may be described as an attempt to equalize the conditions of competition." For instance, rebates were adopted so that once they become common practice in the industry, "the influx of foreign capital may be checked by the application of the Antimonopoly Law."[193]

5.136 **Japan** argues that the 1970 Guidelines were simply general suggestions and lacked any legal force. Japan maintains that the recommendations contained in the Guidelines were completely unremarkable. Significantly, Japan points out that the recommendations in the 1970 Guidelines did not in any way distinguish between imported and domestic products. Japan argues that there is nothing in the Guidelines that can be construed as encouraging the creation of an exclusionary market structure. Further, the relationship between manufacturers and wholesalers was not even the focus of the 1970 Guidelines. In Japan's view, the recommendations in the 1970 Guidelines concentrated on transaction terms between wholesalers and retailers.

5.137 In response to Japan's assertion that its only measure regarding transaction terms was the 1970 MITI Guidelines which in Japan's view were merely suggestions, the **United States** alleges that MITI made it clear that it expected that the photographic film industry would implement the Guidelines with veiled threats of possible legislative action if industry did not respond, along with the demand for industry to follow up with a report to MITI on progress on implementing the transaction terms. The United States notes that MITI published the final Guidelines in March 1970 in an industry journal and requested industry associations to formulate and implement more specific transaction terms based on the Guidelines. In response to MITI's demand, the photospecialty wholesalers association in November 1970 promptly published a "Transaction Outline" to implement the associations own transaction terms, and the association reported the outline to MITI.

5.138 The United States argues that the 1970 Guidelines were preceded and followed by a "near continuous series of measures", and the monitoring by MITI of the implementation of its Guidelines. This extended interaction between government and the private sector regarding transaction terms demonstrates the extent to which the Government of Japan went to ensure that its policies were followed by the industry. Repeated advocacy and monitoring built peer pressure and served to as a constant reminder that the Government was constantly watching. The United States also asserts that MITI applied pressure through the Chamber of Commerce. The Chamber has at its disposal a great deal of authority to influence the dispensing or withholding of government benefits, and also acts as an information gathering arm for MITI. Consequently, medium and small scale enterprises would have second thoughts before ignoring the Chamber's guidance on transaction terms.

[193]Draft a Standard Contract for Film and Criteria for Standardization of Transaction Terms, Zenren Tsuho, August 1971, US Ex. 71-11. Japan disagrees with the US translation of this quote from the 1971 Standard Contract. See translation issue 8.

5.139 The United States further argues that to further promote standardization of transaction terms, MITI in 1971 commissioned the Japan Chamber of Commerce to draft standard contracts for 14 different products, including photographic film. This was followed by the publication by the Chamber in 1972 of the standard transaction contract for photographic film. The United States concedes that the Chamber standard contract did not mention standardization of transaction terms but asserts that the very publication of a standard contract by Japanese industry amounts to an exercise in standardization. Moreover, MITI continued its efforts to underlie the importance of standardized transaction terms. In 1973, MITI compiled and published under its name materials by the quasi-governmental Transaction Terms Stabilization Committee. This Committee's findings emphasized the importance of standardization of transaction terms as essential for systemization of distribution activities as well as being a countermeasure against foreign capital.

(i) Impact of the Guidelines

5.140 The **United States** further argues that in response to the direction given by MITI, Fuji and Konica implemented tough new transaction terms that increased their control over wholesalers and retailers. The Japanese photographic materials industry instituted an aggressive program of volume-based rebates and tightened payment terms for their distributors.

5.141 According to the United States, the new standardized trade terms had precisely the effect the Japanese Government intended. Volume rebates encouraged wholesalers to purchase from a single source (to achieve the rebate target) rather than from multiple sources, thereby promoting exclusivity. According to photo industry press and studies, the new transaction terms were instrumental in turning the wholesalers into exclusive agents of the Japanese manufacturers and in vertically integrating distributors.[194] The United States cites as an example, a Japanese study of the competition between Fuji and Konica published in 1980 which examined the factors behind distributors becoming Fuji's exclusive agents -- and pointed to progressive volume rebates as the main factor.[195] The United States further argues that the manufacturers' coordinated policy of tightening payment terms (payment rebates) strengthened the manufacturers, often at the expense of wholesalers.[196]

5.142 The United States further asserts that the smaller wholesalers and retailers at first resisted these standardized terms, but were eventually pressured into submission. Another turning point, in the US view, was the 1968 bankruptcy of Chuo Shashin, a relatively large photo industry wholesaler. Consequently, wholesalers and retailers considered how best to avoid a similar fate and concluded that making independent business decisions entailed greater risk than following the dictates of the industry. The United States cites the following passage in support of their contention:

> Tokuyakuten [primary wholesalers or special contract agents] realized the need to correct their sales postures after the [financial] failure of Chuo Shashin. If certain tokuyakuten take advantage of this opportunity and offer lower prices or long term, sight credit, customers will probably lean towards those with looser transaction terms. However, such tokuyakuten will have the same problem that Chuo Shashin had. That is why primary wholesalers should have tougher collection standards.[197]

5.143 **Japan** responds that the bankruptcy of Chuo represented a dramatic example of the underlying business rationality of having reasonable payment terms. Thus, observers in this industry had a

[194]Wholesale: So-called Keiretsu-ka Problem -- Course Unclear, Nihon Shashin Tsushin, 1 November 1967, US Ex. 67-14.

[195]Niizu Sgigeyuki, Fuji Photo Film vs. Konishiroku, 1980, US Ex. 80-1.

[196]Fuji Film's Result of Stricter Policy on Receivables, Zenren Tsuho, March 1968, US Ex. 68-2. Japan disagrees with certain US translations contained in Ex. 68-2. See translation issue 9.

[197]Get ready for Breakthrough; Trade Normalization Further Advanced; Proposed to Increase Profit; Concern About Impact on Retailers, Camera Times, 19 March, US Ex. 68-3.

compelling business lesson of the importance of rational payment terms, a lesson that predated both the 1969 Survey in this industry and the 1970 Guidelines that formalized MITI guidance on this issue. This industry had no need to wait for MITI guidance before considering and taking action in accordance with individual economic self-interest. Indeed, the United States itself goes on to explain, that the Fujifilm primary wholesalers began tightening their payment terms to retailers, after the Chuo bankruptcy but before the 1970 Guidelines.

5.144 The **United States** argues that the pressure put on the primary wholesalers by the new transaction terms turned into an immediate loss for foreign manufacturers because once progressive rebates were introduced, the wholesalers had a strong incentive to deal only with the leading manufacturers - the Japanese producers. In addition, Fuji and Konica pressed their systemization efforts beyond the wholesalers down to the retailers. Despite initial resistance from retailers, MITI pressed forward with the Guidelines because of their importance as a liberalization countermeasure. This was strengthened further by the formulation of the 1971 Basic Plan.

5.145 **Japan** argues that the US allegations completely mischaracterize the 1970 Guidelines. According to Japan, the 1970 Guidelines explicitly discouraged the use of rebates and did not call for shorter payment terms. It is quite clear, in Japan's view, from what was actually written in the 1970 Guidelines, that they were unrelated and even inimical to the establishment of single-brand distribution.

5.146 Japan further argues this effort by the United States to avoid the text of the 1970 Guidelines overlooks several key points. First, the 1970 Guidelines say nothing about "progressive" rebates, and in fact discourage rebates generally. Second, although the 1970 Guidelines do encourage volume discounts, the stated rationale is for greater efficiency, not encouraging "channel exclusiveness." Third, even if one of the consequences of volume discounts is some tendency toward larger volume purchases from fewer suppliers, that business decision rests with the wholesaler. Regardless of the MITI recommendations, all of the actions -- either manufacturers deciding to offer discounts or wholesalers deciding to accept them -- are purely private business decisions.

5.147 According to Japan, as to payment terms, MITI's recommendations were also completely unexceptional. The 1970 Guidelines did not call for shorter payment terms.[198] MITI was merely stating that, after a certain period, suppliers should charge their customers interest for late payment. Late payment charges are not novel or unusual; rather they are a completely normal term of credit arrangement. It is simply not credible to contend that the institution of late payment charges is a draconian assertion of control by suppliers over their customers.

5.148 According to Japan, the United States argues that "wholesalers would no longer benefit from what amounted to easy credit from the manufacturers." Japan believes the US position would require the Panel to believe that a MITI statement simply that "[for promissory notes with unusually long sight], appropriate interest should be charged …" set in motion the following chain of events: (1) all manufacturers will in fact change their policy; (2) the policy change will be so dramatic as to materially affect the wholesaler; (3) the wholesaler will be driven to financial desperation; (4) all suppliers but one will ignore its financial plight and insist on tighter terms; (5) a single supplier will craftily offer more flexible terms, and finally, (6) that wholesaler then will have no choice but to abandon all other suppliers' brands and instead reluctantly become dependent on a single supplier.

[198]According to Japan, it should also be noted that, contrary to US assertions, the 1970 Guidelines do not call for uniform or rigid standard payment terms. In fact, the 1969 Survey, which led to the 1970 Guidelines, notes "Many wholesalers point to the period of payment collection, especially the period of draft site as an important issue of terms of trade. However, the draft site highly depends on the financial circumstances and the policies of individual enterprises at the time of each payment. Therefore, it is not appropriate to establish standards indicating that 90 days or 120 days are appropriate." 1969 Survey, p. 14, Japan Ex. B-1.

5.149 The **United States** requests the Panel not to place undue emphasis on a single phrase in the 1970 Guidelines that rebates "should be kept to a minimum". Instead, the Guidelines' recommendations should be considered in their entirety:

> "Rebates are generally awarded at the discretion of the sellers. Therefore, rebates are widely used as a means of controlling the distribution process. However, their excessive use may constitute an unfair trade practice under the Antimonopoly Law. Even when it does not constitute a violation of law, the distribution process can in effect be controlled. Also, it may make it difficult for recipients [of the rebates] to formulate a clear management plan, and the final price may not fully reflect the merits derived from rebates. In addition, the rebate system has become very complicated in recent years, and the administrative burden of rebates has increased. In principle, discounts should be used as a means to reward consumers for the benefits of large quantity transactions. The use of rebates will be allowed as a supplementary means to achieve other price policies. However, the use of rebates should be kept to a minimum."[199]

5.150 According to **Japan**, relationships between manufacturers and wholesalers were not even the focus of the 1970 Guidelines. MITI's 1969 Survey, which led to the issuance of the 1970 Guidelines, stated clearly that its analysis and recommendations were concentrating on transaction terms between wholesalers and retailers. Japan further asserts that the imposition of unfavourable terms by any manufacturer would have created incentives to switch suppliers, or at least add other suppliers so as to play them off against each other and thereby secure more favourable arrangements. Thus even accepting the United States' characterization of the 1970 Guidelines, in Japan's view, their effect logically would have been the opposite of what the United States contends.

5.151 Japan believes the starting point for analysis should be the Guidelines themselves, and what they said and did not say. Specifically, the Guidelines did not either mandate *uniform* transaction terms or provide *specific* transaction terms to be followed by manufacturers, wholesalers, secondary dealers, and retailers. The Guidelines did nothing more than make general suggestions related to payment terms, volume discounts and rebates. The United States has made no effort to establish that these payment terms are at all remarkable. In fact, the payment terms cited by the United States are common in many industries throughout the world. Moreover, payment terms are not the reason that the distributors chose to become single-brand or remain single-brand. Payment terms, even the unremarkable ones at issue here, are simply one element of the cost to the buyer.

5.152 Japan rejects the US argument that the wholesalers became more dependent on the manufacturers and, in particular, on volume discounts and rebates. First, it should be noted that the 1970 Guidelines did not encourage the use of volume discounts without reservation, and did it never encouraged rebates. The Guidelines encouraged transparency if volume discounts were given, and discouraged the use of rebates. Obviously, the more transparent the volume discount, the easier it would be for a competitor to provide the buyer an offsetting incentive (e.g., lower price) to purchase its product rather than the product of the manufacturer offering the volume discount. Thus, if anything, the encouragement of transparency in granting volume discounts improved the position of competitors with a customer.

5.153 The **United States** responds that the Japanese Government effectively ensured that wholesalers could not turn to alternative suppliers for more competitive transaction terms. The Japanese Government's advocacy and monitoring of standardized transaction terms -- both between manufacturers and wholesalers and between wholesalers and secondary wholesalers and retailers -- helped create the discipline to achieve standardization.

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[199]US Ex. 70-4.

(ii) Timing

5.154 **Japan** argues that, according to the United States, MITI's distribution policies during the 1960's and 1970's, i.e., the so-called "systemization" policies, formed the centrepiece of its alleged strategy to block imports of consumer photographic film and paper. Japan recalls that the United States argues that MITI encouraged and facilitated the creation of a closed and exclusionary market structure for consumer photographic film and paper. In Japan's view, however, there is no causal connection between the policies that were being followed by the Government of Japan and the resultant market structure.

5.155 Japan argues that the US theory has intractable timing problems. According to Japan, domestic manufacturers had begun to reform their payment and rebate policies in the early 1960's, long before the 1970 Guidelines. Fujifilm revised its existing volume rebate policy over a year earlier on 21 October 1966. This policy remained unchanged from 1966 until 1974.[200] Fujifilm's volume discount policy therefore precedes both the 1970 Guidelines and the 1967 Cabinet Decision.[201] In addition, Fujifilm made no change in its policy in response to the 1967 Cabinet Decision. Fujifilm had already tightened payment terms in April 1966.[202] In fact, the average number of days required for Fujifilm to receive payment from its primary wholesalers had already dropped during the first half of fiscal year 1966, which began on 21 October 1965.[203] Indeed, Konica began tightening its payment terms as early as 1962.[204] In addition, three of Fuji's four major primary wholesalers were already single-brand distributors by 1968, two years before the guidelines were issued. While Fuji's fourth primary wholesaler, Asanuma, did not become a single-brand distributor until after the issuance of the Guidelines, it only made this private business decision after Kodak explicitly refused to deal with it directly. Japan goes on to state that, as to the other domestic manufacturer, Konica, all of its primary wholesalers had been single-brand distributors by 1955. According to Japan, therefore, there was no causal connection between the 1970 Guidelines and the development of single-brand wholesale distribution in the film sector. In Japan's view, the Japanese manufacturers had perfectly rational business incentives for taking these actions.

5.156 The **United States** responds that the Japanese photographic materials manufacturers instituted an aggressive program of volume-based rebates and tightened payment terms for their distributors in October and November of 1967, just a few months after the June 1967 Cabinet Decision's call for the industry to modernize distribution to resist foreign competition. Their move to implement these transaction terms was also consistent with the Second and Fifth Interim Reports' call for the greater use of "volume discounts" and a move away from long payment terms.[205] The new terms included volume based rebates, in which wholesalers received rebates for reaching target sales volumes. They also included "payment rebates," in which the wholesalers received a rebate if they made prompt payment, but the amount of the rebate was reduced for each additional time period that payment was

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[200]See Affidavit of Tanaka Takeshi, p. 3, Japan Ex. A-10.

[201]According to Japan, while the United States claims that Japanese film manufacturers tightened payment terms in November 1967, it has misunderstood the article it cites to support this assertion. Manufacturers in fact tightened payment terms much earlier. Fujifilm, for example, tightened payment terms in April 1966. See Fujifilm's Result of Stricter Policy on Receivables, Zenren Tsuho, March 1968, US Ex. 68-2; Affidavit of Tanaka Takeshi, p. 3, Japan Ex. A-10. Japan argues that even if the date cited by the United States were correct, however, the fact remains that payment terms were tightened prior to the 1970 Guidelines.

[202]See Fuji Film's Result of Stricter Policy on Receivables, Zenren Tsuho, March 1968, US Ex. 68-2.

[203]Based on these average statistics, Japan notes that Fujifilm estimates that payment terms were tightened around 20 October 1965 Affidavit of Tanaka Takeshi, p. 3, Japan Ex. A-10. An article appearing in the Zenren Tsuho supports this assertion. Fujifilm's Result of Stricter Policy on Receivables, Zenren Tsuho, March 1968, p. 5-7, US Ex. 68-2. ("It is now clear that it was two years back, just before 20 April 1966 … that Fujifilm started to try to improve its receivables and related shipments.")

[204]Affidavit of Haruyoshi Okuyama, p. 3, Japan Ex. A-18.

[205]Second Interim Report, US Ex.65-2; Fifth Interim Report, US Ex. 66-3.

delayed, and after the potential payment rebate reached zero, the volume rebate was reduced as payment delays continued. According to the US, these rebates were tantamount to tightened payment terms.

5.157 The United States continues that Japan actively pressed for standardized transaction terms in the 1968-75 time frame precisely as Japan was lowering its tariffs and moving toward this first significant liberalization of capital investment. MITI's repeated and active efforts to standardize the terms (including through publicizing the particular terms applied by individual wholesalers) served to standardize those terms at this time when standardization was most needed to resist the imminent threat of foreign competition. Japan's timing was right on the mark regarding the second goal as well. Although Japanese manufacturers had implemented rebates, volume discounts, and shortened payment terms before the 1970 Guidelines, the 1969 survey and the 1970 Guidelines themselves noted that rebates and volume discounts were less widely used between primary wholesalers and secondary wholesalers and retailers.

5.158 According to the United States, Japan admits it held off foreign investment in the distribution sector in order to ensure that foreign manufacturers could not establish their own distribution networks in Japan until Japanese manufacturers had restructured their own distribution networks and made them more efficient. The pressure put on the primary wholesalers by the new transaction terms turned into an immediate loss for foreign manufacturers. Prior to the institution of the Government-directed new transaction terms, two primary wholesalers served as major marketing and distribution channels for imported film: Asanuma, Japan's dominant photospecialty wholesaler, and Misuzu, another large nationwide wholesaler. However, once the progressive rebates were implemented, these wholesalers had a strong incentive to deal with only the leading manufacturers -- the Japanese producers. The shortened payment terms also weakened the wholesalers' financial condition, making them more vulnerable to control from the Japanese manufacturers.

(c) 1990 Guidelines

5.159 **Japan** points out that efforts towards distribution rationalization did not end in the 1970s. In 1990, MITI issued the "Guidelines for Improving Trade Practices".[206] Not surprisingly, these Guidelines addressed many of the same traditional irrational business practices targeted by the various industry-specific trade rationalization guidelines 20 years earlier. This is proof that Japan did not change its basic policies. The objective of reforming traditional but outmoded distribution practices made sense in 1970 and it still made sense in 1990. Japan stresses that in recent years the United States has pressured Japan to be more aggressive in encouraging its industries to follow these policies.

5.160 Japan notes that the 1990 Guidelines emerged from an inquiry by the Minister of International Trade and Industry, who requested the Distribution Committee of the Industrial Structure Council to revisit the issue of distribution rationalization during the US-Japan Structural Impediments Initiative ("SII") talks. Japan indicates that after receiving the Distribution Committee's interim report, MITI sent the 1990 Guidelines, which constituted one part of the interim report, to 141 different industrial associations.

5.161 The **United States** concedes that the 1990 Guidelines arose out of international pressure on Japan to increase market access, including the SII talks between Japan and the United States. In response to that pressure, Japan introduced guidelines indicating that "international harmony is required" and businesses "must give consideration so as not to have their business practices become obstacles to others [including foreign suppliers]."[207] This statement contrasts with the repeated calls to take countermeasures

[206]Shoukankou Kaizen No Kihonteki Houkou Ni Tsuite (Basic Direction for the Improvement of Commercial Practices), 20 June 1990, [hereinafter "1990 Guidelines"], US Ex. 90-5, Japan Ex. B-22.

[207]1990 Guidelines, p. 2, US Ex. 90-5.

"in order to prevent disorder arising from"[208] the incursion of foreign capital enterprises, stated in many of the key documents from the late 1960's and early 1970's.

5.162 The United States contends that based on these positive statements, in various exchanges with the Government of Japan, it has taken the view that the 1990 Guidelines have the potential to help improve market access in the distribution sector (as Japan promised), if Japan in fact implements the policies indicated in these positive statements. According to the United States, however, Japan has not implemented these policies in the photographic materials sector (or indeed any other sector, as far as the United States is aware). Japan's failure to implement these policies led the United States to state, in its November 1996 submission to the Government of Japan on deregulation matters, that Japan should implement what these Guidelines provide for. Moreover, this failure of implementation led the United States to conclude that Japan in fact has not changed its basic policies on distribution, and in fact has not implemented the positions stated in the 1990 Guidelines to correct the restrictive structures in the distribution system for photographic film and paper.

5.163 The United States emphasizes that in considering the implementation of the 1990 Guidelines, it is important to bear in mind that Japan implemented its distribution policies, beginning in the 1960's and 1970's, not by a mere announcement of Guidelines in 1970, but based on the back-and-forth process of "concerted adjustment" between government and industry. That process spanned years and involved near-constant government surveying and consulting with the domestic industry, building consensus, issuing reports and guidelines, following up with more surveys and guidance to industry. It was the combination of these actions -- the leadership, monitoring, and close follow-up by the Government -- that made effective the Japan's policies to limit foreign access to the its distribution system. Thus, it would take even greater efforts by MITI to undo what it has done, particularly because the formation of this system in the first instance was in the interest of Japanese manufacturers, whereas its dismantling would pose a direct challenge to the two-company oligopoly of Fuji and Konica.

5.164 The United States argues that as far as it is aware, Japan has undertaken no actions in the photographic film and paper sector to follow-up on the 1990 Guidelines. Specifically, MITI has not pursued any meaningful actions to reverse its policies on transaction terms or to address the restricted structure of the distribution system for photographic film and paper in Japan. Moreover, the exclusionary distribution system remains in force in the form it existed in 1990, and an elaborate system of rebates and discounts continues at various levels of the distribution system in this sector.

5.165 The United States further argues that in addition, nothing in the 1990 Guidelines indicates that MITI no longer favours standardized transaction terms as a means to blunt competition from foreign manufacturers. Japan's interpretation of the Antimonopoly Law continues to provide that the use of transaction terms departing from standard industry terms can be an unfair trade practice, and the Antimonopoly Law continues to require reporting of all contracts between foreign manufacturers and Japanese distributors.

5.166 According to **Japan**, the 1990 Guidelines address many of the same traditional irrational business practices targeted by the various industry-specific trade rationalization guidelines 20 years earlier. For example, the 1990 Guidelines note that many of the rebates paid by wholesalers and manufacturers are based on complex or unclear criteria, that unsold merchandise is often returned, that frequent small deliveries are required at the suppliers' expense, and that suppliers often dispatch employees to expand the sales force of retailers.[209] Just as in the various industry specific guidelines of the 1970's, the 1990 Guidelines suggest as "directions for improvement" that rebate conditions be clarified and that the use of rebates be kept to a minimum, that returns should not be allowed except in cases where the merchandise has been damaged or is defective, that the cost burden for deliveries be shared equitably

[208]1970 Guidelines, US Ex. 70-4.
[209]1990 Guidelines, pp. 2-4, 5, 8-9, Japan Ex. B-22.

between suppliers and retailers, and that the practice of dispatching employees be limited to cases in which the supplier has something to gain and is not being coerced by the retailer.

5.167 Japan argues that the close similarities of the 1970 Guidelines and the 1990 Guidelines are not at all surprising from its perspective, but they possess a serious problem for the US claims. From a Japanese perspective, both sets of guidelines pursue the same basic policy agenda, i.e., eliminating "irrational" business practices to modernize the Japanese distribution industry. From the US perspective, there must be some reason why the 1970 Guidelines are a problem while the 1990 Guidelines are sound policy that should be encouraged. Japan argues that as recently as in November 1996 the official US position was that MITI should "monitor and report" on the Japanese industry's compliance with the 1990 Guidelines "in order to promote a free, transparent, and competitive distribution system."[210] This US Government request is completely consistent with the Japanese Government's view of its distribution modernization policies, but it is at odds with the theories presented by the US to this Panel.

5.168 The **United States** counters, however, that with respect to rebates, the 1990 Guidelines depart in an important respect from the many policy documents of the late 1970's addressing transaction terms. Specifically, regarding rebates, the United States stresses that the 1990 Guidelines emphasize that:

> It is desirable for manufacturers to voluntarily refrain from offering rebates aimed at maintaining a keiretsu-based relationship in order to prevent manufacturers from exercising excessive influence over the business of retailers.[211]

5.169 In **Japan**'s view, the major difference between the 1990 Guidelines and the earlier ones is that now modernization is specifically identified as necessary for (among other things) improving imports' access to the Japanese market.[212] Therefore, opaque rebates were criticized because new foreign entrants would have trouble knowing what terms they would have to offer to be competitive.[213] Requirements for frequent small deliveries were also characterized as hindering the entry of imported products into the marketplace.[214]

6. OTHER DISTRIBUTION "COUNTERMEASURES"

5.170 According to the **United States**, Japan took additional steps to ensure that foreign firms could not utilize their capital strength to attract wholesalers by providing more favourable transaction terms than those offered by domestic firms. Two mechanisms for accomplishing this were (1) to severely limit foreign firms' ability to offer financial inducements to distributors, and (2) to subject foreign firms to anti-monopoly scrutiny if they departed from the standard transaction terms that the government had mandated.

(a) JFTC Notification 17

5.171 The United States notes that on 20 May 1967, the JFTC issued Notification 17, "Restrictions on Premium Offers to Businesses."[215] Notification 17 essentially prohibits a consumer goods manufacturer from offering cash or other "premiums" to wholesalers or retailers as an inducement for the wholesaler or retailer to begin handling the manufacturer's products, or to reach a certain level

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[210]Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Administrative Reform and Competition Policy in Japan, 15 November 1996, p. 7, Japan Ex. B-23.

[211]1990 Guidelines p. 8, US Ex. 90-5.

[212]1990 Guidelines, p. 2, Japan Ex. B-22.

[213]Ibid., p. 2.

[214]Ibid., p. 8.

[215]US Ex. 67-4.

of sales of a manufacturer's product. Notification 17 took away an important means a foreign manufacturer could otherwise have used to attract customers.

5.172 The United States asserts that Item 2-4 of Notification 17 contained an exception to its prohibition on inducements to distributors that allowed a manufacturer to offer premiums to employees of distributors and retailers who were in exclusive, vertically-integrated relationships with the manufacturers. The Japanese manufacturers who had achieved exclusive dealing arrangements with wholesalers or retailers, could offer unlimited premiums (including cash) to the employees of those wholesalers and manufacturers. Foreign manufacturers, which had no direct relationships with Japanese wholesalers because of Japan's requirement that they deal with a sole import agent, were prohibited from offering such inducements. The United States further asserts that the JFTC described this Notification as "a breakwater before liberalization."[216]

5.173 **Japan** responds that low price offers, rebates and offers of goods to assist the other parties' promotional activities were outside the scope of the Notification. Although the United States would like to give the impression that "photographic materials" were expressly singled out as one of the industries covered by the Notification, almost all the industries producing goods consumed or used in every day life - more than 100 industries ranging from automobiles to soap - were covered. In any event, the regulation restricted only excessive premium offers - not normal promotional activities - to distributors. The rationale was that such offers could impair fair and free price competition in the distribution and could increase the distribution cost to the detriment of consumer interests.

5.174 Japan further argues that the US argument concerning Item 2-4 of the Notification contains a fundamental misunderstanding. Premiums offered to employees of companies which were in a special relationship (share holdings or sending executives) with the manufacturer were not considered premiums under the regulation, because they were no different from premium offers to its own employees. This exception applied only to transactions which were virtually identical to operations within a single entity. Fuji and its primary wholesalers were not eligible for the exception because they were not in a special relationship.

5.175 Japan indicates that as price competition intensified at the distribution level due to changes in the Japanese economy since 1967, distributors tend to demand lower prices, rather than premiums, from the manufacturers. The need for the regulation declined, commensurate with the trend. For these reasons, the Notification was abolished in April 1996 in the course of the review of the Premiums Law. In Japan's view, it should fall outside the scope of the present proceedings.

5.176 While the **United States** concedes that Notification 17 has been repealed, it maintains that there are other provisions that make that repeal meaningless. According to the United States, premiums from manufacturers to wholesalers are still subject to JFTC Designation 9 of JFTC Notification 15 of 1982. This provision governs the use of "unjust inducements" under the Antimonopoly Law and prohibits premium offers in excess of "normal business practice".

5.177 **Japan** responds that JFTC Designation 9 of JFTC Notification 15 of 1982 does not violate the WTO Agreements. Moreover, Japan emphasizes that Designation 9 has not been specifically identified in the US panel request and thus is outside the Panel's terms of reference.

(b) International contract notification

5.178 The United States argues that through the Transaction Terms Standardization Committee report and the 1970 Guidelines, MITI worked to develop standard transaction terms and to ensure that domestic

[216]Severe Restrictions Placed on Business for Premium Offers: Shatokuren Hears JFTC Explanation at Jyosui Kaikan on the 12th. Nihon Shashin Kogyo Tsushin, 20 June 1967, US Ex. 67-8.

industry would follow them. Japan found an effective tool to achieve this objective through the use of the international contract notification provision of the Antimonopoly Law. Article 6 of this Law requires parties entering into an "international agreement" or "international contract" to submit a copy of the contract to the JFTC. Contracts between domestic firms are not subject to similar notification requirements. The discriminatory reporting requirement, coupled with the use of administrative guidance, formed an effective combination of tools for discovering and preventing the use of transaction terms that were not in accord with the systemization policy.

5.179 According to the United States, therefore, although domestic manufacturers were free to execute distribution agreements without the notification to an examination by the JFTC, contracts involving foreign manufacturers were subject to the international contract notification to, and examination by, the JFTC. In addition, the responsibility to notify rested with the domestic distributors. The result is that if a foreign producer had offered a wholesaler more favourable terms than those called for by the Japanese Government, the wholesaler would have had to submit a copy of an international contract that blatantly revealed that the company was challenging Japanese Government policy and measures. For the United States it follows, therefore, that if foreign manufacturers offered wholesalers more favourable terms than domestic manufacturers, those contracts would be brought to the attention of the Japanese Government.

5.180 **Japan** responds that the provision of the Antimonopoly Law concerning international contracts has its basis in the prohibition of participation in any international cartel under the 1947 Imperial Decree issued during the Allied Occupation. The notification requirement serves to ensure compliance with the prohibition, and has existed since 1947. In Japan's view, it is very obvious that the mechanism was not designed as part of "countermeasures" for rationalization of the distribution against foreign investments. The review by the JFTC is concerned only with competition policy, and does not examine whether or not the conditions were favourable to Japanese distributors nor does it serve as a guide for applicants to modify contracts in favour of Japanese distributors.

5.181 The **United States** points out that the JFTC's 1971 annual report shows that the international contracts of foreign manufacturers were scrutinized by the JFTC.[217] According to the report, the JFTC took action to ensure that import agents complied with the international contract notification requirement, received 484 notifications from import agents, and gave particular attention to film import agents.[218] This scrutiny inhibited foreign firms from offering attractive terms to wholesalers while the systemization program was being put in place. The JFTC's report indicates that the JFTC's purpose was to solve "problems resulting from liberalization of the Japanese economy involving international transactions," and that Rule No. 1 of 1971 was a "first step" toward addressing these "problems."

5.182 The United States notes that Japan argued that US manufacturers' activities in Japan were not subject to this international contract notification provision. In fact, Rule No. 1 made clear that international contract notification applies to contracts "between a domestic business and a foreign business … for the purpose of conducting continuous sales … in which the purchaser is [re]selling to a third party."[219] Thus, sales from Kodak to its import agent, Nagase, were covered by this provision. Moreover, any relationship between Kodak and Japanese wholesalers would be subject to this provision as well. Equally important, the United States pointed out that the JFTC has relied extensively on informal guidance in taking action under the international contract notification provision. The United States referred to the explanation of a Japanese scholar that the JFTC may legally apply guidance under the contract notification provision even if the JFTC does not have enough evidence to conclude that an Antimonopoly Law violation exists. The expert noted that "in Japan, corrective (administrative) guidance, in the context of the notification system, has ensured the effectiveness of restrictions on

[217]JFTC Annual Report 1971, US Ex. 71-4.
[218]Ibid.
[219]Ibid.

international contracts."[220] This use of informal guidance, combined with the need to report international contracts, has chilled the ability of foreign manufacturers to offer more competitive terms.

5.183 **Japan** responds that the JFTC Annual Report of 1971 merely notes that the JFTC urged various industries (e.g., western liquor, lemon, fountain pens) to notify international contracts, and that it did not exercise any guidance with respect to film products. Only 13 cases of guidance were given to all industries and no guidance was given to the photographic industry. Moreover, not all international contracts had been required to be notified, and the contracts between Kodak Japan Limited and Japanese distributors were not required to be notified under the Antimonopoly Law.

5.184 Japan emphasizes that, while the requirement for international contract notification was technically still in effect at the initiation of this Panel proceeding, a bill to repeal the international contract notification requirement was passed by the Japanese Diet in June 1997 which amended Article 6(2) of the Antimonopoly Law and simultaneously abolished JFTC Rule No. 1.

7. SYSTEMIZATION: PHYSICAL AND INFORMATION LINKS

5.185 The **United States** argues that simultaneously with MITI's policy to standardize transaction terms, MITI promoted two other types of linkages between manufacturers and distributors. First, MITI provided financial and managerial support to encourage "physical" ties, particularly joint distribution centers, for which Japanese manufacturers and distributors would share control, operations, and often ownership. Second, MITI provided support for the development of inter-company computer ties to specific sectors attempting to systemize distribution channels. In the US view, such "informational" ties bind distributors together under the dominance of manufacturers.

(a) Physical links and the 1975 Manual

5.186 The United States alleges that an important element of the systemization program was the regulation of the physical movement of goods through the distribution system in such a way as to encourage the vertical alignment of wholesalers and retailers under individual Japanese manufacturers. Japan used guidance and financial incentives to persuade manufacturers, wholesalers and retailers to cooperate in the establishment and use of centralized joint delivery and processing centers. A government-coordinated effort assured that this interweaving of a Japanese manufacturer with multiple wholesalers and retailers would tighten the bonds between the firms in a vertically integrated system, enhancing the manufacturers' control over its distributors. It is alleged that the Sixth and Seventh Interim Reports of the Distribution Committee introduced this policy.

5.187 According to the United States, the Seventh Interim Report called for distribution "to progress from a basis of centralized processing of physical distribution control at distribution centers … established jointly by multiple companies or the entire industry".[221] It indicated that as part of the process of physically integrating distribution operations, the manufacturers, wholesalers and retailers would need to (i) unify product codes or transaction codes, (ii) standardize business forms and (iii) standardize packing types. The United States argues that these steps would tie participating companies closer together and make it more cumbersome to transact business with companies that did not operate in accordance with these standards.

5.188 In **Japan**'s view, as the Industrial Structure Council's Distribution Committee itself recognized, standardization of distribution practices should make the Japanese market more permeable by imports, not less. Specifically, its Seventh Interim Report in 1969 recognized that "one effect of systemizing Japan's distribution system is the simplification of entry [into Japan's market] by foreign capital, which

[220]Murakami Masahiro, Dokusenkinshiho [Antimonopoly Law], 15 March 1996, p. 19, US Ex. 96-4.
[221]Seventh Interim Report, p. 7, US Ex. 69-4.

are more adept at systems methodology."[222] Standardization would alleviate the burden of having to adjust to hundreds or thousands of individualized ways of doing business, and thus should facilitate market penetration by outsiders.

5.189 The **United States** notes that Japan selectively quotes only the first half of a sentence in the Seventh Interim Report. The second half of the sentence makes clear that allowing foreign enterprises to lead systemization was the last thing Japan wanted:

> "While it is true that one effect of systematizing Japan's distribution system is the simplification of entry [into Japan's market] by foreign capital, … we should instead emphasize preventing the immense impact that would be felt if foreign capital took the lead in systematizing Japan's distribution activities, and quickly develop a system sufficiently capable of resisting the rational systems introduced by foreign capital."[223]

5.190 The United States further submits that Japan continued to direct physical linkages among manufacturers, wholesalers, and retailers in the 1971 Basic Plan for the Systemization of Distribution and the 1975 Manual for the Systemization of Distribution by Industry (Camera and Film). The Photosensitive Materials Committee, which was established following a recommendation in the Manual, produced the Distribution Center Facilities Basic Plan. The Plan described as its purpose, according to the United States, to improve distribution in response to "liberalization" in the photographic film and paper sector. The Plan set forth a blueprint for establishing joint distribution facilities between manufacturers and distributors. The United States also alleges that the Government of Japan provided financing to help Konica form a joint distribution center with the four large photospecialty wholesalers through which it had been marketing and distributing its products. The Photosensitive Materials Committee recommended to MITI that the project be funded by the Japan Development Bank.

5.191 The United States further asserts that in 1975, the Distribution System Development Center (DSDC), another MITI creation, and a photography industry "working group" produced a detailed Manual[224] for the systemization of distribution in the film and camera industries. According to the United States, the Manual made clear that it was prepared as part of MITI's policy on systemization. The Manual emphasized that systemization meant integration among firms. The Manual allegedly noted that Japan had lifted quotas on film imports in 1971 and reduced tariffs. As a result, the Manual indicated that Kodak had been able to lower its prices to within a few yen of domestic producers' prices and that imports of Kodak film and paper were rising. The Manual stressed the need "to improve the structure of manufacturers to a capacity that will resist foreign-capital affiliated firms".[225] The Center expressed hopes for widespread adoption of the Manual by the industry.

5.192 The United States further argues that to ensure continued government-industry cooperation to advance systemization, the Manual called for the establishment of another government-industry body, the Distribution Systemization Promotion Conference in the Camera and Film Industry. This organization was supposed to promote systemization of distribution through surveys, information processing activities, research and development, and standardization activities.

5.193 **Japan** responds that the information and recommendations contained in the 1975 Manual were directed toward MITI for internal use, not private industry. According to Japan, therefore, the 1975 Manual can in no way be considered to have had a binding effect on private industry. The 1975 Manual does, however, contain a few suggested recommendations in its final six pages including that:

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[222]Ibid., p. 4.

[223]Seventh Interim Report, p. 4, US Ex. 69-4.

[224]Distribution System Development Center, Manual for the Systemization of Distribution by Industry (Camera and Film), March 1975, [hereinafter "Manual"], US Ex. 75-5.

[225]Ibid., pp. 27 and 122.

(i) transaction terms (such as payment terms, rebates, ordering practices) be improved and standardized;

(ii) the various document forms and codes used in the camera and film industries be standardized and unified;

(iii) the efficiency of the distribution of cameras and film be improved (through measures such as the standardization of units, the standardization of pallet sizes, and a reduction in the frequency of deliveries); and

(iv) the quality of information management be improved through the introduction of computers.

5.194 Japan emphasizes that the Manual was submitted to MITI by the Distribution Systems Research Institute for the internal use of MITI and not the other way around. The 1975 Manual was never released outside the government.

5.195 According to Japan, there is no basis for assuming that MITI's systemization policies had any exclusionary impact. MITI's policies recognized and addressed all distribution channels for film, including distribution channels used by imports. Nagase's subsidiary Kuwada, a single-brand primary wholesaler for Kodak, was a member of the wholesalers' trade association ("Shashoren") at the time MITI's 1975 Manual was prepared,[226] and Kodak was thus in a position to access information contained in the Manual. Imports were not left out of the process. There is thus no reason to think that imports would have encountered difficulties because they did not share the same standardized forms and practices.

5.196 Japan's position is that the objective of these policies was to foster computerization and standardization of business forms and practices so as to improve information flow through the distribution system. Accordingly, the subject matter of these policies was often very dense and technical: e.g., uniform invoice forms, standard pallet sizes, and other very specific recommendations. There was not a hint of anti-import conspiracy.

5.197 The **United States** responds that however innocent these policies may seem, they had an indirect effect of fostering vertical integration by encouraging closer coordination, greater sharing of information, and standardization of forms and practices between manufacturers and wholesalers. According to the United States, systemization made it harder for foreign producers to convince domestic distributors to carry their products, since they were already so closely linked with domestic manufacturers.

5.198 **Japan** further asserts that the United States presents no evidence of any business changes implemented pursuant to MITI recommendations that actually had the effect of making wholesalers less likely to carry imported brands of film. In Japan's view, the United States has the burden of proving its allegation that these facially neutral policies serving valid domestic policy objectives had the effect of hindering imports; it is not up to Japan to prove the negative.

(b) Information links

5.199 The **United States** argues that related to the physical integration of distribution, Japan's systemization policy also encouraged computer linkages among Japanese manufacturers and their wholesalers. It was envisaged by the Japanese Government that information links would enhance efficiency in distribution, and would also allow the manufacturer to know if any of the "systemized" wholesalers dealt in significant quantities of a competitors' products. Japan recognized that such

[226]1975 Manual, at the list of "Collaborators in Study," US Ex. 75-5.

computer ties would foster ties between a Japanese photographic materials producer and its distributors by raising the transaction costs of dealing with outsiders. In addition, Japanese manufacturers commonly use such systems to "stabilize" or control distribution channels through the monitoring of distribution systems. The United States indicates that a 1996 JFTC[227] study concluded that such manufacturer-distributor computer ties increased efficiency and also gave rise to three significant challenges for competition:

(i) preventing competitors' entry into distribution;
(ii) maintaining prices; and
(iii) stabilizing transaction relationships between manufacturers and distributors.

5.200 The United States argues that MITI saw the development of information links as an integral part of its distribution systemization efforts and, therefore, advocated computer linkages to cement the vertical distribution system. After identifying the importance of information links, MITI created beginning in the mid-1970's, a series of government-industry entities to facilitate the creation of computer networks between Japanese manufacturers and Japanese distributor. The United States asserts that the Japanese Government also worked closely together with private companies to develop computer ties and address the variety of obstacles they faced in achieving this goal, including through low-interest financing.

5.201 According to the United States, Japan was well aware that creating information links between manufacturers and their distributors entails the risk of enforcing oligopolistic distribution structures and limiting competition. The United States points to a JFTC study as evidence of this.[228] In addition, it cites the Distribution Committee's Ninth Interim Report[229], which it alleges reiterates the importance of strengthening information ties necessary to strengthen horizontal and vertical linkages:

> "The basic plan for the method of advancing information of the distribution sector is as follows. … Second, is to offer guideposts on the ways individual or multiple companies through cooperation can engage in information activities. One can think of many situations with respect to the latter, in particular, such as a cooperative type that works horizontally among the businesses; a type that *clusters client retailers around a powerful wholesaler that serves as its nucleus; a type where the fulcrum is an organized system of integrated wholesale centers* and the wholesale business districts, etc. Guidelines should be established for each of these … ."[230]

5.202 The United States further argues that the 1971 Basic Plan for Distribution Systemization[231] called for the strengthening of information ties as a key element of distribution systemization. The United States asserts that the plan specifically called for the creation at the national economic level of distribution information networks, the implementation of joint information activities, and the creation of special organizations to promote the provision of distribution information. The plan stated "such systemization of distribution must be realized through various stages: vertically from the intra-firm level, horizontally on the inter-firm level to the national economic level. Furthermore, in seeking to implement this, sufficient attention must be paid to the introduction of computers as an effective means of achieving [such systemization]."[232]

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[227]JFTC Investigation Division Information Management Office (Yamamoto Takeshi, Distribution 3 Problems and the Antimonopoly Law, 2 June 1996), US Ex. 96-6.

[228]US Ex. 65-5.

[229]Industrial Structure Council Distribution Committee, Distribution for the 1970's (Ninth Interim Report), 22 July 1971, US Ex. 71-9.

[230]Ibid. pp. 80-81 (emphasis added).

[231]1971 Basic Plan, US Ex. 71-10.

[232]Ibid., p. 4.

5.203 **Japan** responds that the United States presents no causal connection between the alleged guidance and support of the Distribution Systemization Development Center as given in the 1975 Manual, and the establishment by Japanese film manufacturers of on-line computer links with their primary wholesalers. In fact, according to Japan, Fuji, the leading domestic manufacturer, did not establish its first on-line connection with a primary wholesaler until 1989.[233] Thus, Japan contends that, the alleged systemization guidance that the United States claims was so effective in creating an exclusionary market structure was in reality ignored for at least fourteen years.

5.204 The **United States** responds by citing a series of MITI actions to implement the integration of distributors' and domestic manufacturers' computer systems that began with the 1975 Manual. The key developments in MITI's assistance to this sector occurred in 1975, 1976, 1985, 1986, 1987, 1988, and 1989 (the year that Japan claims Fuji's system was completed). The US arguments concerning the assistance by the Japanese Governments in creating electronic information links during the period between the publication of the 1975 Manual and the establishment of on-line connections between Fuji and primary wholesalers in 1989 are described in more detail in section VI.D.3.(f) on "Electronic information links".

(c) MITI/SMEA support for systemization

5.205 The United States alleges that with the growth of colour photography in the late 1960's and 1970's, the importance of photoprocessing laboratories grew. However, the technology and capital equipment necessary to process colour film were beyond the reach of most small photo retailers. With the Japanese Government's financial support, the manufacturers stepped in, establishing colour laboratories and providing photographic paper and developing and processing services. These laboratories were an important distribution channel for film because of the laboratories' strong ties to its retail customers and its daily deliveries to them.

5.206 The United States further argues that the Japanese Government's support to domestic manufacturers solidified their control of this distribution channel. Japan provided funding under MITI's Small and Medium-Sized Enterprises Act (SMEA). During the 1967-70 period, SMEA provided at least 160 million yen to the effort of laboratory conversion. Aided by this government funding to the laboratories, Fuji and Konica allegedly rapidly developed strong networks of affiliated laboratories, which used their photoprocessing equipment, chemicals, and paper. Accordingly, foreign firms were put at a strong disadvantage since they were unable to obtain this assistance. Approximately 84 percent of the nearly 1,700 laboratories fall under the umbrella of one of the Japanese manufacturers and are commonly affiliated with retail outlets.

5.207 The United States submits that in 1973 the photoprocessing laboratories were designated as eligible for another SMEA subsidy program. The United States notes that the laboratories are a service business. Consequently, lowered tariffs on photoprocessing equipment and a strengthened yen would decrease the cost of imported photoprocessing equipment and materials, and therefore improve the laboratories' bottom line. Liberalization would be a threat to the laboratories only if they were tied in relationships with Fuji or Konica and did not feel free to purchase cheaper imported equipment and materials. In this situation, concessionary government financing could help reduce the comparative cost of purchasing domestic equipment and materials, and therefore help form or continue the bonds between laboratories and domestic film and paper manufacturers.

5.208 The United States asserts that the administration of the SMEA financing programs helps ensure that loans are dispensed in conformity with MITI industrial policy. Loans are approved on a case-by-case basis, at the discretion of a MITI certified management consultant. These policies have contributed

[233]Affidavit of Tanaka Takeshi, pp. 3-4, Japan Ex. A-10.

to Fuji's strong and excessive ties with photoprocessing laboratories in Japan, and it is these ties that have reinforced Fuji's dominant position in the market. Kodak has extended substantial efforts to develop a laboratory network in Japan, and has been disadvantaged by the extensive ties between Fuji and the laboratories fostered by Japanese Government subsidies.

5.209 **Japan** disagrees with the conclusion that 84 percent of the laboratories in Japan fall under the umbrella of Fuji. According to the data given in Photo Market 1996, of the 753 amateur laboratories in the Japanese market, 292 laboratories (38.8 percent) are affiliated with Fuji, 124 laboratories (16.5 percent) are affiliated with Kodak, 216 laboratories (28.7 percent) are affiliated with Konica, and 121 laboratories (16.1 percent) have other affiliations.

5.210 Japan further contends that the US arguments are unpersuasive for a number of reasons. Firstly, the financing was designed to help small laboratories, not the major manufacturers. Laboratories receiving the financing were free to choose the type and brand of all the equipment they acquired with the help of these loans. Once the laboratories obtained the new equipment, they were available as customers to anyone who could supply them the colour paper they would need to use the new technology. Therefore, this independent source of financing actually reduced any dependence the laboratories would have on the manufacturers. Japan points out that the United States does not even offer any argument as to why SMEA financing would favour Japanese manufacturers rather than any other supplier with a competitive product. Japan also points out that SMEA loans continue to be made and are available to laboratories affiliated with both foreign and domestic manufacturers. According to Japan, the trend toward affiliation with manufacturers actually began long before any of the alleged government efforts to integrate the photofinishing laboratories came into effect. Both Fuji and Konica were beginning to develop affiliations with its laboratories by the early 1960's.[234]

5.211 Japan points out that the US argument implies that affiliations between photosensitive materials manufacturers and photofinishing laboratories in the Japanese market are somewhat unusual and exclusionary. In Japan's view, such affiliations are common throughout the world. Strong market incentives favour forward integration by manufacturers into photofinishing. The demand for photographic paper is ultimately a function of the demand for photographic prints. Consequently, manufacturers have a strong incentive to participate in the downstream photofinishing market. Thus, the structure of the Japanese paper market is a reflection of rational business decisions, not government measures.

5.212 With respect to US allegations about MITI's financial support for systemization, Japan responds that the United States cites only a single example where Konica was able to receive funding from the Japan Development Bank (JDB) to develop a distribution facility. This JDB loan came too late to encourage vertical integration as Konica and its wholesalers were already affiliated.[235] Therefore, for Japan, it is misleading to suggest that cooperation between Konica and its primary wholesalers and their joint development of a distribution facility is the result of some government plan to strengthen the relationship between these primary wholesalers and Konica. Japan further emphasizes that in any event JDB does not evaluate applications from foreign enterprises or from enterprises that carry foreign products any differently than it evaluates applications from enterprises that carry domestic products. In fact, since 1984, JDB has been promoting imports by providing loans for the construction of distribution facilities and services for imported products.[236]

5.213 The **United States** contends that while Japan argues the JDB would provide the same type of loan for establishing joint distribution facilities to a foreign manufacturer, the fact remains that the only manufacturer who received such a loan was Japanese.

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[234]Affidavit of Tanaka Takeshi, p. 5, Japan Ex. A-10.

[235]See Affidavit of Haruyoshi Okuyama, p. 1, Japan Ex. A-18.

[236]JDB Annual Report 1995, pp. 26-27, Japan Ex. B-36.

8. POST-1975 DEVELOPMENTS

5.214 The United States argues that with the vertically integrated, exclusive distribution system in place, the Government of Japan turned its attention to measures that have helped maintain the structure. In its efforts to suppress the clearest challenge to the vertically integrated system, Japan has focused on new or strengthened measures to ensure that foreign manufacturers could not use their financial or marketing strengths to increase their foothold in the Japanese market.

5.215 The United States asserts that the Government of Japan has continued its close coordination with Japanese industry to implement industrial policy favouring Japanese manufacturers. It cites as an example, the 1990 MITI issued Guidance for Improving Business Practices, which it contends indirectly affirmed the continued use of rebates. It also cites Japan's 1995 enactment of the Special Measures Law to Promote Business Reform for Specified Industrialists (Business Reform Law), which allegedly establishes a broad legal framework for MITI's continued intervention to strengthen and protect domestic industries. This law allows for the designation of specified industries, and by ministerial order, MITI has designated "camera and related products manufacturers" and "camera and photographic materials industry" as specified industries.[237] The United States further refers to a 1994 Japanese industry journal article that noted changes in the Japanese film distribution system, such as a revision of the rebate schemes and the opening of more discount stores, but concluded that "a limit to the expansion of sales channels seems to be appearing" and that "the actual network has not changed much."[238] Other Japanese analysts have concluded that distributors remain highly dependent on manufacturers.[239]

5.216 **Japan** denies any coordination with industry designed to favour Japanese manufactures. Japan specifically notes that the 1990 Guidelines suggest that rebate conditions be clarified and that the use of rebates be kept to a minimum. Japan also rebuts that the US description of the "Business Innovation Law"[240] is misleading, noting that the law treats foreign-affiliated firms and domestic ones on an equal basis. Japan asserts that the government has discouraged exclusionary practices in the photographic film industry. Japan claims that distribution practices in the film industry have been closely scrutinized by the JFTC to guard against possible anti-competitive practices.

5.217 Japan cites as an example situations when "parallel price increase" have been reviewed. Although these industry wide surveys - which have included Fuji, Konica, and Kodak - found no violation of the Antimonopoly Law, the fact that the surveys were conducted confirms that the JFTC has been particularly vigilant in monitoring developments in this industry. Japan, therefore, concludes that the US theory of a government conspiracy to create an exclusionary market structure is not supported by the facts.

5.218 The **United States** emphasizes, that in considering Japan's recent formal and informal actions, it is important to recognize that the distribution structure set up by the measures beginning in the 1960's and 1970's is, to a large extent, self-sustaining. Once Japanese manufacturers achieved domination over the distribution system through implementation of short payment terms, rebates and discounts, vertical information links, and other measures advocated and implemented by the Japanese Government, the manufacturers' power allows them to maintain such domination, through the continuing use of these transaction terms and other mechanisms, with less need for support from the Government. However,

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[237]MITI Ministerial Ordinance No. 31 of 1995, Items 123 and 164, US Ex. 95-5.

[238]Distributors in Tough Environment; The Distribution Structures Continue to Change, Nihon Shashin Kogyo Tsushin, 1 May 1994, US Ex. 94-10. Japan disagrees with the US translation of the quote from the above-mentioned article. See translation issue 3.

[239]Four Fuji-Group Distributors Reported Unimpressive Results in Spite of Low Interest Rates, Shukan Shashin Sokuho, 24 June 1994, US Ex. 94-11. Japan disagrees with the US interpretation of this article. See translation issue 10.

[240]Japan notes that the proper translation should be the "Business Innovation Law" rather than the "Business Reform Law". Japan's further explanation about this law is discussed below in section VI.D.3.(h)(ii).

a reduced need for support does not mean that the Japanese Government reversed its policy. To the contrary, the United States asserts, Japan has continued to advocate short payment terms, rebates and discounts, and vertical information links, and Japanese manufacturers and wholesalers have continued to apply these practices to maintain the oligopolistic distribution system. The United States concludes that, moreover, Japan has continued to suppress alternative channels and potential challenges to this system, such as large stores and independent photoprocessing laboratory networks, thereby shielding the oligopolistic distribution system from competitive pressures that could undermine it.

B. LARGE STORES LAW

1. INTRODUCTION

5.219 The **United States** submits that the second element of the Government of Japan's liberalization countermeasures was the promulgation, implementation, and application of measures limiting the entry and operation of large scale retail stores. Restricting the presence and operations of large retail stores was necessary in order to support Japan's systemization policy, to limit market access for imports, and to limit competition in the distribution sector. This policy was strongly supported by photographic film and paper manufacturers, distributors, and retailers. Underlying their support was the recognition that large stores are more likely to carry imported products than small stores, to price more competitively, and to buy directly from manufacturers, with which they had greater bargaining power.

5.220 For the United States, the principal measure used by the Government of Japan to restrict large stores is the Law Concerning Adjustment of Retail Business Activities by Large Scale Retail Stores (Large Stores Law), which became effective on 1 March 1974.[241] This Law regulates the opening or expansion of retail stores with a total retail floor space in excess of 500 square meters. In the view of the United States, the Law sets out a complicated notification and explanation process which requires builders and operators of proposed large retail stores to notify the Government of their plans to build or expand a large retail store, and to explain the plans to local retailers in the vicinity of the new store, with a view to obtaining their agreement. If the Government determines that the proposed store poses a risk of adversely affecting nearby small and medium retailers, it can require the proposed store to reduce its floor space, delay the opening of the store, or reduce the days and hours of its operation.

5.221 According to the United States, the formal procedures established by the Large Stores Law, and the Government's implementation of the law have led to an informal process in which large stores often are forced to negotiate informal adjustments with local small and medium retailers in order to ensure that the local retailers will not oppose the store in the formal process. In addition, several local governments have implemented measures to restrict the entry of large retail stores into their areas.

5.222 Taken together, the adjustments that flow from these measures decrease revenues and delay return on investment for store operators and may even discourage or block outright the opening or expansion of new retail stores. This results in restricting the growth of large stores in Japan, the one viable alternative distribution channel for imported film and paper.

5.223 For the United States, revisions to the Law from 1973 through 1990 in most cases served to strengthen the Law's regulation of large stores. Although since 1990, Japan has modified some of the Law's requirements, under pressure from foreign governments, the Law continues to operate to effectively limit large scale retail stores. In most important respects, the law today remains more restrictive than when originally enacted.[242]

5.224 For **Japan**, the US claim depends on a theory that imported film and paper products are denied access to primary wholesalers, and ultimately, small retailers; that large retail stores make direct-to-retail sales efficient; and that the greater amount of shelf space in large stores increases the likelihood that imports will be displayed.

5.225 In Japan's opinion, before addressing the US factual claims, two fundamental points must be noted that go to the legal relevance of the US allegations. In the first place, the provisions of the Large Stores Law have nothing to do with specific products at all; rather, they establish an adjustment process

[241]Large Stores Law, Law No. 109 of 1973, US Ex. 74-4 and Japan C-1.

[242]The United States argues that when the Large Stores Law was originally enacted, it only regulated stores with floor space in excess of 1,500 square meters. Now, however, it covers all retail stores above 500 square meters.

for the opening and expansion of large retail stores. The law does not regulate which products large retailers can carry nor does it - with one exception that is actually favourable to imports - take into account what products, much less the origin of the products, that a retailer sells when determining whether and what adjustments are necessary. There is absolutely no connection between the provisions of the law and decisions by retailers, whether large stores themselves, or small and medium-sized stores within the vicinity, to carry imported products. Accordingly, the Large Stores Law is incapable of establishing unfavourable conditions of competition with respect to imported products. Moreover, the Large Stores Law has in fact been liberalized significantly in recent years. Thus, even assuming that the liberalization of the law were favourable for imports, the conditions of competition under the law are more favourable now than at the time of any tariff concessions on photographic film. It is therefore impossible to conclude that the law today is upsetting competitive conditions relative to those that existed at the time of those tariff concessions.

5.226 In Japan's view, putting aside these threshold issues of relevance, the US theory must overcome two factual hurdles. First, the United States must prove that the *current* operation of the Large Stores Law in fact severely restricts the growth of large stores. The United States fails to meet this burden. The Panel must evaluate current Japanese measures in the light of relevant GATT provisions, i.e., it should evaluate only the present nature and operation of the law in comparison with those of the past. For Japan the evidence is quite clear that there is no current meaningful limitation at all on the growth of large scale stores.

5.227 Second, Japan points out that the United States must prove both conceptually and empirically that large stores are more likely to carry foreign brands of film than small and medium-sized stores. In Japan's view, the United States also fails to meet this burden. Retailers, whether large or small, choose the brands they carry to maximize profit. For Japan, there is no reason to believe that the size of stores in any way changes the profitability of a particular product. Therefore, the United States fails to prove that large stores are more likely to carry foreign brands of film than small and medium-sized stores. Empirical data also confirms that there is in fact no correlation at all between the size of a store and its propensity to carry foreign brands of film.

5.228 Japan notes that the United States also argues that the Large Stores Law is used to protect small retailers that have joined the alleged exclusive distribution network of domestic manufacturers from competition with large retail stores. In Japan's view, this US argument fails for the following reasons. The law does not take into account anything about the alleged exclusive distribution networks, about the brands small retailers carry, or about the business relationships between retailers and a manufacturer. If the Large Stores Law had been enacted to protect the affiliation between small retailers and manufacturers, it would have been designed in a way to block convenience store chains, which are outside the alleged exclusive distribution network of domestic manufacturers, and which are competing with small retailers that may have a particular affiliation with domestic manufacturers.

5.229 Finally, Japan points out that it is important to note at the outset that the US allegations regarding the Large Stores Law apply only to film. Photographic paper is not a consumer product and is not sold at retail, whether at large or small stores. Accordingly, the Panel should evaluate this law only in relation to its alleged effect on imports of film.

5.230 The **United States** responds that the restriction on the presence and operation of the large retail stores has been an important policy objective for Japan in maintaining an exclusionary distribution structure based on the domestic film manufacturers' control of primary wholesalers, and in limiting an important alternative channel for imports. In response to Japan's contention that there is no connection between the Large Stores Law and the retailers' decision to carry imports, the United States argues that numerous studies conducted by the Japanese Government recognized that large stores are more likely to carry imported products than small stores. Indeed an analysis of the Japanese survey conducted for this case showed that larger stores are more likely to carry imported film than small stores. The

United States further argues that despite recent changes to the law, Japanese Government studies by the JFTC and the Management Coordination Agency demonstrate that the current operation of the Large Stores Law continues to severely restrict the growth of large stores.

5.231 With respect to the application of the Large Stores Law to photographic paper, the United States submits contracts negotiated between large photospecialty stores and local retailers pursuant to the Large Stores Law that contain commitments, among other things, to the effect that "we will not install mini-lab machines" and that "[i]n the spirit of co-existence and co-prosperity with area stores, we will match our prices for developing, colour printing, etc., to area prices."[243] The limitation of price competition relating to photo development and colour printing and the use of mini-labs at retail outlets directly affects sales of photographic paper and chemicals.

2. LARGE STORES AND IMPORTS

(a) Import-friendliness of large stores

5.232 The **United States** cites Japanese Government reports which have recognized that large stores are more likely to carry imported products than small stores. A study by the Economic Planning Agency in 1989 found, "it is the large retail stores which handle imported products at a high ratio"[244], and, to promote increased import competition, it called for relaxation of regulations affecting large-scale stores.[245] MITI's Small and Medium Enterprise Agency also found a clear correlation between store size and imports in a survey of 4,600 stores that it conducted in December 1995: "Examined by annual sales, the ratio of stores 'handling [imported products]' gets larger as the sales increase".[246] In addition, the United States submits a survey demonstrating that large stores are more likely to carry foreign film. According to this survey, foreign film is available in 40 percent of stores under 500 square meters, 49 percent of stores between 500 and 2,999 square meters, and 63 percent of stores 3,000 square meters and greater.

5.233 According to the United States, one reason that large stores carry more imports, is that the greater amount of shelf space in large stores allows them to carry more diverse brands, and this product diversity increases opportunities for imports. The Economic Planning Agency study concluded that increased shelf space meant greater opportunities for imports.[247] Similarly, a study by the Government Regulation and Competition Policy Research Council of the JFTC in June, 1995 noted that restrictions on large stores limited product diversity.[248]

5.234 **Japan** responds, however, that retailers, whether large or small, choose the brands they carry to maximize profit; there is no reason to believe that the size of stores in any way changes the profitability of a particular product. Therefore, the United States fails to prove that large stores are more likely to carry foreign brands of film than small and medium-sized stores.

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[243]Agreement and Memorandum between Tokyo Zenren, Branch Office No. 9 and Yodobashi Camera K.K., 31 January 1990, US Ex. 90-3.

[244]Research Related to Imports and Prices, Economic Planning Agency, 1989, p. 5, US Ex. 89-1.

[245]Ibid. p. 10.

[246]Small and Medium-Sized Retailer Data Book, Small and Medium Enterprise Agency, Ministry of International Trade and Industry, December 1, 1995, p. 9, US Ex. 95-19. The United States also refers to a study commissioned by the Economic Planning Agency in 1994, Present Condition and Clarification of Price Destruction, Price Destruction Problem Research Council, August 1994, p. 7, US Ex. 94-12. See also: Economic Planning Agency, Planning Bureau, Research Related to Imports and Prices, 1989, US Ex. 89-1; JFTC Government Regulation and Competition Policy Research Council, Concerning the Reevaluation of Government Regulations in the Distribution Sector, June 1995, US Ex. 95-11; JFTC, Research on Domestic and Import Products Sold at Low Price, June 1995, pp. 29-30, US Ex. 95-10.

[247]Research Related to Imports and Prices, Economic Planning Agency, 1989, p. 11, US Ex. 89-1.

[248]See Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, p. 7, US Ex. 95-11.

5.235 In Japan's view, further general propositions that "large stores are more likely to carry imported products" are not particularly relevant to this proceeding, since this Panel is not reviewing the Large Stores Law in general. The only relevant issue before this Panel is the effect the law has on a specific product: consumer photographic film.

5.236 Japan further argues that if one considers the incentives facing individual retailers, it becomes clear that overall retail space has no effect on the decision to carry multiple brands of film. Japan underscores that film is just too small a product for space to be a material consideration in the retailer's decision.

5.237 Even in stores that sell large volumes of film, the space used to sell film is quite limited: often only a single square meter and rarely reaching above 3 square meters. With retail space devoted to film ranging from 0.04 to 9.92 square meters and averaging only 1.44 square meters as indicated by a survey[249], the range of possible variation is far too small for total store area to be a meaningful constraint on purchasing decisions.

5.238 Accordingly, Japan argues that the various studies cited by the United States asserting the general "import friendliness" of large stores, which were all macro level reviews of import trends for different retail segments, do not take into account the specific business realities for film. Furthermore, none of those studies makes any attempt to supply any statistical data in support of the contention that large stores generally are more likely to carry imported products than smaller stores. For Japan, the Panel has an obligation to focus on the specific products at issue in this proceeding, and need not resolve or even address the macro level question of whether large stores buy more imported products in general.

5.239 The **United States** responds that Japan does not, as it cannot, refute the evidence in many Japanese Government reports that large stores are more likely to carry imports. Instead, according to the US, Japan attempts to argue that film is somehow different from all the many products in its previous surveys finding this correlation between store size and imports.

5.240 The United States further argues that the fact that film is a small product is irrelevant to the correlation between store size and imports. Retail stores are filled with many different types of small products, and while a single roll of film might not take up much room, carrying different types and speeds of film from several manufacturers takes up considerable retail space.[250] It is not the size of the product that matters, but the size of the display for the product in all its variations and competing brands that is the issue. The United States cites an example concerning Japan's largest photospecialty retailer to show that a downward revision of floorspace plans for a new store affected the retailer's ability to market foreign film as it had planned.[251]

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[249]MITI surveyed the 10 department stores and the 10 chain stores with the largest total sales in Japan. This survey indicates that even large stores usually devote the same amount of small retail space to film as do small stores (Japan Ex. C-19). Another MITI phone survey covering 60 large stores showed an average of only 1.44 square meters of retail space devoted to film (Japan Ex. C-20).

[250]The United States argues that a full display of Kodak film would include, at a minimum, 100, 200, 400, and 1000 ASA colour film, in rolls of 12, 24 and 36 exposures, for slides and for prints, as well as black and white film and "multipacks" combining rolls of different speeds, and single-use cameras. In the colour film product line alone, Kodak offers the following items: super Gold in 100, 200, 400, and 1600 - in single rolls (12, 24, 35 and 36 exposures), and 2,3, or 5 roll packs; Royal Gold in 25, 100, and 400 - in single rolls (24 and 36 exposures), and 2,3, or 5 roll packs, Ectochrome Dyna in 50, 100, 200, and 400 - in single rolls (24 and 36 exposures), and 5 and 20 packs; Chrome in 25, 64 and 200 in single rolls (24 and 36 exposures), and 3 and 10 packs; single use cameras in five different varieties including a new APS version.

[251]Letter from Akikazu Fujizawa, President, Yodobashi Camera K.K. to Director General Tohoku Region Trade and Industry Bureau, MITI, Members of the Tohoku Committee and Large Retail Store Deliberation Council, Report from Yodobashi Camera to MITI concerning the opening of their new Retail Store in Sendai, 6 December, 1996, US Ex. 102.

5.241 **Japan** responds that retailers do not necessarily display a full-line of one brand. They may sell a partial line of several different brands based upon their own business decisions as to which products and which brands will maximize profit. Thus, even small convenience stores may carry multiple brands, while large stores do not necessarily have a large area devoted to film.

5.242 Further, Japan points out that although the United States presents a letter from the President of Yodobashi Camera in support of its claim, in the letter, the President notes that the real reason for cutting back on the shelf space for imported film is the poor sales record of imported film, not its foreign origin; moreover, in fact, Yodobashi Camera is actually selling imported film currently.

5.243 The **United States** further argues that Japan's own data affirmatively supports a connection between store size and propensity to carry imports. In response to a question from the United States at the first Panel hearing, Japan provided the United States and the Panel with the raw data from its survey, which Japan claims show a correlation between sales volume and import availability. Each of the stores in the Japanese survey were classified under the Large Stores Law as Class I stores, Class II stores, or smaller than 500 square meters. The United States performed two analyses using the survey data that Japan had not performed. The first analysis examined the relationship between store size and foreign film availability;[252] the second examined the relationship between store size and volume of film sold.[253] The results of the first analysis confirmed the US contention that larger stores are more likely to carry foreign film than smaller stores.[254] In the second analysis, the data showed a correlation between store size and the volume of film sold. Thus, Japan's argument that larger volume stores tend to sell more imports supports the US argument that larger size stores tend to sell more imports.

(b) Large stores and direct sales from manufacturers

5.244 The United States argues that the Government of Japan also has found that large retail stores are more likely than small stores to deal directly with manufacturers, and that cutting out the wholesaler lowers prices for consumers. The United States refers to a study by the Japan Fair Trade Commission in April, 1995 which noted this greater likelihood of chain stores and discount stores to deal directly with manufacturers in high volume transactions.[255] The United States also quotes the 1989 Economic Planning Agency report which concluded that the traditional wholesaler-to-small-scale-retailer route impeded imports and kept prices high.[256] Furthermore, a Report by the Small and Medium Enterprise Agency of December 1995 indicated that the larger the store, the more likely it was to procure its imports directly from suppliers abroad, rather than dealing through the regular wholesale channels.[257]

5.245 The United States further notes that the restriction on the presence and operation of large retail stores has been an important policy objective for Japan in maintaining an exclusionary distribution structure based on the domestic film manufacturers' control of primary wholesalers, and in limiting an important alternative channel for imports. The United States recalls that the 1969 survey of transaction terms sponsored by MITI noted that the photo film industry "has established a distribution system where oligopolistic manufacturers lead," and cited two threats to this system: "As future problems, we can cite first the growth of retail routes (especially regular chains and supermarkets) other than the photo retail route and changes in transaction terms due to this leadership, and secondly the effects of full participation by Eastman Kodak. … When this share [the share of film sales by supermarkets] becomes

[252]Second Panel Meeting, US Opening Statement, Exhibit 8.

[253]Second Panel Meeting, US Opening Statement, Exhibit 9.

[254]In the US view, the results of the survey submitted by the United States and the Japanese survey are nearly identical. (US First US Submission, Figure 12 and Second Panel Meeting, US Opening Statement at Exhibit 8).

[255]Research on Domestic and Import Products Sold at Low Prices," JFTC, June 1995 p. 1, US Ex. 95-10.

[256]Research Related to Imports and Prices, Economic Planning Agency, 1989, US Ex. 89-1.

[257]Small & Medium-Sized Retailer Data Book, Small and Medium Enterprise Agency, Ministry of International Trade and Industry, December 1, 1995, p. 10, US Ex. 95-19.

larger, influence over manufacturers will grow, and the market system controlled by the manufacturers will be shaken. This must be monitored carefully, and the industry itself must develop competitive activities."[258] The United States further notes that the 1969 Survey stated that although the "All-Japan Federation of Photo Dealers, known as Zenren," which is a trade association consisting of mostly small photospeciality retailers, "has imposed pressure on others in order to maintain its position", the rise of "general merchandise store -- for example a regular chain supermarket" can pose a serious challenge "as a new distribution route."[259]

5.246 In **Japan**'s view, the US argument presupposes that the relationship between retailers and their suppliers (either wholesalers or manufacturers) differs depending on the retail space of the retailer. This assumption, however, does not reflect the market reality of Japan. To maximize profit, every retailer, whether large or small, procures those goods it chooses to carry either directly or through wholesalers from manufacturers. In this sense, it is not more difficult for imported film products to be sold to small and medium-sized retailers than to large-scale retail stores. First, small retail stores do not necessarily procure goods through wholesalers. For example, convenience stores have grown significantly.[260] For all of these convenience store chains, which are outside the scope of the Large Scale Retail Stores Law, manufacturers can deal directly with one decision-maker and immediately reach thousands of outlets. In addition, foreign film products can easily find wholesalers in the Japanese market to reach small and medium-sized retailers. Also, nothing prevents new wholesalers from dealing in imported film products.

(c) Large stores and imported film

5.247 The **United States** claims that foreign suppliers' experience in the Japanese film and paper market bears out that large stores are more likely to carry imported products and to price them more competitively than small stores. A survey commissioned in 1995 by Kodak of over 2,000 outlets for film in 144 cities revealed that foreign film (including Kodak, Agfa, and other foreign film) was available in 40 percent of small stores (those less than 500 square meters) as compared to 63 percent of large stores (those over 3,000 square meters). This relationship between higher availability of imports and size of store has been consistent over time. According to figures compiled by a major industry journal, in every year that the figures were published (i.e., 1979, 1980, 1982, 1983 and 1984), Kodak's market share by store size was highest in the large size stores.[261]

5.248 The United States further submits that the Kodak survey also showed that prices for film, both foreign and domestic, were lower in the large stores. In stores with floor space over 500 square meters, the price of Kodak film was lower for all three film types surveyed: ASA 100, ASA 400, and ASA 100 multipacks. This pattern of lower prices for imported film was repeated for domestic film. The average prices of single-roll Fuji 100 ASA, single-roll Fuji 400 ASA, and multipack Fuji 100 ASA were lower in large stores than the comparable prices in stores not subject to such measures. Agfa's experience also suggests that large stores offer greater market access for foreign products. Agfa sells almost half of its film in Japan to a single customer: Daiei, Japan's largest supermarket chain.

5.249 In **Japan's** view, what a market survey shows is not the competitive relationship between products, but the results of market competition, which is generated from the complex interaction of

[258]Institute of Distribution Research, Fact-Finding Survey Report Pertaining to Transaction Terms: Actual Conditions of Transaction Practices in the Wholesale Industry, March 1969, p 62-63, US Ex. 15.

[259]Ibid.

[260]Japan explains that it has more than 48,400 convenience stores, and more than 80 franchise chains of convenience stores (Census of Commerce, Store Type: Retailers, 1994, p. 8). The leading convenience store chain has more than 6,300 outlets and almost 1,500 billion yen in annual sales, which is almost equivalent to that of the second largest general market store (Nikkei Ryutsu Shimbun, September 16, 1996, p. 1, Japan Ex. C-21).

[261]Camera Times, May 15, 1979, p. 49, US Ex. 79-5; Ibid., April 29, 1980, p. 50; April 27, 1982, p. 61, US Ex. 82-4; 3 May 1983, p. 45 and May 1, 1984, p. 45, US Ex. 84-2. This series does not appear to have been continued after 1984.

various factors, among which the competitive relationship is no more than one factor. Thus, the competitive relationship cannot be deduced from market survey results. Further, Agfa's success with Daiei, alleged by the United States, may have resulted from Agfa's concentration of its business effort on Daiei, and has no logical connection to the large retail space of some of Daiei's stores. Also, in addition to large stores, Daiei operates a number of small and medium-sized stores.

5.250 Japan further rebuts that it is hard to know exactly how the results showing a positive correlation between store size and the frequency of carrying foreign film were reached, since the United States never explains how the survey segmented stores of different retail space.[262] It also appears that the Kodak survey in no way controlled for either the volume of film being sold through the specific outlets surveyed or the type of outlet. In other words, the category "under 500 square meters" appears to be heavily populated with very small volume kiosks and other low-volume outlets that might have little motivation to carry more than a single brand film to maximize profit from the sales of film. The categories "500-3,000 square meters" and "over 3,000 square meters" reflect very different types of retail outlets.[263]

5.251 The **United States** explains that it categorized stores by size; each store was checked against published listings of class I and class II stores under the Large Stores Law in the two leading directories.[264] Based on these directories, each store was categorized as class I, class II, or neither (i.e., under 500 square meters). The survey therefore checked film availability in stores in each of these three size categories. The results show a clear correlation between store size and the availability of foreign film.

5.252 In response to the Japanese Government claim that the Kodak survey did not control for the volume of film being sold through specific outlets or the type of outlets surveyed, the United States performed another run of its data using store type as a proxy for sales volume. Specifically, the United States sorted its data on the assumption that: (1) kiosks, small convenience stores, pharmacies, and cleaners were likely to deal in small volumes of film; (2) large convenience stores, convenience stores at tourist sites, and grocery stores were likely to deal in intermediate volumes of film; and (3) photospecialty stores, supermarkets, and discount stores were likely to deal in the largest volumes of film. These data show that the correlation between store size and imports holds even when controlling for sales volume (i.e., these store types).

5.253 According to **Japan**, these oversights by the United States are not minor; they fundamentally undermine the reliability of the US analysis. The volume of film being sold by the outlet depends on whether the outlet is actually marketing film or just offering film as a convenience. The more the outlet is marketing film as a particular product line, the more likely the profit maximizing outlet might be motivated to offer consumers the maximum choice, and thus carry multiple brands. In every market in the world, when the retail outlet is just offering film as a convenience, the outlet might be unlikely to carry more than the leading brand of film. Now in the United States, that leading brand is Kodak; in Japan, that leading brand is Fujifilm.

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[262]For Japan, nothing in the Affidavit of Susan Hester, US Ex. 97-9, that explains how the United States disaggregated the data by store size. In particular, the Hester Affidavit only describes how Kodak constructed its original availability survey. It provides no explanation at all how the data was disaggregated into store types. Since the questionnaire provided in the affidavit does not ask for any data on the store size, it appears Kodak may have simply used some unstated assumption to classify stores, rather than actually surveying retail outlets on the basis of retail space.

[263]Japan also notes that the age of some data, which the United States admits are taken from magazine articles, makes them irrelevant for assessing the current operation of the Large Stores Law. Moreover, the authors of the articles themselves note that "it should be noted that this questionnaire survey might not reflect the total objective figures because of the stock volume and the number of samples at the time of the inquiry" (Camera Times, 3 May 1983, p. 45, US Ex. 83-10).

[264]Toyo Keizai's 1996 Comprehensive List for the National Large Scale Retail Stores (Zenkoku Ogata Kouriten Soran 1996) and Sangyo Times Comprehensive List of Large Scale Store Plans (Ogataten Keikaku Soran 1996).

5.254 Japan submits that MITI conducted its own analysis and found the following:

Percentage of Retail Outlets by Store Size Carrying Foreign Brands

Volume Sold	Under 500 m^2	Over 500 m^2
under 300 rolls	16.3 %	26.1 %
301 to 1,400 rolls	35.0 %	29.8 %
over 1,400 rolls	71.8 %	72.6 %

5.255 In the view of Japan, these results provide no support at all for the US theory, but do in fact confirm what common sense would predict. The more film sold by the outlet, the more likely the outlet is to carry foreign brands. In high-volume outlets, whether they are covered by the Large Stores Law or not, the outlets might be very likely to carry foreign brands[265]. Conversely, in low-volume outlets, whether they are covered by the Large Stores Law or not, the outlet might be much less likely to carry foreign brands.

5.256 Japan further argues that a closer examination of the subset of data including only large scale stores - 164 outlets out of the universe of 1,966 outlets - reveals other interesting patterns. Logically, the United States argument that the more retail space in a store, the more likely the outlet is to carry foreign brands, is not plausible. A store's decision own whether or not to stock imported film is based on whether or not a particular product will sell and make a profit for the store, and has nothing to do with the Large Stores Law. It is not credible to argue that in a smaller store a retailer could not find a few square meters (or less) on a shelf to stock imported film if the retailer believed doing so to be in its commercial interest.

5.257 Japan submits a figure which plots the retail space of the large scale stores from the Nippon Research Survey against the total volume of film sales. One can see that there is no correlation at all between the total volume of film sold and floor space. Large stores do not necessarily sell more film. The figure then plots the percentage of foreign brand availability at each large store. Once again, one sees no particular pattern - either in the likelihood of carrying foreign brands (i.e. having a data point greater than zero) or in the success of foreign brands (having a larger share of the film sales at the outlet).

5.258 Based on these facts, it is clear for Japan that the Large Stores Law in no way disadvantages imported consumer photographic film.

5.259 The **United States** rebuts that the correlation between a store's volume of film sales and its likelihood of carrying foreign film and the correlation between a store's size and its likelihood of carrying foreign film are not mutually exclusive, if a store's volume of sales correlates with its size. A larger store is also more likely to have a larger volume of film sales and to carry foreign film. The United States submits that the Japanese claim that its study led to different results from the US study is false. Japan never analyzed its data correlating store size and the availability of imports. Such an analysis of the Japanese data by the United States reveals that stores subject to the Large Stores Law were significantly more likely to carry foreign film than small stores, and stores subject to the Large Stores Law sell significantly higher volumes of film than stores not subject to the Law. The United States therefore argues that Japan's data showing a correlation between import availability and overall sales volume also directly support a correlation between import availability and store size.[266]

[265]Within this sample, the high-volume range represented 92.8 percent of the total volume of film in this sample. Foreign availability is thus greatest where it matters most.

[266]Second Panel Meeting, US Closing Statement, 3 June 1997, US Ex. 8 and 9.

5.260 The United States further argues that as a general matter, large stores have larger volume sales, and that Japan has submitted no credible data to show that this logical correlation does not apply in the case of photographic film. Instead, in the view of the United States in the figure referred to above, Japan presents an unusable diagram, with an unusable scale, based on indefensible methodology, from which no conclusion can be drawn.[267]

5.261 The United States concludes that Japan has refuted neither the general studies nor the film-specific study showing a clear correlation between store size and likelihood to deal in imports.

5.262 **Japan** responds that both of the two surveys themselves indicate no meaningful difference in the imported film availability at photospecialty stores, supermarket stores, and discount stores -- stores selling a high volume of film -- regardless of whether the store size is above or below 500 square meters. The remaining stores -- not major distribution channels of film -- consist of convenience stores and kiosks for the most part, and show lower availability of imported film. Thus, the US claim is far from the market reality. Stores selling a high volume of film, for example photospecialty stores and supermarket stores, are likely to carry multiple brands to meet their consumers' demand, while others like kiosks tend not to do so.

3. BACKGROUND AND PURPOSE OF THE LARGE STORES LAW

5.263 The **United States** argues that large stores posed a challenge to the Government of Japan's policy of systematizing distribution into vertically aligned, exclusive channels dominated by Japanese manufacturers. The purchasing power of large stores would allow them to bargain with wholesalers or directly with manufacturers for the best terms and operate outside a vertically-integrated, manufacturer-dominated structure and would bring greater price competition to the market, contrary to the Government of Japan's aim of maintaining stable prices to maximize profits for domestic manufacturers. In addition, limiting price competition allowed the inefficient, small retailers, who were the easiest to "systematize" under the control of domestic manufacturers, to survive. Finally, the large stores' greater ability to carry foreign products and to by-pass the domestically-controlled distribution system to deal directly with foreign manufacturers threatened the basic underlying purpose of distribution systemization: supporting Japanese manufacturers. Japan, therefore, sought to limit the proliferation of large stores as a way to support manufacturer domination and control of distribution as well as to protect small retailers.

5.264 **Japan**, however, notes that the Large Stores Law does not regulate retailers based upon their relationship with manufacturers. If the purpose of the law was to restrict those retailers with enough purchasing power to directly deal with manufacturers, as the United States alleges, the law would impose restrictions on retailers based upon the aggregate price of transactions with manufactures or some other measure to serve this purpose. The law imposes no such restrictions because the law is indifferent to relationships between retailers and manufacturers.

5.265 The **United States** rebuts that the concern that large stores would undermine the manufacturer-dominated distribution system comes through clearly in a 1969 survey of transaction terms in the photographic sector. According to the United States, the survey describes the Japanese film industry as a stable oligopoly of two domestic manufacturers and the photo film industry as having "established

[267]The United States submits that to make this diagram, Japan discarded 1,802 of its 1,966 responses, and plotted the diagram based only on 164 cases consisting of those stores in the sample that were over 500 square meters. Japan therefore makes no attempt, in the view of the United States, to correlate sales volume and store size with respect to the vast majority of the stores in the study that are less than 500 square meters. In the US view, it is not possible to produce a sound study of store size and sales volume while categorically excluding small stores. Even with respect to the 164 stores in the diagram, Japan uses such a large scale for the horizontal axis that most of the data points end up in a black smudge crammed into the lower left corner of the diagram. This, in the view of the United States, allows for no meaningful conclusions at all.

a distribution system where oligopolistic manufacturers lead". The survey also identifies the "growth of retail routes (especially regular chains and supermarkets) other than the photo retail route" and the "effects of full participation of Eastman Kodak" as future problems.[268] The US also submits that in several other surveys, the Government of Japan has drawn a connection between the growth of large stores and a challenge to vertically integrated distribution.[269]

5.266 **Japan** challenges the US characterization of the 1969 Report by explaining that the report simply notes the need for existing stores to streamline commercial practices to improve their efficiency, even setting aside the issue of whether the report was legitimized by the Government of Japan.

5.267 Furthermore, the **United States** responds that Japan fails to mention that convenience stores under 500 square meters frequently are subjected to review and adjustment under measures applied by local governments. According to the United States, Japanese government studies have found that these local regulations continue to be widespread and that they impose a significant burden on the opening of stores of less than 500 square meters. Just as under the Large Stores Law, the local measures frequently require a builder or retailer to provide advance notice of its plans to establish or expand a new store and undertake adjustments with local competitors. The United States cites an example where the retailer felt compelled to enter into an agreement with a local shopping centre association.[270]

5.268 **Japan** responds that MITI has undertaken significant efforts in recent years to ensure that additional local regulations are not excessive or inconsistent with the Large Stores Law. In this respect, the agreement cited by the United States is a purely private action and does not demonstrate the intent of the government; there is no government requirement for any store openers -- whether large or small and medium-sized -- to negotiate with local retailers, because Japan has made a continual effort to detect and correct such local rules.

5.269 The **United States** further submits that the Government of Japan was particularly concerned that the above effects would multiply significantly if large foreign retailers were allowed to enter the Japanese market. Large foreign retailers had the capital strength to establish quickly a major presence in the Japanese market once Japan lifted investment restrictions in the distribution sector. Their large size would ensure that they could deal with Japanese manufacturers directly and on the most competitive terms. In addition, their established relationships with foreign manufacturers would allow them to introduce more foreign products into the Japanese market, and to use this access to foreign products as a strong bargaining chip with domestic manufacturers.

5.270 **Japan** responds, however, that first, there is no reason to consider that retail stores operated by foreign capital are more likely to carry imported brands. Second, the Large Stores Law does not discriminate against foreign retailers in favour of domestic retailers. In fact, numerous foreign retailers have recently opened in Japan.

5.271 The **United States** cites two of Japan's leading antitrust scholars, one a former and one a current senior official of the Japan Fair Trade Commission, who note that relatively sparse competition in distribution had prevented price competition among Japanese manufacturers on the domestic market,

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[268]The United States indicates that Japan submitted a version of the survey edited and republished by MITI in 1971, which differs in several important respects from the original. The United States quotes from the original (US Ex. 15). See Japan Ex. B-1, p. 309.

[269]The United States cites the Economic Planning Agency, Economic Theory of Deregulation, 10 June 1989, US Ex. 64 and Distribution and Business Practices of Imports, Edited by the Price Policy Department, Price Bureau, Economic Planning Agency, 28 March 1986, US Ex. 54.

[270]The agreement, among other things, limited the retailer's floorspace, mandated certain holidays and closing times, restricted the retailer's ability to "sell competing products at a significantly discounted price, and required the retailer to advertise on behalf of its competitors". Arrangement between A New Retail Store and the Local Shopping Centre Association, 1996, US Ex. 93.

thus stabilizing prices[271]. These scholars also noted the protective effect of a vertically integrated distribution system:

> "Distribution keiretsu … may work to foreclose the access of foreign products into the Japanese market. A manufacturer's dominant position might work as a disincentive for distributors to lower their prices. A distributor's dependence on a particular manufacturer would make distribution channels exclusive and raise entry barriers significantly."[272]

5.272 According to the United States, MITI's Industrial Structure Council understood that large stores could challenge the vertically integrated distribution structure that its policy reports aimed to create. In its Ninth and Tenth Interim Reports (1971 and 1972), the Council acknowledged that large stores could improve distribution efficiency in Japan, but opted instead for a policy of restricting large stores in favour of supporting small and medium retailers. Although the Council's concerns extended to all types of large retail stores, it was most concerned about the adverse effects that large, foreign retail stores could have directly on small and medium retailers and indirectly on the government's systemization policy. Specifically, in the Ninth Interim Report[273], the Council recommended only limited liberalization in the retail sector, and that measures be taken to protect small and medium retailers from large or chain retailers in light of foreign capital liberalization.[274] In the Tenth Interim Report, the Council developed this policy further, again stressing the need to protect small and medium retailers in light of foreign capital liberalization.[275]

5.273 In the view of **Japan**, however, the United States cites not a single shred of evidence in support of its allegation that the Large Stores Law was enacted as a "liberalization countermeasure" designed to impede imported products - especially photographic film. For Japan, a careful review of the US citations of statements that supposedly document the protectionist purpose of the Large Stores Law reveals that not one of them has anything to do with the expected effect of the law on goods at all, much less consumer photographic film. For Japan, the Ninth and Tenth Interim Reports of the Distribution Committee discuss competition between large and small retailers, and specifically ways to promote the competitiveness of small retailers. There is nothing suggesting concern about competition between domestic and foreign products.

5.274 Japan argues that the United States tries to create the impression that the Large Stores Law "represents a systematic and elaborate plan to obstruct [Japan's trading partners] market access" through "one potentially significant alternative distribution channel" for imported consumer photographic film. This argument ignores the actual operation of the law and implies a focus on products that simply does

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[271]See The Antimonopoly Laws and Policies of Japan, H. Iyori and A. Uesugi, Federal Legal Publications, Inc., 1994 p. 293, US Ex. 94-1.

[272]Ibid., p. 107.

[273]Distribution for the 1970s, Ninth Interim Report, Industrial Structure Council Distribution Committee, July 1971, p. 64, US Ex. 71-9.

[274]Ibid., p. 68 (emphasis added).

[275]The United States quotes the following from Retail Business Under Distribution Reforms: The Direction of Revising the Department Stores Law, Tenth Interim Report, Distribution Committee of the Industrial Structure Council, US Ex. 72-3: "[I]n light of the international conditions following the currency crises, and economic demands for modernization of the distribution system, it is necessary to advance liberalization in stages in accordance with the progress being made in the small- and medium-scale retailers countermeasures" (p. 82).
"Attempts should be made to further strengthen and expand small and medium-sized retail policies. For example, legislative measures need to be explored to promote small and medium-sized retailers. Active subsidies should be given to small and medium-sized retailers for various independent and *cooperative modernization* efforts for the strengthening of management. These efforts are being done to counter the anticipated advancement of giant foreign capital into the distribution sector following full-scale capital liberalization as well as [to counter] the development of vigorous nation-wide activities of large-scale retailers, including department stores and super chain stores" (p. 88, emphasis added).

not exist. The Large Stores Law does not regulate particular products. The purpose of the Large Stores Law, as clearly stated in Article 1, is

> "to foster the sound development of the national economy. To achieve that end, giving due consideration to the protection of consumers interests, the Law allows for the adjustment of retail business operations in large-scale retail stores, thereby ensuring that small and medium-sized retailers operating within their vicinity enjoy reasonable opportunities for business, and that the retailing sector as a whole achieves sound development".[276]

Thus, the Large Stores Law does not address the sale of consumer photographic film in the Japanese market.

5.275 Japan submits that like many countries around the world (such as the United Kingdom)[277], Japan would like its domestic market to have a variety of small, medium, and large scale retailers to provide consumers with the maximum degree of choice. Similarly, communities in Japan care about the mix of different business uses in their neighbourhoods.

5.276 Japan explains that while many other countries use a permission system, the function of the law in Japan is to provide adjustments, when necessary, to ensure that new large store openings are consistent with continued retailing diversity. The Large Stores Law accomplishes its objective through a notification and coordination system for large scale retailers. Large retailers are obligated to provide requisite notification of their plans; they may then proceed with those plans unless it is decided that some adjustment is necessary. As part of the adjustment process, the Large Stores Law allows the government occasionally to recommend modifications in certain operating characteristics upon the opening or expansion of the large store. The statute and regulations permit only four adjustment parameters: (1) retail space, (2) opening day, (3) closing time, and (4) store holidays. The Large Stores Law does not regulate what products a large store decides to carry.

5.277 According to Japan, determinations under the law are in no way based on which products, or the origin of the products, that a particular large store decides to carry. Likewise, there is no reason to think that a particular retailer's product purchasing decisions would be in any way influenced by any of the possible adjustments under the law. In sum, the Large Stores Law is incapable of establishing unfavourable conditions of competition with respect to imported products. The only instance in which product origin is considered at all in the process actually treats foreign products more favourably than domestic products.[278]

5.278 The **United States** responds to Japan's claim that the Large Stores Law does not influence the products that large retailers carry by submitting evidence showing that prospective large retailers enter into agreements with existing local merchants that limit the types of products that the prospective retailer may sell.[279]

5.279 **Japan** also argues that decisions under the law are made taking account of certain qualitative and quantitative factors, none of which is related to whether the large store at issue, or small stores

[276]Large Stores Law, Article 1, Japan Ex. C-1.

[277]See Planning Policy Guidance: Town Centres and Retail Developments, Department of the Environment, United Kingdom, revised PPG6, June 1996, Article 1.1, Japan Ex. C-2.

[278]When calculating the retail space of the retailer to determine whether it falls under the Large Stores Law coordination process, up to 1,000 square meters of retail space devoted to imported products is taken out of the calculation.

[279]See para. 5.243.

in the vicinity, carry particular products, much less the origin of the products they carry.[280] Similarly, the four adjustment parameters under the law - retail space, opening day, closing time, and store holidays -- have no connection to a retailer's decisions regarding which products to carry or whether to stock domestic or imported brands. Accordingly, none of the four adjustment factors alters the competitive relationship between imported and domestic products.

5.280 Japan further submits that it has long regulated large stores to preserve retailing diversity. This policy concern long predates the capital liberalization of the 1960s and '70s. The history of the origin and amendment of the Large Scale Retail Stores Law makes it clear that the law concerns retailing services, and does not address particular products.

4. PROCEDURES UNDER THE LARGE STORES LAW

5.281 The Large Stores Law regulates the opening and expansion of large-scale retail stores above 500 square meters in floor space. Stores above that threshold are divided into two categories: Class I stores, with more than 3,000 square meters of floor space, which are regulated by MITI; and Class II stores, with more 500 square meters and less than 3,000 square meters of floor space, which are under the jurisdiction of the prefectural governor.

5.282 The **United States** explains that the key procedures under the law currently include the following.

5.283 *Article 3 Notification* - Parties planning to build or open a large scale retail store must submit a notification, which includes the proposed floor area of the store, planned opening date, and area surrounding the building, at least 12 months before the proposed completion and opening of the new store or expanded retail store to MITI or the prefectural governor (appropriate authority).

5.284 *Local Explanations* - Within four months after filing the Notification, the builder or retailer must explain the plans for the store opening, i.e., the name of the store, floor area, opening date, closing times, and number of days closed, first to MITI, the prefectural governor, local government officials in the city or town where the building will be located, the Chamber of Commerce and local merchants' associations (collectively "Chamber of Commerce"), and then to local medium and small retailers, retailers associations, and consumers.[281] After the local explanations, the appropriate authority must post a notice as to whether the store will be subject to "adjustment".[282] The retailer may not commence business until seven months after the date of this notice.[283]

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[280]The factors considered are the following:

(i) qualitative factors:
  (a) protection of consumers' interests;
  (b) effects on small and medium-sized retailers and commercial integrations within the vicinity; and
  (c) local "community development"; and

(ii) quantitative factors:
  (a) the shares of large scale retail stores in a relevant municipality;
  (b) the level of retail space per capita;
  (c) local population trends; and
  (d) the influx and outflow of customers.

See Deliberation Procedures, Section I, Japan Ex. C-4.

[281]For Class I stores, MITI determines the area in which the local explanation should be made as well as the groups to whom the explanation should be made. The prefectural governor decides the procedures for Class II stores (Guidance for Local Explanation for Class I Stores that have Submitted a Notification for a New Building, Directive No. 93, 1 April 1994, US Ex. 94-7).

[282]Large Stores Law, Article 3(2), US Ex. 74-4.

[283]Large Stores Law, Article 4.

5.285 **Japan**, however, explains that a public briefing is to be given to the Chamber of Commerce and Industry (or alternatively, the Commerce and Industry Association), consumers or consumers' unions, and local retailers or their associations. The purpose is to help the Large Stores Council form its views based upon well-informed opinions. Further, the appropriate authority must post a notice after an Article 3 Notification is filed, rather than after a public briefing is completed.

5.286 *Article 5 Notification* -- The **United States** notes that at least five months before the opening of a new or expanded large scale store, the retailer must submit an Article 5 Notification to the appropriate authority.[284] The authority then determines whether the proposed store poses the risk of a significant effect on nearby small and medium retailers' business activities, and may recommend that the store reduce sales floor space, and/or delay opening date.[285]

5.287 *Large Store Council Recommendation* - If the appropriate authority determines that elements of the proposed plan pose a risk of significant effect, it refers the items to the national (in the case of Class I stores) or prefectural (in the case of Class II stores) Large Store Council, which is an official advisory body to MITI and the prefectural governors, respectively.[286] The Council must submit the results of its deliberations to the appropriate authority.[287]

5.288 **Japan** points out that under Article 7.2 of the Large Stores Law, in order to conduct deliberation, the Council must hear views from the Chamber of Commerce and Industry (or alternatively, Commerce and Industry Association), consumers or consumers' unions, and local retailers or their associations.

5.289 *Recommendations and Orders* - The **United States** submits that after receiving the Large Store Council's views, the appropriate authority may submit recommendations to the persons proposing the large scale store, among other things, delay the store's opening or reduce its floor space.[288] If the store does not follow the recommendation, MITI may order it to do so.[289]

5.290 According to the United States, the entire process from the Article 3 Notification through the completion of the review and "adjustment" process is supposed to take no more than 12 months.[290] In addition to the "adjustments" that may be applied to large stores on a case-by-case basis, the Large Stores Law requires all large stores to close for a minimum of 24 days per year and by 8:00 p.m. each working day (except stores may petition to stay open until 9:00 p.m. for up to 60 days per year).[291]

5.291 **Japan** remarks, however, that this assertion is factually incorrect. Japan rebuts that the Large Stores Law does not obligate large stores to close no less than 24 days per year, or no later than

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[284]Large Stores Law, Article 5.

[285]Large Stores Law, Article 7(1).

[286]Large Stores Law, Article 7(1). Councils generally are comprised of academics, business persons, press, and consumer representatives, of which the local retailers generally are the most influential. The Council must seek the opinion of the Chamber of Commerce or other business organizations, retail organizations, retailers and consumers. (Large Stores Law, Article 7(2), US Ex. 74-4, JFTC Council Report, pp. 16-17).

[287]Large Stores Law, Article 7(1), US Ex. 74-4. According to the US, the examination of a new store by the Large Store Council is based upon mathematical formulas for comparing the Commercial Population and large scale retail store Occupation Rate of one city with similar cities. See, Large Store Council Decision, Investigatory Procedures for the Adjustment of the Business Activity of Large Scale Retail Stores, 14 November 1991, US Ex. 91-4. The US emphasizes that the quantitative approach allows the Large Store Council to ration retail space. Japan disagrees because in its view quantitative factors are never determinative. See translation issue 11.

[288]Large Stores Law, Article 7(1).

[289]Large Stores Law, Article 8(1).

[290]The Application of the Law Regarding the Adjustment of Business Activities of Large Scale Retail Stores, Directive No. 90, 1 April 1994, US Ex. 94-8.

[291]Enforcement Regulations for the Law Regarding the Adjustment of Business Activities of Large Scale Retail Stores, MITI Ministerial Order No. 17, 27 February 1974, US Ex. 74-2, Article 10(2), as revised by Ministerial Order No. 33, 1 April 1994 and Article 3 of the Supplementary Provision for MITI Ministerial Order No. 33, 1 April 1994, US Ex. 94-6.

8:00 p.m. The law only subjects them to the notification and adjustment procedures if they operate beyond these thresholds. Further, in practice, 12 percent of notified stores close after 10:00 p.m.[292] and 89 percent of notified stores close less than 20 days per year; 22 percent of notified stores close less than 10 days per year.[293]

5. EVOLUTION OF THE REGULATION OF LARGE STORES

5.292 In the view of the **United States**, the Government of Japan imposed and progressively strengthened restrictions on large stores, and in most important respects, the Law today remains more restrictive than when originally enacted. The United States argues that the Government of Japan's efforts to restrict large stores to counter the effects of trade and investment liberalization proceeded in stages. After the close of the Kennedy Round, MITI issued three directives to strengthen the Department Stores Law, which had existed since 1956. When the directives proved ineffective at closing the loopholes for large store expansion, MITI recommended in 1972, and the Diet passed the following year, the Large Stores Law as an expansion and replacement of the Department Stores Law. The Large Stores Law has been revised several times.

5.293 **Japan** responds that whatever restrictions are imposed on large stores by the Large Stores Law[294], and whatever the legal relevance of any such restrictions[295], the fact remains that the law has been significantly liberalized in recent years and is more liberal today than at any point in the relevant past. Accordingly, the law today cannot be upsetting competitive conditions with respect to imported film.

5.294 **The United States** rebuts, however, that the law has not been significantly liberalized in recent years. For the United States, the Law today *does* currently suppress large stores, as described further below (see Section VII), and it is also important that Japan aggressively imposed restrictions on large stores in the past. Without these strong measures against large stores, it is quite possible that large stores would have brought sufficient bargaining power and competition into the Japanese distribution system to erode the exclusive vertical control over distribution exercised by Japanese manufacturers.

(a) Department Stores Law

5.295 The Japanese Diet enacted the Department Stores Law in 1956[296] to, *inter alia*, "secure business opportunities for small and medium merchants by adjusting the business activities of department stores".[297] It prohibited the opening of a "department store" with floor space in excess of 1,500 square meters unless the retailer obtained a permit from MITI[298], which MITI could deny if the store would "affect the business operations of small and medium merchants and pose a significant risk of injuring their interests".[299]

5.296 **The United States** submits that by the late 1960's, the Department Stores Law no longer accorded adequate protection to small retailers because large stores were evading its application by

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[292]See Article 9-1 of the Large Stores Law, Executive Regulations Regarding the Law Concerning the Adjustment of Retail Business Operations at Large Scale Retail Stores, 27 February 1994, Article 10.2, Japan Ex. C-10.

[293]See Article 9-2 of the Large Stores Law, LSRSL Executive Regulations Article 10.4, Japan Ex. C-10.

[294]As discussed below, the Large Stores Law as currently administered does not restrict the opening of large stores. See Section VII.B.4. below.

[295]As discussed above, the Large Stores Law is not concerned with any particular products. Therefore, regardless of how restrictive or liberal the Large Stores Law was and is, the law is incapable of establishing unfavourable conditions of competition with respect to imported products.

[296]The Department Stores Law, Law No. 116, 23 May 1956, US Ex. 56-2 and Japan C-3.

[297]Article 1, Department Stores Law.

[298]Article 3, Department Stores Law. The threshold was 3,000 square meters in cities designated by ministerial ordinance.

[299]Article 5, Department Stores Law.

creating so-called "pseudo-department stores".[300] MITI closed this loophole on June 7, 1968 by issuing a directive, which mandated that such entities obtain department store permits.[301] When small retailers continued to complain, MITI issued a second directive in September 1970, which further limited the entry and business activities of large stores, by *inter alia*, requiring that they "make appropriate adjustments with the local retailers regarding new store expansion, advertising, bargain sales, number of days closed, and hours of operation".[302] MITI issued a third Directive in October 1972[303], which instructed large stores to respect local business "customs" and to not "disturb the order in the retail [market]" by using aggressive sales promotions.[304]

5.297 The United States explains that ultimately, however, MITI recognized that issuing directives to supplement the Department Stores Law was insufficient. Accordingly, in its Tenth Interim Report, MITI's Industrial Structure Council called for replacing the Department Stores Law with a new law that would apply to all types of large scale retail stores, not just department stores.[305]

5.298 The United States also submits that concern for the effects of large stores was widespread among Japanese industry, particularly among consumer goods industries such as the photosensitive materials sector. In this sector, manufacturers, wholesalers, and retailers shared a common interest in opposing large stores. In the mid 1960s, the film manufacturers, the wholesalers, and the photospecialty retailers worked together to find ways to counter bargain sales by the large stores. At a meeting in 1964, the three groups agreed to cooperate and set up a joint investigation committee to develop countermeasures for "bargain sales of film by supermarkets".[306] At a 1964 meeting of the manufacturers, wholesalers, and retailers endeavoured to determine which primary distributors were selling film to Daiei, the largest supermarket chain, at a discount price.

5.299 The manufacturers, wholesalers, and retailers continued working together against the discount stores and supermarkets in the late 1960s. A meeting of the three groups on February 14, 1969 again focused on Daiei and the problem raised by its "cheap price attack". Each of the three groups committed to do its part to attack the problem. The wholesalers took action a few months later, on November 1, 1969, when the Federation of Photosensitive Materials Wholesalers (*Shatokuren*) issued the "Directive Regarding the Supermarket Problem" to its membership to "maintain order in the industry".

5.300 The United States claims that these actions taken by the manufacturers, wholesalers, and retailers in the photographic materials sector show the concerns large stores raised throughout Japan: manufacturers were concerned by large stores' low prices; wholesalers were concerned about the large stores' ability to bypass them or bargain for better terms; and retailers, of course, were worried about increased competition. The Government of Japan took action to address these concerns first by strengthening the existing law restricting department stores. When that proved inadequate, the Government replaced the law with the more comprehensive Large Stores Law.

5.301 **Japan** points out that the United States offers statements of concern by photographic industry representatives concerning large stores' pricing policies -- nothing, however, about their alleged tendency to carry imported merchandise. Further, Japan explains that, as the United States itself notes, the Large

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[300]Stores established "pseudo-department stores" by creating legal identities for separate sales floors that were below the Department Stores Law's floor space threshold.

[301]Directive No. 941, Guidance Considering Pseudo Department Stores, 7 June 1968, US Ex. 68-6.

[302]Directive 1759, Concerning the Construction and/or Expansion of Specified Stores, 28 September 1970, US Ex. 70-6.

[303]Directive No. 971, Concerning the Construction and/or Expansion of Specified Stores, October 1972, US Ex. 70-6.

[304]MITI History, Volume 13. US Ex. 78-2 and 78-5.

[305]Tenth Interim Report, p. 4, US Ex. 72-3.

[306]The Establishment of the Countermeasures Committee - Photo-sensitive Materials Three-Party Liaison Meeting to Deal with Aggressive Supermarkets, Camera Times, 1 October 1963, US Ex. 63-3. Kinki District Three-Party [Manufacturers, Wholesalers, Retailers] Market Countermeasures Council - Daiei Bargain Sales - ¥120 for 36 Exposure Black and White Film, Camera Times, 21 April 1964, US Ex. 64-2.

Stores Law was preceded by the Department Store Law. By the late 1960s, however, this law was failing to meet its objective, both due to the emergence of new types of large stores (e.g., supermarkets) and the deliberate circumvention of the law through division of a single large store into a number of subsidiaries that each fell below the 1,500 square meters threshold. As the United States notes, MITI first attempted to supplement the law through a series of anti-circumvention directives; in the end, however, it was decided that the Department Store Law should be replaced with a law that deals explicitly with all kinds of large stores.

(b) Enactment of the Large Stores Law

5.302 In the view of the **United States**, the purpose of the Large Stores Law[307] was to protect small stores from competition and to help the Japanese distribution system restructure to resist foreign competition. Former Prime Minister and then MITI Minister Yasuhiro Nakasone emphasized this purpose during a Diet proceeding on July 19, 1973:

> "[T]he Government is about to provide thorough and generous measures to small- and medium-sized companies. With regard to the problems of internationalization and liberalization, we are not doing this too suddenly, we are nurturing and nourishing the small- and medium-sized companies' resistance so as to provide them with the ability to ambush [foreign capital], so we are implementing liberalization in a step-by-step, gradual fashion.
>
> As part of this policy to increase resistance [to foreign capital], we have decided to amend the Department Stores Law in order to make adjustments to the business operations of department stores, supermarkets and the retail industry".[308]

5.303 **Japan** notes, however, that these quotations address the competitive challenge posed by foreign companies (large retailers) to smaller Japanese retailers and there is no mention of the competitive challenge posed by foreign products. Japan also notes that the Nakasone statement neither indicates the actual purpose of the law, nor reflects the "subjective intent" of the government at the time of its enactment.

5.304 **The United States** further explains that concurrently with the passage of the law, MITI issued Directive No. 123 of February 28, 1974, which elaborated procedures applicable to the Large Store Council review process and formalized the role of local retailers in influencing whether a new large store would be subject to "adjustment". Over time, changes in the law, administrative measures, and practices, would greatly strengthen this influence.

5.305 According to the United States, implementation of the Large Stores Law had an immediate and negative effect on the growth of large stores. For example, Daiei, Japan's largest supermarket then and now, attributed its downturn in profitability, in part, to the new law. The applications for new stores declined by over one-third from 399 applications in 1974 to 264 in 1976.

5.306 **Japan** submits, however, that the Department Store Law imposed more restrictive regulations on large retailers than the Large Stores Law. Specifically, the Department Store Law required entities to obtain permission to operate a "department store business", which it defined as a business operating

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[307]The United States notes that another law of related concern is the Law on Special Measures for the Adjustment of Retail Businesses (Commercial Adjustment Law), Law No. 155 of 1959, 23 April 1959, US Ex. 59-1, which applies to stores not covered by the Large Stores Law.

[308]Kanpo, 71, Diet Commerce Committee Session, Upper House Diet Record, No. 52, 19 July 1973, US Ex. 73-2. The United States argues that on 13 September 1973, Minister Nakasone further confirmed that the bill formed part of the plans put forth by the Industrial Structure Council to restructure the distribution sector.

more than one retail store with retail space in excess of 1,500 square meters. In addition, the law prohibited those entities engaging in a "department store business," from opening retail stores, irrespective of the size of their retail space, without a permit from MITI. Nevertheless, it did not regulate large retail stores with retail space in excess of 1,500 meters, if all retailers in it independently operated their own stores each of which had retail space no more than 1,500 square meters. This regulatory scheme created a circumvention problem. To solve this problem, the Large Stores Law regulates not large retailers, but the opening of large retail store structures in which more than one retailer may operate, and the opening and operation of retailers operating in such structures.

5.307 Japan emphasizes two differences between the two laws. The Department Store Law regulated the opening of small stores if they were operated by a company which operates more than one large store, while the Large Stores Law does not. More importantly, the Large Stores Law has adopted a notification and coordination system, which is less restrictive than the permission system of the Department Store Law.

(c) 1979 Revisions to the Large Stores Law

5.308 **The United States** submits that after the conclusion of the Tokyo Round, the process of strengthening measures against large stores took on new urgency. The Photospecialty Retailers Association, along with other retail groups, strongly supported amendments to the Large Stores Law.

5.309 The Diet amended the Large Stores Law on 15 November 1978, with the amendments effective on May 14, 1979.[309] The most important changes to the Large Stores Law in the 1979 amendments were: (1) to lower the threshold for stores covered by the Law from 1,500 square meters to 500 square meters; and (2) to divide large stores into two classes - Class I stores (1,500 square meters and above) under MITI jurisdiction, and Class II stores (500 up to 1,500 square meters) under the regulation of the prefectural governors.[310]

5.310 The United States explains that lowering the threshold by two-thirds swept a whole new group of stores under the Law, and giving the prefectures authority over Class II stores significantly increased the personnel and other resources available to investigate and order adjustments to large stores. A veritable explosion in notifications for large stores occurred in 1979, most attributable to notifications for the newly-covered Class II stores. However, implementation of the Large Stores Law amendments soon succeeded in suppressing Class II stores, as shown by the decline in the number of Class II notifications from 1,029 in 1979 to 424 in 1980, to 308 in 1981.[311]

5.311 Simultaneously with the May 1979 amendments to the Large Stores Law, MITI issued a Ministerial Order which reinforced the role of the Commerce Adjustment Board, the body representing local retailers and other trade associations.[312]

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[309]Large Stores Law Revision, Law No. 105 of 1979, 14 May 1979, US Ex. 74-4. The United States argues that during the interval between Diet passage of the amendments and their entry into effect, the Government of Japan anticipated, and took administrative actions to prevent, an influx of new stores intended to avoid the strengthened Law. Directive No. 205, Self Restraint Regarding the Rush for Construction and Expansion of New Stores, 13 March 1978, MITI History, Volume 13, p. 525, US Ex. 78-2. The United States also cites: Directive No. 564, Self Restraint Regarding the Rush for the Expansion and Building of New Stores, 3 July 1978, MITI History, Volume 13, p. 525, US Ex. 78-5.

[310]Law No. 105 of 1978, US Ex. 78-1.

[311]The Status of Large Scale Retail Store Notification, Explanation of the Large Scale Retail Stores Law, p. 16-17, US Ex. 94-9.

[312]Enforcement Regulations, Article 8(2), MITI Ministerial Order No. 38, 11 May 1979, MITI History, Volume 13, p. 528, US Ex. 79-2.

5.312 MITI Directive No. 365[313] created "prior adjustment" and "formal adjustment" processes. The prior adjustment process took place after the Article 3 Notification (store construction) and before the Article 5 Notification (store opening). The United States explains that the idea was for the retailer to seek consensus among those involved in the adjustment process (e.g., the local retailers in the Commerce Adjustment Board) before the formal adjustment process, which began after the Article 5 Notification. Successful prior adjustment negotiations would lead to "smooth" formal adjustment procedures based on the understandings reached during prior adjustment". In the view of the United States, the Directive thus institutionalized not just consultation but negotiation with local interests as part of the large store opening process. Because of the importance to a large retailer of ensuring a successful "prior adjustment" process, many large retailers began to coordinate with local interests in advance of even their initial Article 3 Notification.[314]

(d) 1982 Administrative measures under the Large Stores Law

5.313 According to the **United States**, although the strengthened Large Stores Law had an immediate effect in suppressing openings of large stores[315], Japanese manufacturers, wholesalers, and small retailers continued to fear the threat of increased price competition from large stores. Large-scale stores had developed new strategies such as selling products produced by secondary and foreign manufacturers under the store's own brand name at discount prices ("private brand" strategy). Also, alliances with foreign manufacturers were particularly attractive because imported goods were becoming increasingly cheaper as a result of the appreciating yen and decreasing tariff rates. Small and medium retailers reacted forcefully to these threats.

5.314 The United States explains that in response to continuing concerns about the threat of large stores, MITI in 1982 implemented new administrative measures under the Large Stores Law to further severely tighten restrictions on the opening of new large stores. MITI instituted, through Directive No. 36, a "prior explanation" requirement to precede the builder's Article 3 Notification, which obligated the notifier to consult with, and obtain the consent of, local retailers before submitting its Article 3 Notification.[316] The practical effect of the prior explanation process was to force the builder to negotiate "adjustments" with local retailers before it took the first formal step under the Law, as was confirmed by the JFTC's June 1995 report.[317]

5.315 In Directive No. 36, MITI also mandated that the adjustment process "be carried out in a restrictive manner"[318], stating that in some cases large stores should be given direct instructions "to exercise 'self restraint'", i.e., to scale back or abandon their plans.[319] From 1981 to 1982, almost every store that attempted to open was reportedly forced to exercise self restraint.[320]

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[313]Directive No. 365, The Operation of the Commerce Adjustment Board, MITI History Volume 13, p. 528, US Ex. 79-2.

[314]MITI also lengthened the Large Stores Law adjustment process by issuing Directive No. 366, Obligatory Action Pursuant to the Implementation Regulations for the Law Pertaining To Adjustment of Business Activities of the Retail Industry for Large Scale Stores, Directive No. 366, 11 May 1979, US Ex. 79-4.

[315]Notifications for Class I retail stores dropped precipitously from 576 in 1979 to 132 in 1982. For Class I and Class II combined, notifications dropped from 1,605 in 1979 to 402 in 1982 (The Status of Large Scale Retail Store Notifications, Explanation of the Large Scale Retail Stores Law, pp. 16-17).

[316]Directive No. 36, Immediate Measures Regarding Notification to Establish Large Scale Retail Stores, 30 January 1982, US Ex. 82-2 and Japan C-16. Japan disagrees with the US interpretation of the Directive No. 36. See translation issue 13.

[317]Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, pp. 18-20, US Ex. 95-11.

[318]Immediate Measures Regarding Notification to Establish Large Scale Retail Stores, Directive No. 36, 30 January 1982, US Ex. 82-2.

[319]Ibid.

[320]Footnote on page 53 of Zaidan Hojin Nihon Sogo Kenkyujo, The Effect of Large Scale Retail Stores on Metropolitan Areas, February 1983, US Ex. 83-5.

5.316 According to the United States, the results of the Directive were striking. By 1983, new large store notifications had fallen by 75 percent from 1979 levels, from 1,605 to 401, and stayed at these low levels throughout the 1980's. Even more notable, the number of notifications for Class I and Class II stores combined hovered throughout the 1980's at levels typical for Class I stores alone before the 1979 amendments created Class II. Thus, MITI in the 1980's succeeded in restraining openings of all stores above 500 square meters to the levels typical in the 1970's for stores above 1,500 square meters.

5.317 The United States cites particular cases where photospecialty retailers entered into agreements with local retailers or retailers associations to illustrate how this restrictive application of the law affected the photographic materials sector and of how the process of local consultation and prior adjustment instituted by the Government of Japan under the Large Stores Law gives local retailers power to extract restrictive conditions from large stores. The United States cites the following examples:

- In November of 1982, Doi Camera, a large photospecialty retailer attempted to open a store in the Shibuya section of Tokyo, but was stopped by the formation of a group composed of local retailers. The Tokyo Metropolitan government issued administrative guidance which led to an agreement between Doi and local retailers. This agreement included a prohibition against expansion of the sales floor area in its Shibuya store, and a requirement that it "negotiate in good faith [with the local dealers] if the market environment were to change in the future".

- On June 4, 1983, the Large Stores Law was used to force the Sakuraya electronics and photospecialty store to enter into an agreement with the Tokyo branch of the Photospecialty Retailers Association in order to open a large store in the Shinjuku section of Tokyo. According to the agreement, Sakuraya was, among other things, "prevented from expanding its store space without consulting local dealers," and prohibited from wholesaling and in-house photoprocessing".

- On February 28, 1989, Yodobashi notified the Tokyo Metropolitan government of its intent to open a Class II store in Hachioji City, Tokyo. The Tokyo 9th branch announced its opposition to Yodobashi's plans and demanded that it withdraw them immediately. After a series of unsuccessful meetings with the leader of the Federation's Tokyo 9th branch office and of meetings of the Chamber of Commerce, Yodobashi prepared an agreement based on the association's demands, which it executed with the Photospecialty Retailers Association and the Photographer's Association. The agreement provides, *inter alia*, that the parties agree to "conduct their business activities based on co-existence and co-prosperity, and regional cooperation and will always cooperate in good faith". The agreement further bound Yodobashi to undertake commitments set out in an attached memorandum.

5.318 **Japan** responds that the 1982 circular has been repealed. Thus, as discussed in Section VI.C.1(b) below, the past operation of the circular is irrelevant. Also, Japan argues that the Large Store Law does not regulate which products large retailers can carry nor does it take into account what products, much less the origins of the products, that a large retailer or small and medium-sized retailers within the vicinity sell when determining whether and what adjustments are necessary, as discussed in Section B.1. above. Japan, nevertheless, point out that there is no phrase in the 1982 circular that obligates a store opener to obtain the consent of local retailers before submitting its Article 3 Notification.

(e) Restrictions on acquisitions

5.319 The **United States** further argues that, as the Government of Japan strengthened restrictions on new or expanded large stores in the early 1980's, some large store chains looked for an alternative route to grow through acquisition. However, Japan's application of merger guidelines in the retail sector limited the opportunity to pursue this avenue.

5.320 **Japan** submits that the US argument on the difficulty of mergers between large-scale retailers -- due to the review rule to consider the market share of large-scale stores alone -- is misguided. Even if such mergers become easier, the total area of floor space will not increase. Therefore, there is no link between the merger regulations and the large-scale store regulations.

5.321 The **United States** cites the example of one of Daiei's subsidiaries, which planned to merge with a large local supermarket, and was required to lower its shareholdings in the new company before the JFTC would approve the merger.[321] In that case, the JFTC had concluded that the merger would result in a store with more than a 25 percent market share for certain products, giving rise to competition policy concerns. The JFTC calculated this market share by defining the market as including only large stores. Thus, it found that the merged store would account for more than 25 percent of the retail market served by large stores, not the retail market as a whole.[322]

5.322 The United States explains that on July 24, 1981, the JFTC formalized this analysis of the market in Retail Merger Guidelines, a new set of guidelines which applied only to the retail sector. The Guidelines defined three types of retail markets, categorized by the same floor space criteria utilized at the time in the Large Stores Law to distinguish Class I stores, Class II stores, and stores excluded from the law. The three categories included department stores (with floor space at or above 1,500 square meters), mass-merchandizing stores (with floor space at or above 500 square meters), and general retail stores (with floor space of less than 500 square meters). In essence, the JFTC considered each of these categories to belong to a separate market. This definition of the market meant that a large store would more easily reach a high market concentration through acquisition than if the market were defined as a combination of the different types of stores. Accordingly, this policy had the effect of limiting opportunities for stores to avoid the Large Stores Law restrictions through pursuing acquisitions rather than opening or expanding new stores.

(f) Changes to the law since 1990

5.323 In the view of the United States, revisions to the Large Stores Law and related administrative measures from 1973 through 1990 in most cases strengthened the regulation of large stores. However, since 1990, Japan has modified some of the requirements under pressure from the United States under the US-Japan Structural Impediments Initiative, and from other governments. For example, MITI in 1990 issued administrative guidance that the prior explanation process was not to be used "to obtain an agreement between the new store and the small and medium retailers".[323] In 1992, MITI replaced the "prior explanation" process with a procedure for "local explanation".[324] MITI also raised the minimum floor space requirements for Class I stores from 1,500 square meters to 3,000 square meters (6,000 square meters in cities designated by ordinance), extended the store closing time from 7:00 p.m. to 8:00 p.m., and decreased the number of mandatory days closed from 48 to 24.[325]

5.324 For the United States, however, the law's requirement to consult with local retailers continues to lead to an informal adjustment process that substantially suppresses the opening and expansion of large stores. Moreover, Japan continues to vigorously apply the formal adjustment procedures, and

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[321]Investigation Condition of Recent Major Notification (International Contract, Merger, etc.), Kosei Torihiki, No. 398, December 1983, US Ex. 83-23.

[322]Distribution Problems and Antimonopoly Law, Yamamoto Takeshi, pp. 263-264, US Ex. 96-6.

[323]Directive No. 135, Guidance for Prior Explanation of Builders Carrying out a Notification for a Class I Store, 24 May 1990, US Ex. 90-4.

[324]According to the United States, "Prior Explanation" was abolished by Directive No. 24 on Local Government Regulations Concerning Store Openings, etc., 29 January 1992 and "Local Explanation" was implemented by Directive No. 25, Guidance for Local Explanation to Those Who submitted a Notification for New Construction of a Class I Large Scale Retail Store, 29 January 1992, US Ex. 90-4. However, Japan points out that "jimotosetsumei" should be translated as "public briefing" rather than "local explanation". See translation issue 14.

[325]Ministerial Order No. 33, 1 April 1994, US Ex. 94-6.

these adjustments continue to impair the growth of large stores as before the recent amendments. Finally, the law continues to apply to stores above 500 square meters (Class II stores), as compared to 1,500 square meters when the law was implemented in 1974.

5.325 **Japan** explains that over the course of the 1990s, the Government of Japan has instituted successive reforms of the Large Stores Law. In particular, in the past the review and adjustment process of the Large Stores Law had no strict time limits and could sometimes drag on for years; in 1994, however, MITI issued a circular directing that the entire process - from first notification to completion - would last no more than twelve months.[326] The average length of time to complete the process is actually only 6 months.[327] Also in 1994, MITI issued a general exemption from the normal Large Stores Law process for stores under 1,000 square meters in size.[328] In addition, the latest closing time that requires no notification has been changed from 6:00 p.m. (based on the Department Store Law), to 7:00 p.m. in 1990, and then to 8:00 p.m. in 1994. The number of the fewest annual business holidays that requires no notification has been changed from 48 days (also based on the Department Store Law) to 44 days in 1990 and then to 24 days in 1994. In parallel with these reforms, there has been a dramatic increase in new large stores (see Section VII below).

5.326 Accordingly, for Japan, the provisions of the Large Stores Law are now more liberal than those in 1979 and 1994, when the law had already been expanded in scope to include stores above 500 square meters in size. In addition, under the present Large Stores Law, large scale retail stores are free to open until 8:00 p.m. and with as few as 24 store holidays without a notification requirement. Under the law at the time of the 1979 tariff concession, large scale retail stores were only free to open until 6:00 p.m. and with as few as only 48 store holidays without a notification requirement. The law is therefore incapable of upsetting competitive conditions for imported film relative to conditions at the time of either tariff concession made by Japan on this product (i.e., the Tokyo Round concession in 1979 and the Uruguay Round concession in 1994). Furthermore, the Large Stores Law is also more liberal than its predecessor, the Department Store Law in 1967. First, the former law has adopted a notification and coordination system, while the latter law used a permission system. Second, the former law expressly mentions the protection of consumers' interest as one of its legislative objectives, while the latter law did not have such a consideration. Third, under the former law, large scale retail stores are free to open until 8:00 p.m. and with no fewer than 24 stores holidays without any requirement, while under the latter law large retailers were free to open only until 6:00 p.m. and needed at least 48 store holidays without permission.[329] In addition, under the Large Stores Law, as indicated above, approximately 96 percent of notified plans are implemented[330], while under the Department Store Law, only 84 percent of applications were permitted and implemented.[331] Thus, the Large Stores Law is more liberal than the Department Store Law was at the time of the Kennedy Round tariff concessions.

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[326]Handling Procedures for the Enforcement of the Law Concerning the Adjustment of Retail Business Operations at Large Scale Retail Stores, Sankyoku, No. 97, issued by DG, MITI, 1 April 1994, Section (1), Japan Ex. C-6.

[327]Figures compiled on a notification basis by MITI, Distribution Industry Division, Industrial Policy Bureau, for the fiscal year of 1995.

[328]Standards for Evaluating Probability under Article 7, Paragraphs 1 and 4 of the Large Stores Law (hereinafter "Probability Standards"), Sankyoku, No. 96, issued by DG, MITI, 1 April 1994, Section I(2)(iii), Japan Ex. C-7.

[329]With respect to the scope of regulated retail service, Japan submits that it is not definite that either is more restrictive. On the one hand, the Large Stores Law regulates retail stores with retail space in excess of 500 square meters, while it imposes no regulation on the opening and operations of retail stores with retail space no more than the threshold. Moreover, in practice, no adjustment is likely to be imposed on retail stores with retail space less than 1,000 square meters. On the other hand, the Department Store Law regulated only retailers operating more than one retail store with retail space in excess of 1,500 square meters, while it regulated all retail stores which were operated by such retailers (Japan Ex. C-1 and C-3).

[330]Figures compiled on a notification basis by MITI, Industrial Policy Bureau, Distribution Industry Division.

[331]Hyakkatenhorei no Kaisetsu (Guidebook of Department Store Law), Commercial Division, MITI, 1956, p. 65, Japan C-9.

5.327 The **United States** responds that Japan's contention that the current operation of the Large Stores Law does not severely restrict the growth of large stores is undercut by its own recent studies, which reached the opposite conclusion. These studies show that MITI and the prefectural governors are requiring significant floorspace reductions for proposed new stores, and that the number of directed floorspace reductions is increasing. Moreover, a 1995 JFTC study found that a number of local government bodies are imposing their own guidelines on store openings, and that "those planning to open stores continue to bear unreasonable burdens in the form of demands requiring very intricate store opening plans to be submitted and other unreasonable demands." Finally, the Japanese Government studies found that many larger stores feel compelled to negotiate informal adjustments with local retailers to ensure that they do not oppose their store in the review process. As a result, according to the JFTC in 1995, "those planning to open a store are unfairly hindered from opening new stores and freely developing business."

6. FORMAL AND INFORMAL ADJUSTMENTS

5.328 In the view of the United States, the formal adjustment procedure in combination with the adjustments arising from consultations with local retailers, cause large stores to reduce floorspace or hours or days of operation in a substantial number of cases.

(a) Adjustments under formal procedures

5.329 According to the United States, MITI and the prefectural governors require downward adjustment of floor space in a large percentage of notifications. The larger the store, the more likely it is to be subjected to downward adjustment and the greater the amount of the recommended adjustment. According to Japanese government data, for the years 1992-1995:

- For Class I stores, MITI ordered floor space reductions in 45 percent of the cases;
- For Class II stores, the prefectural governors ordered floor space reductions in 10 percent of the cases; and
- For Class I and Class II stores combined, the reviewing authorities ordered floor space adjustments in 29 percent of the cases.[332]

Government of Japan data based on reports from MITI regional offices show that the amount of floor space reduction is significant. For Class I stores, average floor space cut-backs ranged from 15 to 50 percent range. For Class II stores, the average reductions generally were between 3 and 30 percent.[333]

5.330 The United States further submits that data analyzed by the JFTC-sponsored Government Regulation and Competition Policy Council shows that the average size of floor space reductions ordered under the Large Stores Law has increased markedly in recent years. During 1988-1990, large supermarket owners were ordered to reduce the sales area of their proposed stores by an average of 13 percent in order to receive approval. By 1994, this average had increased to 22.6 percent.[334] The US submits individual examples to show the extent and burden of floor space reductions imposed on large scale retailers.[335] From such aggregated statistics and examples, there can be no question, according

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[332]Table of official statistics provided to the Government of the United States by the Government of Japan by a letter dated 10 December 1996.

[333]MCA Survey, p. 3, US Ex. 95-15.

[334]Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, p. 19, US Ex. 95-11.

[335]The United States cites the following examples:
-Floor space reductions for a leading chain store have escalated since the early 1990's even though the store's requested sales area declined by 9.3 percent per year. In 1992, three of its stores were ordered to reduce their proposed sales areas by 43 percent, 53 percent, and 63 percent. In 1996, Retailer X abandoned plans to build a store after being served with a store adjustment decision ordering it to reduce the floor space by a prohibitive 39 percent.

to the United States, that the floor space adjustment provisions of the Large Stores Law forces large retailers to significantly scale back their store size to obtain approval for the establishment or expansion of a large store.

5.331 **Japan** rebuts, however, that the United States fundamentally mischaracterizes the operation of the Large Stores Law. Focusing on the isolated exceptions to the general practice, it leaves the impression that all large stores are restricted, when in fact the vast majority of large stores - 80 percent - go through the entire process without having to make any changes in their planned retail space.

5.332 Japan argues that it is important to keep the overall adjustment process under the Large Stores Law in context. To obtain a clear picture of how the law actually operates, Japan requests the Panel to focus on two issues: (1) how often are the adjustment mechanisms actually invoked, and (2) if invoked, the magnitude of adjustments that are actually recommended.

5.333 Over the FY1992 to FY1995 period, 4,513 out of 5,679 notifications - approximately 80 percent of notifications - received no adjustment at all to retail space.[336] In other words, simply being subject to the Large Stores Law process does not mean that some adjustment will automatically occur. On the contrary, most stores require no adjustment at all.

5.334 In particular, the current law is rarely applied at all to stores with retail space under 1,000 square meters. Such stores are exempt from the normal process unless a municipal government or a Chamber of Commerce and Industry (or alternatively a Commerce and Industry Association) requests the deliberation by the Large Scale Retail Store Council on a notified plan, and the administering authority finds that the store is not comparable to other stores in the vicinity based on closing time and number of store holidays.[337] During the period May 1994 to April 1996, only 66 out of 2,280 new stores with less than 1,000 square meters of retail space, or 2.9 percent, had to follow the normal Large Stores Law process.[338]

5.335 Even when adjustments are made, they are generally modest. Actual experience with the Large Stores Law shows how limited these adjustments have been in practice:[339]

- For *retail space*, only 20.5 percent of the notifications receive any adjustment at all. For those stores adjusted, the average adjustment was only a 24 percent reduction in retail space.[340]

-Floor space reductions for a major national supermarket have increased substantially over the past two years. In 1994, Retailer Y was ordered to reduce floor space of new stores an average of 15.1 percent. In 1995, the average increased to 27.1 percent. Data for the first half of 1996 indicates an average floor space reduction of 24.2 percent, with two stores in Kyoto being hit with floor space cuts of 48.8 and 66.9 percent.
-In Kyoto, the Large Store Council required a supermarket to reduce the floor space of a new store from the requested 6,368 square meters to 2,500 square meters, a 61 percent reduction.
-The Large Store Council recommended that Daiei reduce the floor space of a store by 59 percent from the proposed 17,000 square meters to 7,000 square meters. In January 1996, Daiei appealed to the Regional Bureau of MITI explaining that it could not keep sufficient inventory with such a small store. In March, 1996, without modifying the decision, MITI issued an order that Daiei follow the decision made by the Large Store Council.

[336]Figures compiled on a notification basis by MITI, Industrial Policy Bureau, Distribution Industry Division.

[337]Probabilities Standards, Section 1, para. 4, Japan Ex. C-7.

[338]Japan notes that only a subset of this small number (34 cases or 1.5 percent) received any adjustment after the process.

[339]The data regarding store hours and holidays cover the period May 1994 - March 1996, while the opening days and retail space data cover FY1992 - FY1995.

[340]Japan notes that although the United States cites a few examples of large adjustments to retail space, such large restrictions are exceptional. Over the period FY 1992 - FY 1995 there were only 67 cases - 2 percent of all notifications - in which retail space reductions of over 50 percent were made.

- For *opening days*, only 2.8 percent of the notifications receive any adjustment at all. For those adjusted, the average delay in opening has been about 4.5 months, and in no case has the delay been longer than 12 months.

- For *closing time*, the adjustment only becomes an issue if the store wishes to be open past 8:00 p.m. Otherwise, there is not even an obligation to notify the authorities. Only 24 percent of the notifications receive any adjustment at all.

- For *store holidays*, the adjustment only becomes an issue if the store wishes to close fewer than 24 days per year, or basically twice a month. Otherwise, there is not even an obligation to notify the authorities. Only 27 percent of the notifications receive any adjustment at all.

5.336 In the view of Japan, the retail space reduction rate of 29 percent cited by the United States exaggerates the current rate and conceals the declining trend over time. This figure from the MCA Report cited by the United States refers only to the six MITI branches and six prefectural governments included in the MCA Report. Although the US data are technically correct, country wide data more appropriately represent the complete picture. The following are the average reduction rates in retail space, as calculated on the basis of those cases *where adjustment is made.*[341] The average reduction percentage of all notifications will likely be much lower:[342]

Figure N

Average Rate of Retail Space Reduction for Large Scale Stores

	1992	1993	1994	1995
Class I:	27.7	27.5	24.5	22.3
Class II:	19.9	25.9	20.6	20.4
Total:	24.6	26.9	23.6	22.0

5.337 Japan further argues that there are no significant procedural burdens imposed by the Large Stores Law. The average examination period under the law is now only six months.[343] Furthermore, the expenses associated with going through the process are not a substantial barrier to entry.

(b) Continued effect of local measures

5.338 **The United States** submits that supplementing the Large Stores Law are prefectural and local ordinances and regulations requiring notification and "adjustment" by medium and large-scale retail stores planning to open or expand a retail outlet. Several local jurisdictions in Japan maintain such measures. The Large Stores Law expressly recognizes the existence of these local measures, and rather

[341]According to Japan, contrary to US allegations, the retail space reduction rate has declined. The data used in the report of the JFTC ad hoc study group cited by the United States are only those relating to "the cases where the deliberation by the Large Scale Retail Store Council is settled, classified depending on the time of Article 3 Notifications of subject supermarkets," as expressed in the appendix to this report (5 supermarkets were subject to this study). While such data are not necessarily inappropriate as a basis for a report prepared by such an ad hoc study group for a governmental official, they are definitely inappropriate to be used as materials for adjudicatory factfinding proceedings. This is also the case with respect to the MCA Report.

[342]Japan does not concede that the average reduction rate indicates the degree of restrictions. According to Japan, the cases cited by the United States are exceptional.

[343]Data determined by MITI, Distribution Industry Division, Industrial Policy Bureau, based on Article 3 notifications.

than prohibiting them, merely requires that they "respect the intent" of the Large Stores Law.[344] In the view of the US, these local measures provide another avenue for government authorities to impose adjustments on large stores, and for local retailers to informally extract concessions from large stores.

5.339 According to the United States, the JFTC Council found that, as of March 1995, a number of local government bodies were still imposing their own written guidelines on store openings, so-called "augmenting" or "supplementary" regulations, which are beyond the scope and requirements of the Large Stores Law, in that they apply to stores with a floor space of less than 500 square meters.[345] It concluded that:

> "[T]hese excessive regulations and non-transparent administrative guidance on the part of local government bodies and public entities make those planning to open stores continue to bear unreasonable burdens in the form of demands requiring very intricate store opening plans to be submitted and other similar demands".[346]

5.340 The JFTC Council report also found that some local governments have so-called "augmenting" regulations, which are in addition to the requirements of the Large Store Law. The Council cited as examples the imposition of obligations to engage in consultations with local government bodies and to "explain to local governments a specific program for co-existence and co-prosperity with local retailers".[347] The 1995 Survey by the Management and Coordination Agency made similar findings.[348]

5.341 Local regulations have, as the JFTC Council concluded, "resulted in a lengthening of the store opening adjustment time and a loss of transparency in the adjustment process, resulting in some cases in significant handicaps to the opening of new large scale retail stores".[349] The "adjustments" taking place under these local measures add to the burdens on large stores. The measures also create another opportunity for local retailers to impose requirements on large stores in order for the large stores to clear the regulatory process without objection.

5.342 **Japan** rebuts that based upon its authority under Article 15-5 of the Large Stores Law, in fact, MITI has undertaken significant efforts in recent years to ensure that additional local regulations are not excessive or inconsistent with the Large Stores Law. Japan notes that the Constitution and national law contemplate that local governments will enact regulations, but does not permit local governments to enact regulations beyond the provisions of national law. In 1989, a MITI survey revealed over 400 additional local regulations that were deemed excessive.[350] MITI ordered corrective action, and by 1993 all of the offending local measures had been brought conformity with the national law. In 1992, the Large Stores Law itself was amended to state explicitly that additional local regulations must "respect the spirit and intentions" of the Law.[351] Japan also argues that the surveys cited by the US are not representative of current conditions.

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[344]Large Stores Law, Article 15-5, US Ex. 74-4.

[345]Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, p. 23, US Ex. 95-11. Japan disagrees with the US interpretation of the JFTC ad hoc study group report. See translation issue 12.

[346]Ibid.

[347]Ibid.

[348]MCA Survey, p. 61, US Ex. 95-15. Japan disagrees with the US interpretation of the MCA survey. See translation issue 12.

[349]Ibid., p. 17.

[350]It would be permissible "to supplement incidental procedures which help accomplish the adjustments in a smooth and appropriate manner". Additional Local Regulations on New Store Openings, etc. by Local Governments, Sankyoku, No. 24, issued by DG, MITI, 29 January 1992 (hereinafter "Additional Local Regulations Circular"), Japan Ex. C-13.

[351]Large Stores Law, Article 15-5, Japan Ex. C-1.

5.343 Japan further explains that in 1994, MITI created ombudsmans offices in all of its branches to hear complaints of excessive local regulations and take corrective action.[352] Thus, the US characterization of local regulations is not consistent with current reality.[353] In any event, the record numbers of new notifications and large store openings confirm that neither the national law nor local measures are restricting the growth of large stores.

5.344 The **United States** provides examples of recent cases in which local measures were applied to scale back the size and operations of retail stores.[354]

(c) Informal procedures under the Large Stores Law

5.345 The United States contends that the formal process established by the Large Stores Law and related administrative measures and local measures are only the tip of the iceberg. Many larger stores feel compelled to negotiate informal adjustments with local small and medium retailers to ensure that the local retailers do not oppose their store in the formal review process. This informal adjustment process in turn promotes the negotiation and signing of agreements between competitors that restrict the business activities and price competitiveness of large stores. Although these anticompetitive agreements are technically "private" agreements, the mechanisms of the Large Stores Law and local measures all but assure the need for large retailers to enter into them, at least in those regions where the formal review process is particularly strict.

5.346 The United States submits that the Large Stores Law presents three opportunities for local retailers to impose informal and formal "adjustments" on plans for new or expanded large stores. The first is the "prior-explanation"[355] adjustment process that may precede the builder's Article 3 Notification of its intent to build a new or expanded large store. The second is a "local explanation" process that occurs after a builder or retailer submits an Article 3 Notification, but before it submits an Article 5 Notification. The third is the Large Store Council review process that occurs after a retailer submits an Article 5 Notification of its intent to open a new or expanded store.

(i) "Prior explanations"

5.347 The United States submits that although MITI revoked in 1992 its administrative guidance requiring the builder of a new store to consult with, and obtain the consent of local retailers before submitting an Article 3 Notification initiating formal procedures under the Large Stores Law, a 1995 survey by the Management and Coordination Agency (MCA), found that MITI regional offices and some prefectural governments still guide and advise large scale retailers to provide national, prefectural and local governments and the Chamber of Commerce with explanations of their store opening plans before submitting an Article 3 Notification.[356] Retailers responding to the MCA survey indicated that they do provide such explanations, and that sometimes they are forced to enter into agreements with local retailers in this process in order to ensure that their formal notification proceeds smoothly.[357]

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[352]Establishment of Ombudsman on Additional Local Regulations Etc. on New Store Openings by Local Governments, Sankyoku No. 92, issued by DG, MITI, 9 April 1994, Japan Ex. C-14.

[353]According to Japan, the examples cited by the United States are not inconsistent with the national law on their face. Further, Japan claims to have appropriately dealt with local regulations on medium stores mentioned in the MCA Report after reviewing the text of the regulations in light of the Additional Local Regulations Circular, Japan Ex. C-13.

[354]Arrangement Letter and Agreements between a New Retail Store and the Local Shopping Center Association, 1996, US Ex. 93.

[355]JFTC Report, pp. 15-16. MCA Survey, pp. 24-25, US Ex. 95-15.

[356]MCA Survey, p. 31; Directive No. 93, 1 April 1994, US Ex. 94-7.

[357]Ibid. See also, Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, pp. 15-18.

5.348 **Japan** responds that citations relating to past MITI actions that allegedly fostered negotiations between large store planners and local retailers are irrelevant, since all of these measures were abolished in 1992.[358] There is no longer any "prior adjustment" or "prior explanation," and there is no longer any Commerce Adjustment Board. Since 1992, MITI has been making continuing efforts to correct the practice of requiring "prior explanation." The instances of "prior explanation" described in the MCA report are rare cases, and MITI has already instructed the relevant MITI branches and prefectural governments to stop giving advice calling for "prior explanation." Should any advice be given, MITI will take appropriate measures as soon as possible.

(ii) "Local explanations"

5.349 The next opportunity for retailers to impose informal adjustment, according to the **United States**, comes after the formal Article 3 notification. A MITI Directive specifically directs MITI regional offices and prefectural governments to request retailers to provide local parties with an explanation of their plans within four months after submitting the Article 3 Notification.[359] According to the 1995 MCA survey, the governmental entities generally designate the localities and associations to whom such explanations are to be given.[360] The MCA Survey revealed that between 1992-1994, the average number of organizations designated to receive explanations ranged from four to 13, with a high of 180 organizations.[361] MCA also surveyed the costs of such explanations, and found that large retailers spend several hundred thousand yen to provide the explanations, and in some cases the costs exceeded 3,000,000 yen.[362]

5.350 For the United States, MITI has given further legitimacy to the local explanation process by providing in a Directive that the local explanations "serve as a resource for the deliberations of the Large Store Council".[363] Since MITI must take into account the Council's recommendations on "adjustments", the local retailers at the Article 3 "local explanation" stage have a direct means to influence MITI's decision on whether to impose "adjustments" on the large retailer after the later Article 5 Notification. Thus, local explanations give local retailers leverage to extract concessions from the large store outside the formal process, and provide an incentive to the large retailer to placate local retailers to ensure that it is able to proceed with its plans, even if it is in a reduced form.

5.351 **Japan** submits that all that is required is that the large store planner make a "public briefing"[364] after the Article 3 notification (new store construction) but before the Article 5 notification (new store opening). The "public briefing (after Article 3 notifications) is necessary in order to clarify the content of the store opening plan to small and medium-sized retailers and consumers around the site for the store, thereby facilitating the deliberations by the Large Scale Retail Store Council" by helping local interested parties understand the plan and comment on it.[365] The relevant MITI circular expressly indicates that the purpose of the public briefing is "not to seek consent, etc., from them".[366] Japan

[358]Instructing Parties Filing Notifications of New Type-I Large Scale Retail Stores, etc. to Hold Public Briefing, Sankyoku, Nos. 25 and 26, issued by DG, MITI, 29 January 1992 (hereinafter, collectively, "1992 Public Briefing Circulars"), Japan Ex. C-17.

[359]Directive No. 93, 1 April 1994, US Ex. 94-7.

[360]MCA Survey, p. 31, US Ex. 95-15.

[361]Ibid., p. 35.

[362]Ibid., p. 41.

[363]Section 1, Directive No. 93, 1 April 1994, US Ex. 94-7.

[364]In US submissions, the "public briefing" is referred to as a "local explanation". See translation issue 14.

[365]Instructing Parties Filing Notifications of New Type-I Large Scale Retail Stores etc. to Hold Public Briefing (hereinafter "1994 Public Briefing Circulars"), Sankyoku, Nos. 93 and 94, issued by DG, MITI 1 April 1994, Section 1, Japan Ex. C-18.

[366]Ibid.

also notes that the United States exaggerates the amount of money that large stores must spend during the public briefing process.[367]

(iii) Large Store Council Review

5.352 The **United States** further argues that the third opportunity for local retailers to impose adjustments occurs during the Large Store Council review. The MCA survey found that in the overwhelming majority of cases the authorities designate the local chambers of commerce and business associations as the main or only parties to provide views to the Large Store Council. The survey found that in 99.2 percent of the cases, the recommendations of the Large Store Council were based directly on the views of local chambers of commerce or business associations in the locality where the store was to be opened.[368]

5.353 The United States cites the June, 1995 report to the JFTC from its Government Regulation and Competition Policy Research Council, quoting that the Large Store Council's consideration of a large store notification "can easily reflect the views of local retailers".[369] According to this JFTC Council, "existing local retailers remain influential members of these organizations" and even "consumer and academic representatives [on the Councils] have close ties to local retailers".[370] The report concluded that in order to prevent recommendations by Large Store Councils of substantial adjustments, large scale retailers enter into negotiations with local retailers.[371] The report also found that in some cases, MITI itself forced large retailers to negotiate with local retailers in connection with an Article 3 Notification and local explanation process:

> "Prior to Article 3 Notification, it appears that in quite a number of cases, those planning to open a store are providing not merely explanations of outline of plans but what amounts effectively to "adjustment".
>
> [S]ome large supermarkets have pointed out that: 1) they have been required to deliver a very large number of explanations (to as many as 45 organizations in one case); 2) they have been forced to alter the method of delivery of the explanation for each recipient organization; *3) some local offices of MITI have orally demanded they lay ground work following local rules or customs; and 4) they have been forced into what amounts to an adjustment process due to demands from existing local retailers* to make out an agreement, etc. Thus, it appears that those planning to open a store continue to be saddled with unpredictable and excessive burdens".[372]

5.354 **Japan** submits that ultimately, only objective criteria are used to determine the need for an adjustment under the Large Stores Law; the law does not necessitate any sort of negotiation between the store planner and the local retailers.[373] The procedures require consideration of all opinions, thereby ensuring a fair and impartial process.

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[367]Even using the largest reported expenditure of ¥3,400,000 as a base, this amount constitutes less than 0.5 percent of a single year's turnover for a large store over 20,000 square meters This expense represents only a tiny fraction of a large store's initial start-up costs. data taken from Census of Commerce: Statistics on Large Scale Retail Stores (Retailers), August 1996, pp. 10-11, Japan Ex. C-8.

[368]MCA Survey, p. 50, US Ex. 95-15.

[369]Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, p. 17, US Ex. 95-11.

[370]Ibid. According to Japan, the United States misleadingly suggests that in the JFTC ad hoc study group report "these organizations" refer to the "Large Scale Retail Store Council". However, in Japan's view, the text of the report clearly shows that "these organizations" refer to the "Chamber of Commerce and Industry". See translation issue 15.

[371]Ibid., pp. 20-21.

[372]Ibid., p. 16 (emphasis added by the United States).

[373]See Deliberation Procedures, Sections II and III, Japan Ex. C-4.

5.355 Japan further explains that the Large Scale Retail Store Council is organized so as to ensure the fairness of the process. Members of the Council are selected and appointed by the MITI Minister from among neutral members of learning and experience. No retailer is included as a member. The US claim that the Large Stores Law process is controlled by small and medium-sized retailers has no support in the membership of the Large Stores Law. The Large Stores Law thus does not provide opportunities for local retailers to "extract concessions" at each stage of the process; the Council applies objective standards to reach a neutral and unbiased decision.

5.356 The **United States** further submits that informal adjustments have also led to the extraction of "cooperation money" from large scale retailers. The JFTC Council found cases in which operators of new stores were forced to pay cooperation money to local retailers, which was "labelled a 'membership fee' or 'modernization fund contribution'".[374] The MCA Survey made similar findings regarding the payment by large retailers of "cooperation money" or membership fees in the local shopping district business associations.[375] These findings illustrate the power that local retailers wield in the process of large retailers' attempts to establish competing large stores. In the view of the US, the Large Stores Law process virtually guarantees that local retailers will force large retailers to make downward adjustments in their business plans.

5.357 **Japan** contests that the law contains no requirement forcing store openers to negotiate with local retailers, enabling the latter to extract onerous concessions from a new large store as the price to be paid for being allowed to open. To the extent there are any local regulations which result in the imposition of such a requirement in contravention of the stated policy of the Government of Japan, appropriate corrective actions have been and will continue to be taken.[376]

7. IMPACT OF FLOOR SPACE ADJUSTMENTS AND RESTRICTIONS ON OPERATION ON THE GROWTH OF LARGE STORES

5.358 The **United States** claims that the adjustments in opening date, floor space, days closed and hours of operation have the effect of restricting the growth of large stores in Japan.

5.359 *Opening Date* - The United States argues that while a retailer is waiting to earn a return on its investment during the review and adjustment process, it may have interest payments or other costs associated with the capital tied up in that investment. Costs without returns mean losses, and losses delay expansion plans, and investment cannot be used for another project. Causing delay in the opening of a store translates into suppressing the growth and expansion of large stores.

5.360 Official MCA data also show that the delays from the review and adjustment process are significant. The average length of time from the Article 5 Notification (store opening advance notification) to the completion of the Large Store Council review in recent years consistently has averaged from seven to eight months.[377]

5.361 **Japan** notes, however, that only 2.8 percent of the notifications receive any adjustment at all with respect to their opening dates. Also, Japan points out that the average length of time of the procedure is now only six months.

5.362 *Floor Space* - According to the **United States**, the profitability of a retail store is directly related to the amount of floor space required to operate efficiently. The Large Stores Law has a chilling effect

[374]Ibid.

[375]MCA Survey, p. 42, US Ex. 95-15.

[376]Japan further notes that the Government of Japan neither requires nor recommends that such payments be made. Whether or not private businesses voluntarily choose to make such contributions is outside the government's responsibility.

[377]MCA Survey, Table 6.

on the opening of large stores because retailers have no assurances that the size of the store they will be allowed to open will coincide with the size of the store required by their business plan to be profitable.

5.363 On the basis of a major retailer's sales estimates, the United States calculates that a 20 percent floor space reduction to 12,000 square meters effectively decreases revenue by about 500 million yen per year. A 30 percent reduction reduces annual revenue by about 1 billion yen, and a 50 percent floor space reduction translates into a 2.5 to 3 billion yen loss in revenue per year.[378] According to the US, floor space reductions of this magnitude render any original business plan useless.

5.364 In the view of **Japan,** however, in the first place, these estimates are useless since they do not take into account *cost* reductions that would ensue from reduced retail space. In any event, the fact that 96 percent of all notifications result in store openings demonstrates that neither retail space adjustments, nor adjustments of other parameters, nor alleged procedural burdens are having any kind of disruptive impact.

5.365 *Store Hours and Days Closed* - The **United States** submits that the JFTC's June 1995 report found that limiting hours and days of operation also hurts the competitiveness of large stores:

> "The restrictions on store closing time, number of days closed and other matters of store operation under the current Large Stores Law do more than just interfere with the free development of business on the part of business operators. For example, extending store hours can help bring in new customer groups and thereby encourage store operators to rethink their sales methods and otherwise use their creativity. Thus, extended store hours represent an important competitive tool with great possibilities. However, restricting these activities not only limit fair and free competition among business operators, but is also likely to limit consumers' freedom of choice as a result".[379]

5.366 **Japan** points out that for closing time, the adjustment only becomes an issue if the store wishes to be open past 8:00 p.m. Otherwise, there is not even an obligation to notify the authorities. Only 24 percent of the notifications receive any adjustment at all. Also, for store holidays, the adjustment only becomes an issue if the store wishes to close fewer than 24 days per year, or basically twice a month. Otherwise, there is not even an obligation to notify the authorities. Only 27 percent of the notifications receive any adjustment at all.

5.367 In the view of the **United States**, perhaps the best indication of the continuing effectiveness of the restrictions on large stores is the fact that the presence of large stores in the Japanese market has not increased despite the recent changes in the laws and measures. From 1982 to 1994 (the most recent year for which figures are available), the share of retail sales in Japan by large stores remained essentially constant and the share of total retail establishments that were large stores also remained essentially constant:

[378]Estimates by staff of Retailer X. Frederick Nagai Affidavit of 14 February 1997, p. 3, US Ex. 97-8.

[379]Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, p. 22, US Ex. 95-11.

Year	Percent of Retail Sales in Japan by Large Stores[380]	Percent of Retail Establishments in Japan That Are Large Stores[381]
1982	20.8	0.6
1985	21.4	0.6
1988	22.0	0.7
1991	21.7	0.8
1994	22.2	0.9

For the United States, this consistent suppression of the growth of large stores limits opportunities for imports to by-pass Japan's manufacturer-controlled, vertically integrated distribution system and to reach Japanese consumers through more direct channels.

5.368 For **Japan**, however, the facts are contrary to the US allegation that the adjustments and procedural burdens of the law have a restrictive chilling effect on the growth of large stores. As noted above, new large store notifications have surged from around 500 per year in the 1980s to over 2,000 per year currently. This surge results from a variety of factors, including increased consumer demand for various types of large stores and the increased mobility of Japanese consumers. During the 1980s, new notifications under the law averaged around 500 per year. When deregulatory initiatives took effect, new notifications surged to record levels:[382]

Number of New Notifications for Large Stores

Year	New Notifications
FY 1992	1,692
FY 1993	1,406
FY 1994	1,927
FY 1995	2,206

The dramatic growth in notifications has been matched by growth in actual store openings. Over the same four fiscal years, 96 percent of all notifications resulted in actual store openings.[383]

[380]MITI, Shogyo Tokeihyo Dai Kibo Kouri Tenpo Tokeihen 1982, p. 342; Ibid., 1985, p. 114; Ibid., 1988, p. 114; Ibid., 1991, p. 116; Ibid., 1994, p. 114 (number of large-scale stores), US Ex. 82-1. MITI, Census of Commerce 1994, Vol. I, p. 19 (total retail stores). Large Stores include Class I and Class II stores.

[381]Ibid.

[382]Figures compiled on a notification basis by MITI, Distribution Industry Division, Industrial Policy Bureau, including the four most recently completed fiscal years.

[383]Ibid. In a few cases, retailers decided for their own business reasons not to go forward with their plans. It is unrealistic to expect 100 percent follow-through on plans.

5.369 In parallel to the increase in the number of new notifications, the sales share of large stores in all sales by all retailers have been increasing steadily:[384]

Share of the Total Retail Sales[385]

Year	Sales Share of Large Stores
1982	27.1 %
1985	27.9 %
1988	28.6 %
1991	28.2 %
1994	29.3 %

5.370 Japan further stresses that 96 percent of all notifications in recent years have resulted in actual store openings. These figures belie the US claim of a chilling effect. As currently administered, the Large Stores Law does not act to restrict the growth of large stores in Japan. For Japan, it is hard to find in any of the data discussed above support for the US view of the Large Stores Law as a restrictive regulatory structure that prevents or chills new store openings.

[384]Japan notes that indeed, the United States itself cites data which show that from 1982 to 1994, large stores as a percentage of total retail establishments climbed from 0.6 percent to 0.9 percent - an increase of 50 percent.

[385]Census of Commerce: Statistics on Large Scale Retail Stores (Retailers), 1984, pp. 342-343; 1987, pp. 114-115; 1990, pp. 114-115; 1993, pp. 116-117; 1996, pp. 114-115, Japan Ex. C-8. Japan notes that these figures differ from those cited by the United States. The US figures are based upon the sales by those large retailers operating a store with retail space in excess of 500 square meters in large scale retail stores, while Japan's figures are based upon the sales by all retailers, that are operating in large scale retail stores. Japan claims that their figures rather than the US figures provide a fair basis for the evaluation of the effect of the Large Stores Law, because the law regulates all retailers in large retail stores. The trend has been positive; however, in principle Japan does not agree that the large scale store share of the total retail market is an appropriate measure of the nature of the law.

C. PROMOTION "COUNTERMEASURES"

1. INTRODUCTION

5.371 The **United States** submits that Japan has reinforced its "liberalization countermeasures" directed against wholesalers and retail stores by limiting how photographic materials producers can promote their products. In doing so, the Japanese Government has, in the view of the United States, curtailed two of the most important remaining means by which imported film and paper may gain a foothold or expand their position in the domestic market: economic inducements to customers and aggressive advertising.

5.372 According to the United States, Japan has implemented its "promotion countermeasures" through application of the following laws: (1) restrictions on the use of economic inducements and statements in advertising under Articles 2 to 4 of the "Act Against Unjustifiable Premiums and Misleading Representations" ("Premiums Law")[386]; (2) an unduly restrictive enforcement regime under Articles 6, 9 and 10 of the Premiums Law; and (3) restrictions on the use of economic inducements and statements in advertising under regulations promulgated pursuant to Articles 2(9) and 19 of the "Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade" ("Antimonopoly Law").[387] Enforcement of these measures primarily is the responsibility of the Japan Fair Trade Commission ("JFTC"), which has issued numerous "designations" and "notifications" specifying the activities that fall within the scope of the laws. The United States further argues that Japan has bolstered enforcement efforts by empowering the prefectural governments to issue cease and desist orders under the Premiums Law and by deputizing members of the domestic industry, in the guise of "fair trade councils", to enforce the Premiums Law through the use of "fair competition codes".

5.373 The United States argues that Japan's "promotion countermeasures" have disadvantaged foreign film and paper manufacturers by constraining their ability to increase sales through the use of certain discounts, gifts, coupons and other inducements, or to rely upon innovative advertising campaigns, particularly where price or price comparisons are discussed. In the US view, Japan imposed these "countermeasures" for the purpose of dampening import competition and, to ensure their success, enlisted the aid of the domestic photographic materials industry in enforcing the regime. Though many of the measures are facially neutral, others are, according to the United States, blatantly protectionist in discriminating against imports. Regardless of form, each has served to maintain the dominant position of Japanese film and paper manufacturers by shielding them from significant forms of promotion competition.

5.374 For **Japan**, the major part of the US submission rests on a conspiracy hypothesis which should be treated with caution. Although the United States claims that the JFTC has taken part, consistently and surreptitiously over the past 35 years, in a concerted action which is a diametrical opposite of the espoused policy, according to Japan, the truth is that the JFTC has long been an active advocate of a more open Japanese economy. Japan argues that the concept of "promotional countermeasures" as used by the United States is fictional. It has no place in the Japanese regulatory language, nor has the Japanese Government ever taken such measures. According to Japan, the United States has admitted that there is no original Japanese phrase or word corresponding to "promotion countermeasures".[388]

5.375 In Japan's view, the US argument emphasizes what an American business was not able to do in selling film in Japan. Japan notes that there are a wide range of lawful promotional initiatives and that the JFTC regulates nothing other than distortive practices, namely, (i) excessive premiums and (ii) misleading representations. The Premiums Law does not restrict in any way low price sales.

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[386]Law No. 134 of 15 May 1962, Kanpo, 15 May 1962, amended by Law No. 44 of 30 May 1972, US Ex. 72-1.
[387]Law No. 54 of 1947, US Ex. 47-1.
[388]See translation issue 1.

Advertising is entirely lawful unless it is misleading to consumers. Japan concludes, therefore, that American businesses have been able to compete freely, subject to no restriction whatsoever under the Premiums Law, in pricing and quality, the two most important aspects of market competition.

5.376 Japan further submits that the United States does not show how much discriminatory impact the "promotional countermeasures," if they ever existed, would have on trade in photographic film and paper. Even if the Premiums Law should have some negative impact on market entry, Japan submits that it could not have been a substantial impediment for established foreign companies such as Kodak which had been active in the Japanese market for a long time with a recognized brand name. Japan also argues that no applicable "fair competition code" or "fair trade council" exists in photographic film and paper. Moreover, in Japan's view, self-regulation similar to a "fair competition code" or a "fair trade council" is not unique to Japan, but exists in many parts of the world as a tool to effectively implement regulations of excessive premiums and misleading representations.

2. THE LAWS UNDERLYING THE PROMOTION "COUNTERMEASURES"

5.377 The **United States** claims that Japan's "promotion countermeasures" arise from articles of the Premiums Law and certain designations under the Antimonopoly Law. At first glance, these measures may appear to be standard trade regulation rules, but, in the US view, some of their provisions have been interpreted and applied by Japan in an overly broad manner so as to impede import sales.

(a) The Antimonopoly Law

5.378 For the United States, the Japanese Antimonopoly Law, as originally enacted on 14 April 1947, was a comprehensive antitrust statute. It targeted four general economic evils for elimination: private monopolization, unreasonable restraints of trade, unfair methods of competition and excessive concentrations of power. The Antimonopoly Law was promulgated during the allied occupation of Japan following World War II and was designed to reduce the influence of powerful cartels in Japan. The Antimonopoly Law also established the JFTC, which was created to enforce the law.

5.379 For **Japan**, the Antimonopoly Law is a competition law with the purpose of promoting fair and free competition. Similar to competition laws of various countries, its goal is fully consistent with the principle of the WTO in ensuring an open and free trading system. According to Japan, the JFTC is the sole administrative agency responsible for the enforcement of the Antimonopoly Law. The Law delegates an independent and exclusive authority to the JFTC, and its interpretation and application of the Law is not subject to coordination or consultation with other agencies.[389]

5.380 The **United States** maintains that, during World War II, trade associations in Japan facilitated government control over industries, enhanced cartel influence and enforced cartel practices.[390] "Essentially, the Japanese Government granted legal authority to these private control associations to enforce economic cartel decisions, which in turn permitted the government to control economic activity through these control associations."[391] In 1948, the Japanese Diet supplemented the Antimonopoly Law by enacting the Trade Association Law.[392] The Trade Association Law proscribed a wide variety of anticompetitive trade association activities, including price controls and other restraints of trade, and enumerated limited permissible activities, such as exchanging public information and product standardization guidelines.[393]

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[389]See Article 28 of the Antimonopoly Law.

[390]Thomas A. Bisson, Zaibatsu Dissolution in Japan, (1954), p. 191, US Ex. 54-1.

[391]Seita Alex and Tamura Jiro, The Historical Background of Japan's Antimonopoly Law, 115 University of Illinois Law Review, (1994), pp. 63-64, US Ex. 94-2.

[392]Iyori Hiroshi and Uesugi Akinori, The Antimonopoly Laws of Japan, (1983), p. 13, US Ex. 83-1.

[393]Ibid.

5.381 According to the United States, after the end of the allied occupation, the Japanese Diet in 1953 amended the Antimonopoly Law in several significant aspects. The amendments included new provisions permitting formation of "rationalization and depression cartels".[394] "Under the amendment, these two types of cartels were given exemption from the application of the Antimonopoly Law when they were licensed by the JFTC, and enterprises could enter into agreements among themselves for the purpose of overcoming a depression and also in order to rationalize their business operations".[395] The amendments also expanded the authority of the JFTC to restrict certain trade practices it found to be unfair or excessive when compared to norms in a particular industry.[396]

5.382 The United States submits that the Antimonopoly Law in its initial form permitted only limited exemptions.[397] However, in 1952, the Diet passed the first of many laws that expressly exempted certain kinds of cartel behaviour from the Antimonopoly Law: the Stabilization of Specific Small and Medium Enterprises Temporary Measures Law"[398] and the "Export Trading Law".[399] The former permitted smaller businesses to form cartels to restrict output in the face of declining demand, while the latter allowed for the creation of exporting cartels.[400] The Diet subsequently passed many other Antimonopoly Law exemption laws.[401] "These laws had provisions allowing the formation of cartels, and furthermore, allowed the issuance of ministerial orders to non-members of the cartel agreement to make them observe the restrictions of the cartel agreement … [T]hese provisions were modelled after prewar cartel-promotion laws".[402] For the United States, the 1953 amendments marked a retreat by the Japanese Government from opposition to restrictive trade practices and the beginning of overt government/private sector cooperation in the cartelization of sectors of the Japanese economy, as was the practice during World War II.[403] A byproduct of this development was the erection of barriers defending against foreign competition. As one of Japan's leading scholars of international trade law has explained, "[W]hen one considers the gap that exists between domestic and foreign firms with respect to scale of business, managerial power, financial resources, and other matters, it probably cannot be denied that, by maintaining fair competition through the Antimonopoly Law, the actual result will include an aspect of protection for domestic firms from unjust pressure by foreign-capital."[404] The sections of the AML banning "unfair trade practices," as revised in 1953, remain largely the same today.[405]

5.383 The United States further argues the following in respect of the JFTC's activities in regulating unfair trade practices. It notes that Article 19 of the Antimonopoly Law provides that "[n]o entrepreneur shall employ unfair trade practices". Antimonopoly Law Article 2(9) sets forth categories of "unfair trade practices" and delegates to the JFTC authority to designate impermissible practices under the law.

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[394]Matsushita Mitsuo, International Trade and Competition Law in Japan, 1993, pp. 79-80, US Ex. 93-1.

[395]Iyori Hiroshi and Uesugi Akinori, The Antimonopoly Laws of Japan, 1983, p. 16, US Ex. 83-1.

[396]Ibid., US Ex. 83-1.

[397]See Antimonopoly Law, Articles 20-24.

[398]Law No. 294 of 1952. This law was repealed by Law No. 185 of 25 November 1957.

[399]Law No. 299 of 1952, US Ex. 52-1. This law was renamed Export and Import Trading Law, Law No. 188 of 8 August 1953.

[400]Iyori Hiroshi and Uesugi Akinori, The Antimonopoly Laws of Japan, 1983, p. 19, US Ex. 83-1.

[401]Ibid., US Ex. 83-1.

[402]Iyori Hiroshi and Uesugi Akinori, The Antimonopoly Laws and Policies of Japan, 1994, p. 32, US Ex. 94-1.

[403]Ibid., pp. 30-34.

[404]Matsushita Mitsuo, Antimonopoly Law & International Transactions (25 May 1970) p. 83, US Ex. 70-2.

[405]The 1953 amendments established the basic structure of the current AML and the modern "unfair trade practice" provisions that underlie Japan's promotion countermeasures. The AML was amended in 1977 to provide the JFTC with additional authority to control monopoly and cartel activity, as well as to impose a reporting system on prices in oligopolistic markets. However, the 1977 amendments are not pertinent for present purposes. See Mitsuo Matsushita, International Trade and Competition Law in Japan, (1993), pp. 79, 82-84, US Ex. 70-2.

5.384 The JFTC issued a list of designated "unfair trade practices" shortly after the Antimonopoly Law was amended in 1953.[406] The JFTC defined unjust inducements as "[i]nducing or coercing, directly or indirectly, customers of a competitor to deal with oneself by offering unjust advantages or by threatening unjust disadvantages in the light of normal business practices".[407]

5.385 The United States submits that the JFTC revised its list of "unfair trade practices" in 1982, modifying the earlier designations and expanding the list from 12 to 16 practices.[408] With respect to unjust inducements, the JFTC prohibited "[i]nducing customers of a competitor to deal with oneself by offering unjust benefits in light of normal business practices".[409] The JFTC also added a new provision addressing representations related to commercial transactions. The JFTC outlawed "[u]njustly inducing customers of a competitor to deal with oneself by causing them to misunderstand that the substance of a commodity or service supplied by oneself, or terms of the transaction, or other matters relating to such transaction are much better or much [more] favourable than the actual one or than those relating to the competitor".[410]

5.386 In the US view, these designations ostensibly protect consumers and guard against well-capitalized businesses acting in a predatory fashion (*i.e.*, using their capital strength to dominate the market through massive give-away-type promotions). According to the United States, however, Japan has employed the unjust inducement and misleading representation designations to insulate domestic film and paper manufacturers from competitive promotional activities by imports.

5.387 In **Japan**'s view, the JFTC has never accorded any foreign entity or product treatment less favourable than that accorded to a Japanese entity or product. On the contrary, the Commission has taken a series of measures, such as economic surveys and reports, the formulation of "Distribution Guidelines," the establishment of a special task force, as well as enforcement actions, in order to eliminate impediments to the market access of foreign products.

5.388 Japan submits that the film manufacturing industry and its oligopolistic structure has been a target of the JFTC's attention since the 1960s. To demonstrate this, Japan provided the Panel with a series of actions taken by the JFTC with respect to the film manufacturing industry. It also argues that since the introduction in 1977, by an amendment to the Antimonopoly Law, of measures against monopolistic conditions and parallel price increases[411], the JFTC has been monitoring the film manufacturing industry.

(b) The Premiums Law

5.389 The **United States** submits that the Japanese Diet enacted the Premiums Law on 15 May 1962.[412] In the US view, as they relate to premiums and representations, the Premiums Law and Antimonopoly Law overlap. The Premiums Law regulates use of premiums and representations in a narrower, more pointed manner. JFTC designations under the Premiums Law typically set out specific criteria with respect to premiums or promotional representations as used within selected industries. In contrast, the JFTC's designations under the Antimonopoly Law serve as catch-alls, applying normal business practice as a standard governing premiums and representations by members of all industries. The

[406]JFTC Notification 11 of 1953.

[407]Ibid., designation 6.

[408]Notification on Unfair Trade Practices, JFTC Notification 15 of 15 June 1982, US Ex. 82-6, which replaced Notification 11 of 1953.

[409]JFTC Notification 15, designation 9.

[410]Ibid., designation 8.

[411]See Articles 8-4 and 18-2 of the Antimonopoly Law.

[412]The United States translation of the Premiums Law is contained in US Ex. 62-6. Japan indicates that it disagrees with a number of points of the US translation. See Japan Ex. D-1. The expert opinions on the translation issues raised by Japan are contained under item 16 of the Annex on Translation Problems.

redundant nature of the Premiums Law and the premium and representation designations under the Antimonoploy Law doubly burden imports attempting to market products aggressively.

5.390 For the United States, the Premiums Law supplements the Antimonopoly Law's economic inducement and representation provisions by authorizing the JFTC to further restrict the use of purportedly unjust economic benefits and misleading promotional statements. According to the United States, the Premiums Law, which was revised in 1972, exempts from Antimonopoly Law enforcement cartel-like practices by members of selected industries who are authorized under the law to establish codes governing the use of premiums and promotional representations. In doing so, the United States argues, the Premiums Law and its attendant codes inhibit the use of a variety of pro-competitive marketing activities.

5.391 In **Japan**'s view, the Premiums Law is a sub-set of competition law which provides for an expedited enforcement procedure, different from the quasi-judicial process under the Antimonopoly Law, to deal with excessive premiums and misleading representations. Under Article 6 of the Premiums Law the JFTC may issue cease and desist orders to non-compliance without a hearing process. According to Japan, misrepresentations or excessive premiums could be considered as a type of unfair trade practice prescribed by the Antimonopoly Law, either as deceptive customer inducement or as customer inducement by use of unjust benefits. However, in Japan's view, at the theoretical level the Premiums Law's primary purpose is not consumer protection per se: the above-mentioned practices have a unique feature of easily spreading wider as competitors scramble to imitate each other; moreover, competitors tend to escalate these practices as the process goes on.

5.392 Japan further submits that premiums are often offered for a limited period of time. If enforcement against them requires a lengthy procedure, the regulation will become ineffective. In order to prevent impediment to fair competition by these practices and to protect consumer interests, it was necessary, therefore, to counter these practices through swift enforcement action. In that sense, Japan argues, the Premiums Law is not redundant. It incorporated the element of consumer protection in the text of the Law, and introduced a swift enforcement mechanism to restrict excessive premiums and misleading representations. Moreover, as the Law lays out specific standards of unlawful premiums or representations, it enhances foreseeability for the business and serves to prevent actual excessive activities.

(i) Background and objective

5.393 In the view of the **United States**, Japan promulgated the Premiums Law, at least in part, to counteract aggressive competition by imports that was expected to occur with trade liberalization. According to the United States, the Japanese Government's protectionist intentions pervade the record of the law's enactment.[413]

[413]The United States submitted that when the Premiums Law was first proposed in the Diet, proponents of the bill acknowledged that the Premiums Law would soften the effects of trade liberalization:
Mr. Tanaka (Takeo): "The second point relates to the liberalization which is now underway … With respect to liberalization countermeasures, we are of the view that the issue of excessive advertisement, etc. should be considered as well. That is because Japanese [companies] will not be able to successfully compete if large foreign companies, etc., came in and conducted various excessive premium campaigns. Accordingly, this [bill] is related to liberalization countermeasures."
Minister Fujiyama: "The enactment of this law is appropriate for purposes of consumer policy … In addition, as a result of liberalization, it could possibly happen that foreign trading companies etc. may come into Japan and enjoy advantageous positions through excessive advertisement or by inviting buyers to foreign countries."
(Diet Record of the 40th Session of the Lower House Committee on Commerce and Industry, No. 31, 18 April 1962, US Ex. 62-4).
The United States also submitted that the Director General of the Prime Minister's Office testified before the Diet Committee on Commerce, stating that restrictions on premiums were needed because "[i]t appears foreign companies will threaten domestic companies by these methods" (Diet Record of the 40th Session of the Upper House Committee on Commerce and Industry, No. 21, 13 April 1962, US Ex. 62-2).

5.394 **Japan** submits that, as the Japanese economy entered the phase of mass production/consumption in the 1950s, premiums sales, including promotional lotteries, became increasingly popular. Prize money and merchandises grew very expensive. According to Japan, the society grew concerned about these promotional prizes which encourage speculative behaviour and could impede consumers' rational selection of goods.

5.395 According to Japan, additional impetus for the legislation came in 1960 when it was uncovered that canned horse meat had been marketed as canned "beef," which was very expensive then. A survey found that only two of the 20-plus canned food manufacturers used 100 percent beef. Concerned about the lack of adequate means to control misrepresentation, the public called for introduction of effective control of misleading representations. The JFTC initially tried to restrain the deceptive expressions as an "unfair trade practice" under the Antimonopoly Law, and issued a notification on the "Specific Unfair Trade Practice in the Canned Meat Industry" in February 1961, which banned the "use of expressions or advertisement misleading to customers." In a December 1960 hearing, voices from consumer representatives and scholars called for expansion of the regulation to all misleading representations in general and for introduction of a new legislation to deal with the matter.[414]

5.396 Japan submits that the objective of the Premiums Law is found in Article 1:

> "This law, in order to prevent inducement of customers by means of unjustifiable premiums or misleading representations …, aims to secure fair competition, and thereby to protect the interest of consumers in general".

Japan argues that, as the panel on *Japan - Taxes on Alcoholic Beverages* found[415], interpretation of domestic law should be based primarily on the text of the statute, rather than in legislative history. For Japan, reference to this twin objective of fair competition and consumer protection is recorded in various parts of the Diet minutes as well.[416] Japan argues that the statements cited by the United States are selective and miss the overall context.

5.397 Japan further argues that, as the United States admitted, the express text of the Premiums Law makes no distinction between imported or domestic products. It does not contain a mechanism which discriminates, inherently, imported products against domestic products. The Law's impact on the market access will be felt equally by domestic and foreign products. In this sense, the Law is trade-neutral.

5.398 The **United States** submits that Japan erred in arguing that its promotion restrictions serve to protect only consumers. Japan's restrictions not only were intended to protect consumers, but they also were designed to protect domestic production. This purpose is evident in a variety of measures, most notably Japan's 30-year restriction on the use of premiums between businesses - a measure which clearly had less to do with consumer protection than dampening competition from foreign competitors. The United States argues that despite Japan's protest that the JFTC is not a "collaborator" in efforts

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[414]Opinions submitted to the JFTC at the public hearing concerning Designation of the Specific Unfair Trade Practices in the Canned Meat Industry, Kosei Torihiki, February 1961, Japan Ex. D-24.

[415]Panel Report, adopted on 1 November 1996, WT/DS8, 10 and 11/R, para. 87.

[416]Japan cited the following examples:

- reaffirming the objective of the Premiums Law, the Commerce and Industry Committee of the House of Representatives passed a resolution which emphasizes that "the Law has an important function as part of the overall promotion of consumer policy" when it passed the bill on April 19, 1962.
- Kodaira Hisao, then Cabinet Minister for General Affairs, introduced the bill to the Diet, stating that "…[i]nducement of customers through excessive premiums or misleading representations, not by value of the merchandise or service, impairs general consumers' proper selection of the goods and services, and undermines fair competitive conditions… [A]ccordingly, the bill is hereby submitted in order to ensure fair competition and to protect general consumers' interests by providing for a swift and appropriate means to effectively control excessive premium sales and misleading representations, as a special rule to the Antimonopoly Law".

to counteract the effects of trade liberalization, Japan has failed to explain the JFTC's expressions of protectionist intent by officials of the JFTC and other agencies of the Japanese Government.

5.399 **Japan** argues that in pursuing the goal of promoting fair and free competition in the Japanese market, the JFTC has never accorded any foreign entity or product treatment less favourable than that accorded to a Japanese entity or product. Japan submits that the JFTC has allowed prize offers linked to sales -- a practice which is prohibited in the United States and other countries -- to the extent compatible with the goal of fair competition. Foreign business in Japan has been able to promote their sales through this type of prize. Had the objective of the JFTC's premiums regulations been to restrict foreign manufacturers' promotional activities these practices would have been made unlawful as well. Indeed, Kodak has been actively taking advantage of this policy and offered a series of promotional prizes. More fundamentally, the ultimate litmus test of intent should be whether or not there is recognizable "intent" or "objective" built in the structure of the system in dispute, rather than individual statements. The fundamentally origin-neutral regulation of the Premiums Law contains no such built-in mechanism based on an "intent" or "objective" of discrimination.

(ii) Substantive provisions

5.400 The **United States** submits that Article 2 of the Premiums Law defines the term "representations" to mean "advertisements or any other representations which a business makes or uses as means of inducement of customers, with respect to the substance of the commodity or service which he supplies or the terms of the sale or any other matter concerning the transaction, and which are designated by the Fair Trade Commission as such". Article 4 proscribes the use of "any representation by which the quality, standard or any other matter relating to the substance of a commodity or service shall lead the general consumer to believe that it is much better than the actual one or than that of other businesses who are in competitive relationship with the business concerned, and thereby which is found likely to induce customers unjustly and to impede fair competition". In addition, Article 4 empowers the JFTC to designate as unlawful "any representation by which any matter relating to transactions as to a commodity or service is likely to be misunderstood by consumers in general".

5.401 For the United States, the definition of a premium is unclear. The JFTC has issued many notifications limiting the value of economic benefits that may be offered and indicating the industries or businesses affected, but these notifications do not specify the nature of the economic inducements subject to the law. The JFTC has explained that "[p]remiums which are the object of notifications refer to products, cash, marketable securities, entertainment, or other economic benefits which are given in connection with a transaction involving commodity or service".[417] At the same time, the JFTC has indicated that it distinguishes between premiums and price discounts or rebates on a case-by-case basis, examining the facts "in light of normal business practices, taking into account details of the transaction, details of the economic benefit, the method and the conditions of offer, and the customs of that particular industry".[418] Nonetheless, the United States argues, the JFTC acknowledges that some forms of discounts or rebates may be premiums.[419] In the US view, given this ambiguity and the fact that the bulk of the JFTC's enforcement actions are informal and unrecorded, businesses often have difficulty knowing whether the inducements they offer fall within the scope of any prohibition.

5.402 **Japan** argues that the US characterization of the Premiums Law is fundamentally inaccurate. The Premiums Law restricts only excessive premiums and misleading representations, and does not control the major part of the promotional activities, including competition by premiums, advertising and low prices.

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[417]FTC/Japan Views: Information and Opinion from the Japan Fair Trade Commission, No. 2, April 1988, p. 15, US Ex. 88-3.

[418]Ibid., p. 16.

[419]Ibid.

5.403 Japan also submits that the US claim that the distinction between premiums and rebates or discounts is "ambiguous" is unfounded. For Japan, the Premiums Law, the JFTC Notifications and the Standards of Application clearly define what constitute premiums. First, Article 2 of the Premiums Law defines premiums as follows:

> "Premiums' as used in this Law shall mean any article, money and other kinds of economic benefits which are given, as means of inducement of customers …, and which are designated by the JFTC".

Second, the "Designation of Premiums and Representations"[420] further clarifies the boundary by establishing that "goods, money or other economic benefits offered in connection with trade do not fall under premiums if they are considered as discounts, post-sales services or others in light of normal commercial practices". Finally, the Designation Notification is further clarified by the JFTC's "Guidelines for the Implementation of the Notification concerning Designation of Premiums, Etc.".[421]

5.404 For Japan, the Premiums Law does not, contrary to the US allegation, prohibit all kinds of premiums. Criteria of the restriction are contained in Article 3 of the Premiums Law which provides:

> "The JFTC may, when it finds that it is necessary to prevent unfair inducement of customers, limit either the maximum value of a premium or the aggregate amount of premiums, the kind of premiums or methods of offering of premium or any other matter relating there to, or may prohibit the offering of a premium".

Japan notes that the word "premiums" in the Law signifies both (a) gifts, namely goods offered free of charge ("premiums" in a narrow sense) and (b) prizes, namely cash, goods or trip offered through lotteries or prize competition.

5.405 Japan further submits that similar restrictions of excessive premiums can be found in other countries. According to Japan, some European countries place even more stringent regulations on these practices. For example, the JFTC has allowed prize offers linked to sales - a practice which is prohibited in the United States and other countries - to the extent compatible with the goal of fair competition. Japan argues that Kodak has been actively taking advantage of this policy and offered a series of promotional prizes.

5.406 Japan argues that the restriction on misleading representations under the Premiums Law applies only to false or unsubstantiated advertisement which would mislead consumers, and would thereby impair fair competition. Article 4 of the Premiums Law defines what specifically constitute misleading representations of the quality of a product, of the price or of other elements. According to Japan, the Premiums Law does not restrict advertisement or representations as long as they are based on facts. Japan argued that the United States failed to give any specific type of advertising representation that Kodak wanted to do but was banned because of the Premiums Law. In Japan's view, restriction of deceptive or misleading representations can be found all over the world. Moreover, according to Japan, the Premiums Law does not restrict low price offers. On the contrary, the Law serves to promote low price offers and other price/quality competition by placing a restriction on excessive premiums.

5.407 For the **United States**, Japan's argument that its promotion restrictions are essentially insignificant -- because of the availability of other ways of competing -- rests on flawed assumptions. In the US view, Japan's argument that foreign producers are free to rely upon discount pricing to compete is simply untrue. Designation 6 under JFTC Notification 15 of 1982 prohibits "unjust low price sales", including "unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties

[420]JFTC Notification No. 3 of 1962 enacted pursuant to Article 2 of the Premiums Law, Japan Ex. D-28.
[421]JFTC/Secretary General Circular No. 7 of 1977, Japan Ex. D-29.

to the business activities of other entrepreneurs". Indeed, the Japanese Government has admitted that it would "monitor" film prices so that Kodak could not dominate the market in Japan as it had elsewhere.

5.408 **Japan** notes that MITI's survey on film distribution including film price was carried out from the standpoint of industrial policy, and not from the viewpoint of the Antimonopoly Law.

5.409 The **United States** submits that the ability of foreign manufacturers to use price discounts to expand their presence in Japan has been rather limited. Kodak has reduced its prices by 56 percent since 1986, substantially undercutting its Japanese competitors. Kodak's dramatic price discounts have had virtually no effect on the market. Price reductions by foreign photographic material producers -- even to levels well below those of domestic competitors - often are not passed on to consumers at the retail level. According to the United States, this lack of price competition in the photographic materials sector is reflected by the fact that Japan's consumer price index for film has shown almost no movement between the third quarter of 1989 and the third quarter of 1996, a period of seven years.[422] Little price differential exists among Fuji, Konica and Kodak at either the retail level[423] or with respect to wholesaler prices to retail outlets.[424] The same lack of price differentiation is observable with respect to various film speeds, types of outlets and individual cities.

5.410 According to the United States, limited price competition, coupled with foreclosed distribution channels, render promotions especially significant to foreign photographic material producers. The United States believes that Japan has understated the importance of the promotional activities at issue and that the zeal with which Japan has regulated premiums and representations, in and of itself, should suggest to the Panel the true significance Japan ascribes to these marketing techniques.

(iii) Enforcement

5.411 The United States submits that authority to enforce the Premiums Law is shared among the JFTC, the prefectural governments and members of the photographic materials industry. The Premiums Law accords to the JFTC the leading enforcement role. Article 6 provides the JFTC with the power to instruct violators "to cease and desist" or to "take the measures necessary to prevent the recurrence of the said act". Article 9 gives the prefectural governments enforcement authority, including the power to issue cease and desist orders.

5.412 The United States notes that Article 10 provides for the creation of "fair competition codes" regulating the use of premiums and promotional representations, as drafted by "fair trade councils" comprised by representatives of the domestic industry. Article 10 permits the JFTC to authorize "businesses or a trade association" to "enter into an agreement or to establish a code" in order to "prevent unjust inducement of customers and to maintain fair competition". "Fair competition codes" must be approved by the JFTC. "Fair trade councils" employ various methods of coercion and monetary penalties to enforce their codes.

5.413 The United States argues that Article 10 of the Premiums Law has allowed powerful photographic industry trade associations to suppress competition by establishing cartel-like groups that suppress competition through enforcement of restrictions on marketing activities. The United States also notes that the Premiums Law does not explain how membership in a council or participation in a code is to be determined.

5.414 In the US view, the statute fails to address whether parties who do not participate in the formulation or administration of the "fair competition codes" are covered by them. The United States

[422]Photo Market, 1996, p. 31, US Ex. 101.
[423]Management Analysis of Photo Stores, Camera Times, 1979-1996, US Ex. 40.
[424]Construction Research Institute, Information on Prices, Monthly Edition, December 1972- September 1996, US Ex. 22.

argues that although the codes are designed to apply exclusively to members, the standards established by the codes are often adopted by the JFTC for application to non-members.

5.415 **Japan** submits that the JFTC does not approve a fair competition code unless it finds that the draft code satisfies the following requirements of Article 10, paragraph 2:

> "(i) That it is appropriate to prevent unjust inducement of customers and to maintain fair competition;
> (ii) That it is not likely unreasonably to impede the interests of consumers in general or the related businesses;
> (iii) That it is not unjustly discriminatory; and
> (iv) That it does not restrict unreasonably the participation in or withdrawal from the fair competition code".

According to Japan, and contrary to the US argument, this review eliminates any possibility of a fair competition code becoming a "quasi-cartel." For Japan, the notion of "related businesses" mentioned in paragraph 2 (iii) of Article 10 includes non-members ("outsiders"). Therefore, the JFTC is obligated to protect outsiders' interests.

5.416 According to Japan, "fair competition codes" are autonomous rules and cannot bind outsiders.[425] Moreover, Japan argued, a 1982 Tokyo Court of Appeals judgment made it clear that non-compliance with a fair competition code by an outsider does not constitute violation of the Premiums Law.[426] The JFTC alone has the authority to take enforcement action against an outsider.

5.417 Japan further submits that the JFTC does not cease to exercise its authority to enforce the premiums regulations in respect of industries which adopt fair competition codes. Generally, if an insider does not comply with a code, the related fair trade council takes a remedial measure. However, if the JFTC finds it necessary to take an enforcement action for the protection of consumer interests and to ensure fair competition it will choose to exercise its statutory authority as well.

5.418 In response, the **United States** provided the following statement by the JFTC Secretary-General: "self-regulatory codes cannot reach businesses who do not participate in the fair competition codes, even when they engage in sales activities that violate the codes. However, when the JFTC takes regulatory actions against unjustifiable premiums and misleading representations, the Commission uses the content of the fair competition codes, as the industry's business practices designed to secure fair competition, to interpret and apply the Premiums Law. Accordingly, businesses engaging in sales activities that violate the codes can be subject to them under the Premiums Law, even when they do not participate in the codes."[427] Although the Premiums Law does not require companies to join a fair trade council, in order to be effective in the Japanese market, businesses often feel compelled, or are required by the relevant association, to join the council.

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[425]In this respect Japan provided the following statement by the JFTC Secretary-General: "Voluntary restraint in a fair competition code is not applicable to sales activities of business entities who are not members of the code, even if the activities are not compliant with it" (Itoda Shogo, JFTC Secretary-General, Jirei Dokusen Kinshiho (Competition Policy Law), 1995, p. 423, Japan Ex. D-75, US Ex. 95-20).

[426]JFTC v. Sanki Co., Ltd, et al, of 1982, Tokyo Court of Appeals, Japan Ex. D-76.

[427]Itoda Shogo, JFTC Secretary General, Antimonopoly Law, (15 December 1995), pp. 392-393, 396, 420-424, US Ex. 95-20.

(iv) Exemptions from the Antimonopoly Law

5.419 Article 10, paragraph 5, of the Premiums Law provides that:

> "The provisions of Section 48 [recommendation, recommendation decision] and Section 49 [initiation of hearing procedures], Section 67(1) [urgent injunction] and Section 73 [accusation] of the [Antimonopoly Law] shall not be applied to the fair competition codes that have been authorized under section (1), and to such acts of businesses or a trade association as have been done in accordance therewith."

5.420 According to the **United States**, this exemption is noteworthy because preparation and application of the "fair competition codes" may involve activities among competitors and trade associations that would be actionable under the Antimonopoly Law.[428]

5.421 In **Japan**'s view this US statement is incorrect. According to Japan, Article 10, paragraph 5, of the Premiums Law only confirms that fair competition codes, as approved by the JFTC, do not constitute violations of the Antimonopoly Law. If a fair competition code later fails to be in compliance with the Antimonopoly Law due to changes in the economic situation, the JFTC will have to revoke its approval according to Article 10, paragraph 3. After the cancellation, the JFTC is authorized to take necessary measures against the actions in question. Moreover, any activity of entrepreneurs or trade associations including fair trade councils which is not taken "in accordance with the fair competition code" approved by the JFTC does not enjoy exemption from the operation of the Antimonopoly Law.

5.422 The **United States** pointed out that Japan's position in this regard overlooks the language of Article 10, paragraph 5 of the Premiums Law, which exempts from antitrust enforcement not only the fair competition codes themselves, but also "such acts of businesses or trade associations as have been done in accordance therewith." Given that fair competition codes, including the 1987 Retailers code, provide councils with extensive enforcement powers and allow for the imposition of penalties for non-compliance, the United States maintained that the exemption permits cartel-like practices by Japanese businesses against foreign competition.

3. INITIAL IMPLEMENTATION OF THE ANTIMONOPOLY AND PREMIUMS LAW

5.423 The United States submits that during the years immediately following the enactment of the Premiums Law, enforcement of the law was sluggish. For the United States, the most noteworthy development during this time was the JFTC's imposition of a notification on "Restriction on Premium Offers by Prize Competition".[429] The notification limited premiums offered in connection with "closed" lotteries[430] or as prizes in games of random selection. On July 15, 1965, the JFTC expanded the scope of the lottery notification to include competitions involving some element of skill, such as quizzes or "pick-a-slogan" competitions.[431]

5.424 According to the United States, the Japanese Government recommended more stringent application of the Premiums Law and Antimonopoly Law against "unfair trade practices" in April 1965.[432] The JFTC responded in April 1966 by implementing changes in its organizational structure, including the

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[428]In this respect the United States submitted the following statement by the present JFTC Secretary-General: "[e]ven if the contents of the codes or the activities based on the codes violate the Antimonopoly Law, no proceedings to restrict them will be taken based on the Antimonopoly Law" (Itoda Shogo, JFTC Secretary-General, Competition Policy Law, 15 December 1995, p. 422, US Ex. 95-20, Japan Ex. D-75).

[429]JFTC Notification 5 of 1962, Kanpo, 30 July 1962, pp. 626-627, US Ex. 62-1.

[430]A "closed" lottery requires purchase of a good or service. An "open" lottery requires no such purchase.

[431]JFTC Notification 20 of 1965, Kanpo, 15 July 1965, p. 5, US Ex. 65-1.

[432]Industrial Structure Council Distribution Committee, Regarding the Basic Direction of the Distribution Policy, Tsusansho Koho, 24 April 1965, p. 8, US Ex. 65-2.

creation of the Premiums and Representation Division.[433] Following establishment of this office, total enforcement actions by the JFTC under the Premiums Law rose sharply from 147 actions in 1965, to 327 in 1966, then to 548 in 1967, and 1,203 in 1971.[434]

5.425 **Japan** argues that, initially, the enforcement of the Premiums Law was carried out exclusively by the JFTC. Whether or not enforcement actions rose sharply due to the creation of the Premiums and Representations Division of April 1966, as the United States argues, the JFTC had been vigorously enforcing the regulation on excessive premiums and misleading representations which are detrimental to fair competition, and the number of the issuance of cease and desist orders was increasing.

5.426 The **United States** argues that despite the JFTC's slow start in enforcing the Premiums Law, one of the subjects it first chose to regulate was cameras. The camera industry in Japan had experienced high growth during the preceding decade.[435] "However, in 1964 and 1965, the growth of the Japanese economy slowed down. The domestic demand for cameras became stagnant, and it became necessary to increase exports in order to absorb large [portions] of the production".[436] At the time, though, Japanese manufacturers faced stiff competition from Kodak, due in large part to an innovative product Kodak created allowing for easier installation of its film.

5.427 According to the United States, domestic photography businesses relied upon ever larger premium offers in response to this competition. "Retailers have started to offer excessive premiums such as trips to Hawaii, Hong Kong, Europe, etc. or even automobiles".[437] The United States further submits that to combat what was perceived as a bloodletting in the domestic photographic sector, the industry formed a "depression cartel". The JFTC certified the "cartel" on June 30, 1965. Domestic photograph businesses began their "move to correct those excessive activities . . . retailers decided to voluntarily refrain from sales with invitation or premiums. The industry filed an application for certification of fair competition codes according to the Premiums Law".[438]

5.428 The United States argues that the JFTC soon acted to protect the "camera cartel" from competition on premium offers. On October 15, 1965, the JFTC issued a notification entitled, "Restrictions on Premium Offers in the Camera Industry", which severely curtailed the use of premiums by camera manufacturers, wholesalers and retailers to one another or to general consumers. Also on October 15, 1965, the JFTC approved the "Fair Competition Code Regarding Restrictions on Premium Offers by the Cameras and Related Products Manufacturers' Industry", as promulgated by the domestic industry in the form of the Camera Manufacturers Fair Trade Council. Like the notification, the code restricted premium offers by participating camera industry manufacturers. On October 29, 1966, the JFTC issued Notification 35, approving an almost identical fair competition code on premiums for wholesalers of cameras and related products.[439]

5.429 In the US view, the notification and codes, though aimed at cameras, affect important promotions for film and paper. Almost all leading film manufacturers in the Japanese market -- including Fuji, Konica and Kodak -- are significant producers of cameras. By circumscribing the use of premiums in promoting cameras, these restrictions limited the ability of foreign manufacturers to promote their film and paper products by offering them as premiums along with cameras.

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[433]Interview with Iyori Hiroshi: the Role of Premiums and Representation Law and Issues for the Future, Kosei Torihiki, No. 502, August 1992, US Ex. 92-3.

[434]1966 JFTC Annual Report, US Ex. 66-1; 1988 JFTC Annual Report.

[435] Otsuka Noritami, JFTC Trade Practices Division, Recent Activities Concerning the Premiums Law, Kosei Torihiki, November 1965, p. 3, US Ex. 65-5.

[436]Ibid.

[437]Ibid.

[438]Ibid.

[439]In Japan's view, *kamera-rui* means "camera category" rather than "cameras and related products". See translation issue 17.

5.430 For **Japan**, there has been no JFTC Notification applicable specifically to photographic film and paper; nor have there been fair competition codes specifically applicable to film and paper either.

4. GENESIS OF THE PROMOTION "COUNTERMEASURES"

5.431 The **United State**s submits that during the 1960's and 1970's, as Japan made tariff concessions and implemented other trade liberalizing measures on photographic film and paper products, the Japanese Government expressed concern that liberalization would open the Japanese photographic materials market to stiff competition from imports. As a consequence, MITI determined that the government needed to initiate policies to forestall that competition. In the US view, the government identified its premium and representation restrictions as efficient tools to blunt the strength of the perceived advantages of foreign manufacturers of film and paper. For the United States, there can be no doubt that Japan's promotion countermeasures were aimed at diminishing the effects of promotional campaigns that could be waged by foreign enterprises with significant capital resources.[440]

5.432 **Japan** argues that the JFTC has been fully aware of Japan's commitment to non-discriminatory treatment of foreign products and business and that evidence to that effect can be found in a series of statements and articles by the Commission officials which were published during the 1960s.[441]

5.433 The **United States** further submits that the Japanese Government imposed its promotion countermeasures, at least in part, because it recognized the importance of marketing to foreign manufacturers of film and paper competing against domestic market leaders. A leading competition scholar in Japan similarly explained that industry-specific notifications were "adopted because of foreign capital affiliated firms' excessive premium offer sales … Fair competition codes are effective in controlling sales with excessive premiums that might disturb the market. We expect active use of fair competition codes in the future.[442] According to the United States, these modes of competition were particularly significant in Japan, given the difficulties foreign photographic materials manufacturers faced with respect to distribution and other market factors. In the US view, Japan understood that, if it were able to handcuff foreign manufacturers in their use of promotions and shackle the distribution network, its tariff concessions would have considerably less impact and the market dominance of domestic players would be preserved. In this regard, the United States maintained that a former Secretary General and Commissioner of the JFTC confirmed that the promotion countermeasures originated from a need to control foreign capital. He stated: "[O]ne reason the restrictions concerning the offering of premiums to businesses are established is to prevent the sale with excessively large premiums by foreign capital related businesses in general, and the resulting distortion of fair competition. There have been three restriction notifications concerning specific industries … All of these were adopted as a result of selling with excessively large premiums by [a] special foreign capital affiliate.[443]

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[440]The United States provided, *inter alia*, the following statement by MITI: "Along with the liberalization of capital and trade, the major issues facing this industry today include the U.S. landing in Japan and market expansion … The struggle to capture market share will depend substantially on promotional activities based on financial strength. Therefore, those film manufacturers in Japan that are lacking in financial strength, even though they are in a monopolistic position domestically, are likely to face serious testing in the future" (MITI, Manual for the Systemization of Camera and Film Distribution, March 1975, p. 121, US Ex. 75-5).

[441]Japan provided, *inter alia*, the following statement by Yamada Sei-ichi, then Chairman of the JFTC: "[Asked whether the JFTC would thwart foreign capital by the Antimonopoly Law:] If we were to treat foreign capital harshly and treat domestic capital leniently, there would be no rule of law any more. The Law must be applied fairly to domestic and foreign capital alike" (Interview of Yamada Sei-ichi by Kanamori Hisao, 205 Kosei Torihiki 20, p. 24, 1967, Japan Ex. D-22).

[442]Matsushita Mitsuo, Antimonopoly Law and International Transactions (With Focus on Extra-territorial Application), 25 May 1970, pp. 83-89, US Ex. 70-2.

[443]Iyori Hiroshi, Basic Approach to Capital Liberalization and Antimonopoly Law: Types of Regulation, Sample Cases, Zaisei Keizai Koho, No. 1332-1333, 24 November 1969, p. 7, US Ex. 69-7.

5.434 The United States argues that during the 1950's and early 1960's, large Japanese consumer-product manufacturers built powerful brand images and proportionately large market shares as a result of their "substantial financial commitments to establish and promote their brands".[444] At the same time, several foreign manufacturers demonstrated that imports could follow similar strategies based on use of promotional tools to mount successful challenges to entrenched Japanese brands. The United States provides examples of foreign companies, such as Bristol-Meyer, Nestlé and Colgate, which successfully captured the Japanese market with promotion campaigns.

5.435 **Japan** argues that the examples provided by the United States fail to prove the US argument that a freer marketing environment had existed prior to the introduction of the Premiums Law; the cited cases are all examples of promotional activities which would not be restricted by the JFTC regulations of excessive premiums even today. Japan argues that Schick's distribution of free stainless steel razor blades to Japanese males has been lawful under the Premiums Law at any point of its history; that Nestlé's promotion was a low price offer, thus falling outside the scope of the Law; and that Colgate's distribution of free toothpaste samples would not have been subject to the Premiums Law. For Japan, these cases demonstrate, on the contrary, that there are plenty of lawful promotional opportunities in Japan, and that foreign business has been able to take advantage of those opportunities successfully.

5.436 In the view of the **United States**, Japan's contention that these examples would be "lawful under the Premiums Law at any point in its history" is inaccurate. JFTC Notification 17 of 1967, restricting premiums between businesses, and JFTC Notification 5 of 1977, restricting premiums to general consumers, provides that samples are exempt from coverage only if they are "found reasonable in the light of normal business practices." In addition, certain low price offers may be regulated as an "unjust low price" under designation 6 of Notification 15 of 1982.

5.437 **Japan** submits that regulations on premiums and representations under the Antimonopoly Law and the Premiums Law do not restrict low price offers.

5.438 According to the **United States**, the Japanese Government expressed strong concerns about the ability of imports and foreign firms to use such strategies successfully and began to formulate policies for countering this challenge. Japan's concerns regarding aggressive marketing techniques were particularly acute for film and paper due, at least in part, to Fuji's strong name-brand recognition among Japanese consumers. The United States points out that one Japanese official later explained that "we were afraid that Kodak would use its capital strength to control the market with huge incentives like low prices, or attach some kind of gift to the films, and then, after ruling the market, they would raise price … There was this worry, so we issued guidelines so that the competition would be fair."[445] Japan thus set out on a course to impede the ability of imports to challenge Fuji's name-brand advantage.

5.439 For the United States, basic economic theory supports Japan's decision to hinder promotion competition for photographic materials. Economists have long noted that new market entrants or products with limited market share - often characteristics of imports - face an uphill battle when competing against established products with strong brand-name recognition.[446] According to the United States, this difficulty is even greater for so-called "experience goods", which develop consumer loyalty based on repeated satisfactory experiences. The natural market advantages enjoyed by established brands may be enhanced further when the product in question is relatively inexpensive, thereby reducing the consumer's incentive to try alternatives.

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[444]M.Y. Yoshino, The Japanese Marketing System: Adaptations and Innovations, MITI Press, 1971, p. 103, US Ex. 71-1.
[445]Japanese See Kodak Case As Hardly Black and White, New York Times, 5 July 1995, US Ex. 95-14.
[446]See J.S. Bain, Barriers to New Competition, 1956, p. 216, US Ex. 56-1.

5.440 The United States submits that new brands and products challenging leading brands can use a variety of competitive tools to attract consumers away from the market leader, but that, in the words of one academic study, the challenging brand must provide "something extra".[447] The "something extra" often consists of some form of premium to attract customers away from their traditional brands. As a first step, however, the challenging brand must be heavily advertised. Essentially, products challenging leading brands must "shout louder to be heard". In the US view Japan has, through application of its promotion countermeasures, sought to thwart foreign producers attempting to do just that.

5.441 **Japan** argues that excessive premiums are subject to restriction in other countries as well and that the Japanese regulations are not particularly more stringent than foreign counterparts. According to Japan, reflecting the divergent social/cultural background, the overseas regulations differ in the degree of restriction of premium offers, and can, generally speaking, be categorized into two groups.[448] The first category of countries including Germany, France, Belgium, the Netherlands, Norway and Denmark have taken a negative approach to premiums as their policy emphasizes price/quality competition. All-purchaser premiums are generally held to a very low level in these countries, and prizes are prohibited.

5.442 In Japan's view, the basic philosophy in those countries where the use of premium offers "per se" is restricted, is as follows:

- as premium offers may lead to competition being concentrated on matters other than price, quality and service, they make it more difficult for the consumers to survey the market;
- premiums offers are likely to divert the interest of the consumers from the main item and thus entice them to buy one item out of interest for another item;
- there is a tendency for consumers to overestimate the value of premiums;
- the consumer may in some cases have difficulties if he wants to make a claim for a faulty or defective premiums;
- in some cases, the consumer is only interested in either the main item or the premium and has no chance to acquire the item he wants without buying also other item which he does not want;
- the market would be artificially inflated by articles which the consumer initially did not want. It would be preferable if consumers were given an adequate price reduction instead.

5.443 Japan further argues that the United States and the United Kingdom belong to the second category which favours premiums. They do not restrict all-purchaser premiums. On the other hand, however, they either prohibit or severely restrict sales with lotteries or prize competition, which are lawful in Japan.

5.444 The **United States** submits that Japan's attempts to compare its "promotion countermeasures" to laws in other countries are unavailing. Though Japan has pointed to individual aspects of its "promotion countermeasures" that approximate facets of measures found elsewhere, the United States argues that it is unaware of any nation with a regime that is quite like Japan's. In particular, no nation has an enforcement mechanism of government/industry cooperation akin to Japan's system of "fair trade councils" and "fair competition codes".

5.445 **Japan** notes that a mechanism of self-regulation on premiums or representations exists elsewhere, citing Germany's Act Against Restraints on Competition (1957) which also provides for self-restraint of business entities. According to Japan, Germany has about 60 "competition rules" approved by virtue

[447]Carpenter and Nakamoto, Consumer Preference Formation and Pioneering Advantage, Journal of Marketing Research, Volume 26, August 1989, p. 297, US Ex. 89-4.

[448]OECD Premium Offers and Similar Marketing Practices (1977), Japan Ex. D-36.

of Sections 28 through 33 of the Act. The United Kingdom's Fair Trading Act of 1973 provides, in Article 124, paragraph (3), that "it shall be the duty of the Director to encourage relevant associations to prepare, and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers".[449] Japan further submits that more recently, in the wake of deregulation/liberalization of industries, countries such as Australia or Canada are contemplating an increased use of self-regulation for the protection of consumers, as well as for the reduction of administrative cost.

5.446 The specific "promotion countermeasures" challenged by the United States are listed in para. 3.6 above and outlined in Section II.B.3.(b) and (c) and 4.(a) and (b) above.

5. POST-KENNEDY ROUND PROMOTION "COUNTERMEASURES"

(a) JFTC Notification 17 of 1967 (premiums to businesses)[450]

5.447 According to the **United States**, the sweeping limitation imposed by JFTC Notification 17 of 10 May 1967 affected nearly all premium offers between two businesses - that is, premium offers made by manufacturers to wholesalers and retailers, as well as premium offers made by wholesalers to secondary wholesalers or retail stores - if used to (1) open a new relationship or (2) reinforce sales volume targets.[451] The JFTC explicitly included "photosensitive materials" as one of the industries covered by the notification.[452]

5.448 For the United States, JFTC Notification 17 imposed a double restriction on premiums between businesses. It limited the aggregate amount of premiums that one business may offer to another enterprise to 100,000 yen per year, subject to a determination that any premium within the 100,000 yen exception is "reasonable in the light of normal business practices". The United States argues that industry "fair competition codes" would play a critical role in the assessment of what constituted "normal business practices". "As for 'normal business practices,' if there is a fair [competition] code, then the code will be used as the standard. If none exists, the JFTC will make a determination after investigating the business practices of that industry or issue guidance to the industry to establish a fair [competition] code".[453]

5.449 In the US view, pursuant to JFTC Notification 17, imported film and paper products attempting to expand their market share were permitted to offer incentives amounting to no more than 100,000 yen to any one business. According to the United States, in so sharply limiting the use of premiums between businesses, the notification all but eliminated one of the seminal methods by which manufacturers open relationships with wholesalers and retailers or provide incentives for down-line distributors to increase sales.

5.450 The United States further submits that the JFTC indicated in its 1966 Annual Report that JFTC Notification 17 was issued as a liberalization countermeasure, noting that premiums "1) impede the rationalization of distribution; 2) harm consumer interest; 3) will lead to competition based on financial resources and sales power where the stronger prey upon the weaker; and 4) *point 3 [above] will intensify particularly with capital liberalization*".[454] The JFTC further explained that "[t]he primary objective of [Notification 17] is (a) rationalization of the distribution stage …; and (b) eliminat[ion] of the stronger

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[449]Japan Ex. D-62.

[450]See Section II.B.3.(b).(ii) above.

[451]Severe Restrictions Placed on Businesses for Premium Offers: Shatokuren Hears JFTC Explanations at Jyosui Kaikan on the 12th, Nihon Shashin Kogyo Tsushin, 20 June 1967, p. 25, US Ex. 67-8.

[452]See table attached to JFTC Notification 17.

[453]Severe Restrictions Placed on Businesses for Premium Offers, op.cit.

[454]JFTC Annual Report, 1966, US Ex. 66-1, emphasis added by the United States.

prey upon the weaker sales competition based on the power of capital … If US capital were to conduct [premium offers] directed at the Japanese distribution sector, this would be no match for [Japan], so the restrictions should be applied as a breakwater before liberalization".[455] For the United States, the JFTC clearly issued the notification with foreign competition in mind.

5.451 For **Japan**, the object and purpose of the notification should be found, by and large, not in the section of the 1966 JFTC Annual Report quoted by the United States, but in the preceding section of the Report:

> "In June 1966, the Consultative Body on Prices, an advisory organ to the Director General of the Economic Planning Agency, recommended that 'premiums offers at the distribution of household goods would unnecessarily raise sales/distribution cost and runs counter to rationalization of distribution and is therefore undesirable from the viewpoint of combating rising prices. The matter should not be left unattended and it is necessary to regulate the practice under the Premiums Law in order to promote fair competition and rationalize distribution, and thereby to pass the benefits of competition to consumers.' In response to this recommendation, the JFTC surveyed 80 organizations including manufacturing associations of consumer goods in August of the same year for the facts surrounding tour invitations …".[456]

Japan argues that the notification applied regardless of the nationality of the entity engaged in the practice.

5.452 Japan further submits that JFTC Notification 17 was applicable only to offers of goods. Low price offers, rebates and offers of goods to assist the other parties' promotional activities were outside the scope of the regulation. Moreover, the notification makes it clear that it does not restrict businesses to "offer equipment or facilities for selling or storing such goods, to offer equipment, facilities, etc. for advertisement or any other aids for advertisement, or to provide guidance on the information on commodities or repair technique". Hence, according to Japan, the manufacturers, both foreign and domestic, have had a large variety of means to establish new, or strengthen existing, relationships with distributors.

5.453 Japan notes that the photographic materials industry was not singled out since almost all the industries producing goods consumed or used in every day life - more than 100 industries ranging from automobiles to soaps - were covered.

5.454 Japan argues that the regulation restricted only excessive premium offers - not normal promotional activities - to distributors. The rationale was that such offers could impair fair and free price competition in the distribution and could increase the distribution cost to the detriment of consumer interests. However, manufacturers were still able to offer low prices or rebates and were free to engage themselves in other normal promotional activities under the notification.

5.455 Japan further notes that premiums offered to employees of companies which were in a special relationship (share holdings or sending executives) with the manufacturer were not considered premiums under the regulation, because they were no different from premium offers to its own employees. This exception applied only to transactions which were virtually identical to operation within a single entity. The relationship between Fuji Film and its primary wholesalers were not eligible for the exception because they were not in special relationship.

5.456 Japan submits that JFTC Notification 17 has already been abolished since April 1996 and therefore falls outside the scope of the present proceeding. As price competition intensified at the

[455]Severe Restrictions Placed on Businesses for Premium Offers, op.cit.
[456]JFTC Annual Report, 1966, Japan Ex. D-43.

distribution level due to changes in the Japanese economy since 1967, distributors tended to demand lower prices, rather than premiums, from the manufacturers. The need for the regulation declined, commensurate with the trend. For these reasons, the Notification was abolished.

5.457 The **United States** notes that the notification remained in effect through March 1996, but that the repeal of Notification 17 leaves premium offers between businesses subject to JFTC Notification 15, Designation 9, of 15 June 1982 on unjust inducements under the Antimonopoly Law. The United States argues that that designation prohibits premium offers in excess of "normal trade practice". Given that premiums worth more than 100,000 yen per year to a single business were unlawful from 1967 to 1996, and thus the "normal trade practice" may effectively be limited to that amount, there is uncertainty as to the extent to which any present restrictions under the Antimonopoly Law will differ from the former standard pursuant to the Premiums Law.

5.458 However, according to **Japan**, the fact is that under Designation 9 of JFTC Notification 15 on "Unfair Trade Practices", the automatic trigger level of 100,000 yen does not exist any more, and that the burden of proof lies with the JFTC.

(b) 1967 Cabinet Decision (guidance on fair competition codes)[457]

5.459 The **United States** submits that in June 1967, the Foreign Investment Council ("FIC") Expert Committee, an advisory committee of the Ministry of Finance, called for the establishment of additional "fair competition codes" as an "effective countermeasure".[458] These codes were to be established, the Committee suggested, "with assistance from the industry that might be affected".[459]

5.460 According to the United States, Japan was well aware that its treaty obligations did not allow the government to treat foreign companies in a facially discriminatory manner. In the words of a Foreign Investment Council Expert Committee member, although Japan wanted "legal countermeasures to prevent any risk of foreign capital disturbing domestic businesses or the Japanese economy, a risk which will arise with capital liberalization," it recognized that "if any discriminatory countermeasures are to be taken … it will have to be the [domestic] companies taking them on their own".[460] To outsiders, the measures would seem evenhanded: "the government must naturally counter such new situations by expanding the application of the [Premiums and Antimonopoly Law,] but it may be that the laws should be technically applied in a fair manner to domestic and foreign firms…".[461]

5.461 The United States further submits that in July 1967, the Japanese Cabinet adopted the recommendations of the FIC and its Expert Committee that the Premiums Law should be used as a liberalization countermeasure by establishing fair competition codes.[462] For the United States, the government directed that the codes were to be established by industry representatives and trade associations, as provided under Article 10 of the Premiums Law, and the government would exercise "active guidance".[463]

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[457]See Section II.B.1 above.

[458]Report of the Foreign Investment Council Expert Committee, Finance, June 1967, p. 3, US Ex. 67-5. See Section II.B.1.

[459]Ibid.

[460]Postwar Developments and Challenges of Corporate Law Part II: Capital Liberalization Countermeasures, Hogaku Seminar, April 1968, p. 3, US Ex. 68-4.

[461]Ibid.

[462]See Section II.B.1.

[463]"What has gained special attention in this law as a liberalization countermeasure is the establishment of fair competition codes, which have a self-regulatory character for industry (Article 10 of the same law) … it was concluded that offering excessive premiums and other such practices can probably be prevented effectively by the more efficacious utilization of this system. There was strong feeling that what is needed for this purpose are the efforts of Japanese industry itself in establishing these codes and active guidance in the government in the direction of helping these efforts" (Sato Hiroshi, Deputy-Director, Foreign Investment Division, Ministry of Finance, Legislative Countermeasures for Preventing Disorder Resulting

5.462 Thereafter, the United States argues, the JFTC urged the private sector to promulgate more "fair competition codes" and offered guidance on drafting them. Industry and associations initially resisted, but the JFTC nonetheless succeeded in securing commitments to adopt such codes: "With respect to establishing the fair competition codes, unlike today, they were all extremely unwilling. They thought that [the codes] were disgraceful . . . Various industries were originally unwilling to establish fair competition codes, but by [1969], they began establishing the codes on their own initiative".[464]

5.463 **Japan** submits that it did not believe it is necessary to elaborate on fair competition codes or fair trade councils as none of them cover photographic film and paper. Nevertheless, it felt compelled to rectify misperceptions contained in the United States submissions. Japan argues that excessive premiums and misleading representations tend to quickly spread among competitors, and to escalate in the process. It is therefore desirable for effective enforcement of the Premiums Law to have business entities agree on self-restraint of such behaviour and to prevent actual violation of the Law. Japan submitted that it is against this background that the Premiums Law allows business entities to adopt, subject to the JFTC's approval, voluntary rules (fair competition codes) on premiums and representations, to ensure consumers' proper selection of merchandises and fair competition in the market.

5.464 Japan argues that the report of the FIC's Expert Committee, invoked by the United States, also clearly states that "[i]n applying the Antimonopoly Law, enterprise with foreign capital should not be treated differently".[465] According to Japan, neither the Antimonopoly Law nor the Premiums Law has any provision that allows treating enterprises with foreign capital differently, and these laws have never been enforced in such a manner.

5.465 For Japan, the report only contained recommendations most of which "had to be further discussed in other expert councils or administrative agencies for their implementation, in light of the character of being an advisory organ to consider important matters in connection with foreign investment".[466] The report specifically states that "for most of the matters discussed here, neither the Committee nor the Council is able to render conclusive judgment". Japan submits that the JFTC has not enforced the Premiums Law to implement these recommendations. Japan also argues that, contrary to the US allegation, the Japanese Cabinet did not adopt the report. Therefore the Japanese Government did not exercise "active guidance".

5.466 According to the **United States**, Japan tries to remove the codes and councils from review by arguing that they do not regulate the sale or promotion of photographic materials. Japan claims that the codes were not *drafted* with film or paper in mind. In making this argument, Japan overlooks the *actual* market effects these codes and councils have on the promotion of photographic materials. For the United States, the codes and councils stultify promotions for photographic materials in the Japanese market, and it is this *actual* effect to which it objects.

5.467 The United States further submits that to buttress the fledgling fair trade councils, Japan took steps to ensure that foreign firms would be unable to make inroads into the Japanese market prior to full enforcement of fair competition codes that were being put into effect. The JFTC initiated proceedings against imports to discourage aggressive promotional efforts. These enforcement actions sent a strong signal that the government intended to use its restrictions on promotions to suppress import competition.

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from Liberalization of Direct Investment, Finance, July 1967, p. 6, US Ex. 67-5).

[464]Interview with Iyori Hiroshi: The Role of Premiums and Representation Law and Issues for the Future, Kosei Torihiki, No. 502, August 1992, US Ex. 92-3. Japan submitted that the reason why the private sector was "unwilling" to adopted the codes was that the target industries had been exercising outrageous misrepresentations (e.g., souvenirs, real property) and felt it was dishonourable to adopt such codes.

[465]Finance, June 1967, Japan Ex. D-58, US Ex. 67-5.

[466]Finance, July 1967, Japan Ex. D-59, US Ex. 67-9.

The United Stated provides three examples where the JFTC enforced the Premiums Law against subsidiaries of foreign companies or importers of foreign products. One example involved a Japanese subsidiary of a Swiss watch company which wanted to provide its top customers with trips to attend seminars in Switzerland. In another example action was taken against importers of US-made air conditioners wanting to offer a free colour television with each product sold. In a third example, a US soft drink producer was prohibited to offer its consumers certain sweepstakes with prizes of cash or a three-pack of soda. The JFTC Premiums and Representations Division director acknowledged at the time that the JFTC was concerned about "flashy premium sales" by large foreign competitors and that a "fair competition code" was needed to protect domestic industries.[467]

5.468 According to **Japan**, each of the examples cited by the United States had nothing to do with the origin of the product. The same action would have been taken against domestic producers. Japan further notes that for the three-year period of 1969 to 1971, JFTC issued cease and desist orders in 159 cases and only three were against foreign products. For Japan, the JFTC has been fully non-discriminatory in enforcement of the Antimonopoly Law and the Premiums Law.

5.469 According to the **United States**, in addition to these enforcement actions, the JFTC took less formal action by issuing "administrative guidance" to foreign companies and their domestic importers. Though not as drastic a form of regulation as a cease and desist order, "administrative guidance" essentially has the same effect.

5.470 The United States also argues that the Japanese Government took additional steps to enhance the promotion countermeasures while fair trade councils were being formed. In 1972, the Premiums Law was amended to provide authority for prefectural governments to initiate premium and representation enforcement actions.[468] Under revised Premiums Law Article 9-2, prefectural governments may direct violators to cease from acting inconsistently with Articles 3 or 4. To mobilize public pressure in support of an enforcement measure, prefectural governments may publicize their findings. If a violator fails to comply with a directive issued under Article 9-2, or if a prefectural government requests, the JFTC also may "take appropriate measures".[469] According to the United States, the 1972 amendment resulted in a dramatic upturn in the number of enforcement actions brought under the law: from 1972 to the present, prefectural governments have been responsible for approximately 75 percent of all Premiums Law enforcement actions.

5.471 **Japan** submits that the 1972 amendment was in response to calls for further cooperation between the JFTC and local governments for the purpose of better protection of consumer interests.[470] The amended Premiums Law empowers Prefectural Governors to investigate possible violations of the law through the requirement of reports and on-the-spot inspection. They are also authorized to issue a non-binding direction to parties in a case to refrain from violation of the Law. Japan noted, however, that the Prefectural Governors do not have the authority to issue cease and desist orders (Article 9 bis of the Premiums Law). If parties do not voluntarily follow non-binding directions by the Governors, compulsory actions will have to be taken by the JFTC. Moreover, the prefectural governments are under the JFTC's control as far as the enforcement of the Premiums Law is concerned (Article 9-5). Both authorities are engaged in close communication with each other in connection with the enforcement, and there is no practical discrepancy in the interpretation or policy of the premiums regulations.

[467]Ueno Toshiro, JFTC's Premiums and Representation Division, Pepsi Cola Premiums Law Case, Kosei Torihiki, December 1971, US Ex. 71-12.

[468]Premiums Law, Articles 9-2 and 9-3, US Ex. 62-6.

[469]Ibid., Article 9-2.

[470]Thirty-Years of Competition Policy, pp. 286-287, Japan Ex. D-56.

5.472 In Japan's view, it should be no surprise that "75 percent of all Premiums Law enforcement actions" are handled by prefectural governments, as noted by the United States submission, because the JFTC has one headquarters and 8 local offices while there are 47 prefectural governments altogether.

(c) JFTC Notification 34 of 1971 (open lotteries)[471]

5.473 The **United States** submits that this notification rules that prizes offered through advertised or "open" lotteries, involving no required purchase of a product, may not exceed 1,000,000 yen. In the US view, the JFTC included "photosensitive materials" among selected industries subject to the new restriction.

5.474 **Japan** argues that Kodak's use of prizes for their sales promotion has hardly been affected by Notification 34 of 2 July 1971. Kodak has conducted a large number of promotion campaigns using open prizes. Japan submits that between 1971 and 1996 (when the limit on "open" prizes was changed from 1 to 10 million yen), Kodak offered 1-million-yen prizes on only a few occasions. In the majority of Kodak's promotion campaigns, the first prizes were between 300,000 to 500,000 yen. Even after the limit was raised to 10 million yen, Kodak kept offering prizes far less than the former limit of 1 million yen. In late 1996, for example, Kodak offered in its promotion campaign 500,000 yen prizes for first place winners.[472]

5.475 The **United States** argues that Kodak has largely curtailed premiums promotions due to the tight controls imposed. Kodak has developed many ideas for premiums and prizes, but "they were removed from the plans if they potentially conflicted with government regulations or the industry self-regulation."[473]

(d) JFTC Notification 34 of 1973 (country of origin of goods)[474]

5.476 The United States argues that JFTC Notification 34 of 16 October 1973 limits the extent to which promotional representations for imported products may be made in Japanese. Among other things, the notification designates as misleading "[r]epresentations … which, when applied to foreign made goods, are found to make it difficult for general consumers to distinguish the goods as made in the foreign country in question: … [r]epresentations in which all or a principal part of the literal description is made in Japanese letters."

5.477 In the US view, limitations on the use of the native language by foreign firms can dramatically impair the efficacy of marketing efforts for imported products. This is especially true if the restriction is applied to the brand name or other essential information about the product.[475] For the United States, the less favourable treatment accorded to imports by any limitation on the use of Japanese is manifest and is exacerbated by guidelines interpreting the notification.[476] These guidelines establish exceptions from the notification in favour of domestic products, exceptions for which there are no analogies applicable to foreign-made items.

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[471]See Section II.B.3.(a).(ii).

[472]See Japan Ex. D-27, containing a "List of Kodak's Previous Prizes".

[473]Affidavit of Sumi Hiromichi, p. 27, US Ex. 96-10.

[474]See Section II.B.3.(b).(iii). Even though this notification does not appear on the US list of measures challenged, it is extensively referred to in both parties' submissions.

[475]In the US view, though the notification also restricts the extent to which representations related to the origin of Japanese goods may be made in a foreign language, the inability to promote goods in a language other than Japanese does not amount to a comparable burden.

[476]Application Standards for "Misleading Representations Regarding Country of Origin of Goods", Secretary General's Directive No. 12, 16 October 1973, US Ex. 73-5.

5.478 The United States notes, for example, that paragraph 2 of the guidelines permits representations referring to foreign nations or places to be made in connection with Japanese products if it is "obviously understood" that the business involved is a Japanese firm. Paragraph 3 provides that domestic products may be identified with a foreign name, *e.g.*, "French bread," if "clearly not to imply that the country of origin of the goods in question is a foreign country".[477]

5.479 For the United States, JFTC Notification 34 and its guidelines clearly disadvantage imports by imposing restrictive requirements concerning promotional representations bearing upon the country of origin of products. The notification's regulation of imports in their use of Japanese serves no proper consumer protection purpose because, regardless of where a product is manufactured, the country of origin can be clearly identified in Japanese. Moreover, the United States argues, no legitimate consumer protection purpose is served by carving out exceptions from the notification for domestic but not for foreign goods.

5.480 In response to the US arguments with respect to JFTC Notification 34, **Japan** submits that in the late 1960s, a huge quantity of imported goods began to be distributed in the Japanese market, in the course of the expansion of exchanges of capital, technology and goods. Unfortunately, improper representations of the country of origin became widespread in the process. Those representations were designed to deceive consumers to mistake domestic goods for products of Europe or North America, and to exploit the consumers' preference of certain products made abroad. With a view to effectively controlling representation which would mislead general consumers on the country of origin of products, the JFTC adopted Notification 34 and also published "Guidelines for the Interpretation of Application of the Notification".[478]

5.481 For Japan, the Notification was thus devoid of any purpose or effect of restricting importation of foreign products; on the contrary, it was designed, partly at least, to preserve fair competitive opportunities for foreign products against disguised domestic goods in the Japanese market.

5.482 Japan further submits that JFTC Notification 34 is symmetrical and consists of two Items. Item 1 provides for a regulation of representations which could misrepresent domestic goods as foreign goods, and Item 2 deals with misrepresentations of foreign goods as domestic goods, as well as misrepresentation between foreign goods in general.[479] The guidelines enacted under the notification clarify Item 1 in particular. According to Japan, this is because the notification was issued primarily to deal with representations which disguise domestic goods as foreign goods, and to protect foreign products. Japan argued that the guidelines apply mutatis mutandis to Item 2 as well.

5.483 Japan argues in addition that as long as the country of origin is clearly expressed in any manner whatsoever, be it in Japanese, in a foreign language, or in a non-literal expression, the use of the Japanese language to express all or a major part of literal representations is entirely lawful.

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[477]The United States also noted paragraph 6 which allows domestic products to use:

"(i) Representations comprising the name of or trade mark of a Japanese business written in foreign letters (including Romanized Japanese), which are found to be clearly distinguished by general consumers as those which are applied to domestically made goods;

(ii) Representations which are allowed by law to be used as descriptions for general consumers instead of Japanese (*e.g.*, "All Wool," "Stainless Steel," etc.);

(iii) Representations which are accepted by general consumers as Japanese by virtue of general business practices (*e.g.*, "size," "price," etc.); and

(iv) Representations which comprise foreign letters, but where it is obvious that the said letters are used only as patterns, ornaments and the like, and will not imply that the country of origin of the goods is a foreign country (*e.g.*, the c[l]ippings from English-language magazines used as patterns on carrier bags)".

[478]JFTC/Secretary General Circular No. 12 of 1973, Japan Ex. D-54.

[479]See Section II.B.3.(b).(iii).

5.484 Japan also submits that paragraphs 2, 3 and 6 of the guidelines do not provide for an "exception of domestic goods" as the United States argues; they are illustrations of representations which would not mislead consumers. According to Japan, the country of origin rules treat domestic and foreign goods in a symmetrical manner. Domestic goods may not use a foreign language to express all or a major part of literal representations unless they carry a recognizable representation to indicate its Japanese origin. The restriction of the use of the Japanese language for foreign goods should be understood as a counterpart of the rule applicable to Japanese goods, and should not be understood to be discriminatory by any means. In this respect Japan notes that the US Federal Trade Commission's principle of the foreign origin provides that "it is unfair, as a general rule, to sell a foreign product, or to offer for sale, without disclosing the country of its origin".[480] The FTC does not require, on the other hand, American goods to identify their domestic origin. For Japan, in contrast, the Japanese country of origin rules under the Premiums Law restrict, equally between domestic and foreign products, representations which could mislead consumers about the origin.

(e) JFTC Notification 3 of 1977 ("closed" prizes)[481]

5.485 The **United States** argues that the most noteworthy development during early enforcement of the Premiums Law was JFTC Notification 20 of 1965, regarding "Restriction on Premium Offers by Prize Competition." In that notification, the JFTC expanded the scope of the lottery notification to include competitions involving some element of skill, such as quizzes or "pick-a-slogan."[482] Notification 3 of 1977 built upon Notification 20 of 1965. The 1977 Notification limited premiums offered in connection with "closed" lotteries or as prizes in games of random selection as follows: (1) where the transaction value involved in the premium offer by prize competition is less than 500 yen: 20 times the transaction value; (2) where the value of a connected transaction was not less than 500 yen and below 50,000 yen, premiums were permitted to be worth 10,000 yen; (3) where the transaction value was at least 50,000 yen but below 100,000 yen, premiums were permitted to be no more than 30,000 yen; and (4) where the transaction value was 100,000 yen or more, premiums were capped at 50,000 yen.

5.486 **Japan** submits that JFTC Notification 3 of 1 March 1977 restricts only unfair sales by lotteries or prize competition. The ceiling has been set at 20 times of the purchase price or 100,000 yen, whichever is the lower. The total value of prizes is held within 2 % of total planned sales. The JFTC has published the "Guidelines for the Interpretation of the Notification on Restriction on Premium Offers by Lotteries or Prize Competition" ("Prize Guidelines").[483] Japan argues that Kodak has taken full advantage of the availability of "closed prize" campaigns in its sales promotion in Japan. In the list of Kodak's premiums offers[484], the number of "closed prize" offers is almost the same as that of "open prize" offers. In the United States, sales with lotteries are prohibited in all 50 states by law.

(f) JFTC Notification 5 of 1977 (premiums to consumers)[485]

5.487 In the view of the **United States**, Notification 5 of 1 March 1977 on offers of premiums to consumers, which limits such premiums to 10 percent of the value of associated merchandise, was particularly detrimental to competition in the film sector. The 10 percent limitation might allow for

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[480]Foreign Origin, Trade Reg. Rep., 7551, Japan Ex. D-55.

[481]See Section II.B.3.(b).(iv).

[482]JFTC Notification 20 of 1965, reprinted in Kanpo (Official Gazette), 15 July 1965, p. 5, US Ex. 65-1. The restrictions imposed under the notification were expanded in 1969, clarified in 1977 and somewhat liberalized in 1981 and 1996. See JFTC Notification 16 of 1969, US Ex. 69-1, Notification 3 of 1977, US Ex. 77-1, and Notification 13 of 1981, US Ex. 81-1. Nonetheless, the restrictions have remained significant, and currently the maximum premium that may be offered is 100,000 yen.

[483]JFTC Secretary General Circular No. 4 of 1977, Japan Ex. D-35.

[484]Japan Ex. D-27.

[485]See Section II.B.3.(b).(v).

some meaningful premiums to be offered on high-price items, but it has a far greater impact on sales of relatively low-price photographic materials. The value of premiums used in connection with low-priced goods must be high relative to the transaction price, otherwise the rest of the promotion likely will outweigh its benefits. This meant that brands challenging market leaders could not "shout louder" in the marketplace. Just as Japan had cut off premiums from manufacturers to wholesalers and retailers, the United States argued, JFTC Notification 5 essentially precluded large-scale premium promotions to consumers.

5.488 For the United States, though Notification 5 excludes samples, secondary products necessary to the use of main products, items given away at store openings or other celebrations, and coupons, all are subject to the requirement that they must be "reasonable in the light of normal business practice."

5.489 **Japan** argues that only excessive premium offers are subject to restrictions under JFTC Notification 5. Japan submitted that it is lawful for film products of 1,000 yen or less to carry premiums up to 100 yen by means of an all-purchaser offering. For example, a premium of 100 yen, or 25 percent of the price, may be lawfully offered for a film roll worth 400 yen. For Japan, it is certainly doubtful if, under normal situations, enterprises can offer, for a sustained period of time, premiums with a value of 25 percent of the commodity. Kodak, in its recent promotion campaign, has offered a premium worth 50 yen to each purchaser of a packet of film. This is only half of the upper limit of the purchaser premium. Japan also noted that for the ease of understanding the notification, the JFTC has published the "Guidelines for the Interpretation of the Notification on the Restriction on Premium Offers to General Consumers" ("All-Purchaser Guidelines").[486]

6. POST-TOKYO ROUND PROMOTION "COUNTERMEASURES"

5.490 The **United States** submits that tariff negotiations between the United States and Japan in the Tokyo Round of Multilateral Trade Negotiations were effectively concluded by August 1978. At the same time that the Japanese Government agreed to tariff concessions on photographic materials, it expressed concerns to the United States regarding the ability of foreign producers - most notably Kodak - to compete aggressively in the Japanese market.[487]

5.491 The United States further argues that after the conclusion of the Tokyo Round, the Japanese Government established new institutions to strengthen its existing measures to restrict the use of premiums. Its first step was to provide greater coordination for the growing number of fair competition codes and fair trade councils that the JFTC was approving in almost all sectors of the Japanese market. On 1 April 1979, the JFTC issued administrative guidance to the councils to create an umbrella group, the Federation of Fair Trade Councils, to coordinate the activities of the various fair trade councils and provided cooperation and support for them to do this.[488]

(a) JFTC guidance on the use of dispatched employees[489]

5.492 According to the United States, in October 1979, the JFTC proposed and the Cabinet approved the establishment of a Distribution Sector Office ("DSO") to "administer duties pertaining to unfair

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[486]JFTC Secretary General Circular No. 6 of 1977, Japan Ex. D-34.

[487]The United States submitted the following quote from a letter sent by the US Deputy Special Representative for Trade Negotiations to the president of Kodak: "I should mention to you something that the Japanese have always mentioned as an aside during our talks with respect to colour film and paper. The Japanese are very worried about their ability to compete with Kodak. They have asked for an assurance that Kodak would not market aggressively in Japan. I have indicated to the Japanese that this is not the kind of assurance that the United States Government has ever given with respect to concessions we have received" (letter dated 30 August 1978, US Ex. 78-6).

[488]The Fair Competition Code System and Status of establishing Fair Competition Codes, Kosei Torihiki, No. 390, April 1983, pp. 37-38, US Ex. 83-8.

[489]See Section II.B.3.(c).(i).

trade practice designations related to distribution".[490] Upon its establishment, the DSO studied 16 business sectors, issuing its findings on cameras and photographic materials in December 1981.[491] For the United States, the DSO's report conveyed guidance to the "camera, photographic materials, colour photo laboratories and related industries" to develop "self-regulating measures" - meaning enforced by the private sector rather than the government - controlling "the permanent dispatch of sales people so as not to go too far [with] manufacturers' sales promotion methods".[492] In the US view, dispatched employees are a unique form of economic inducement between businesses: they reduce costs for wholesalers and retailers and thereby allow for increased sales based upon cost or price reductions passed down the line of distribution.

5.493 **Japan** submits that the photographic industry was in fact working on standards for the dispatch of personnel even before the JFTC published the result of the "Survey of Distribution of the Camera Industry" in December 1981 and issued administrative guidance in the matter.[493]

(b) 1982 Self-Regulating Measures (dispatch of employees)[494] and the Promotion Council[495]

5.494 According to the **United States**, the domestic photographic industry responded to the JFTC's guidance in June 1982 when it promulgated "Self-Regulating Measures Regarding Making Business Dealings With Trading Partners Fair."[496] These measures govern the use of dispatched employees and contributions by manufacturers and wholesalers to promotions by photospecialty retailers.[497] The National Photographic Industry Fair Trade Promotion Council ("Promotion Council"), the enforcement body for the 1982 Self-Regulating Measures, was established on 23 December 1982.[498] The United States submits that the JFTC has acknowledged that it relies on the Promotion Council to regulate the use of dispatched employees and promotional contributions to retailers among council members and that the JFTC also relies on the standards set by the council in regulating the affairs of non-members.

5.495 In the US view, the close relationship between the JFTC and the Promotion Council is reflected in the council's articles of association, which state that "establishing or abolishing provisions of these Articles of Association and the responsibilities of this Council shall require prior approval from the Japan Fair Trade Commission".[499] From its inception, the Promotion Council intended to look to the JFTC for approval and guidance. The Promotion Council's Chairman explained the Council's approval process with the JFTC: "And on 22 April, we submitted a draft … [which went] as the report of the Distribution Sector Office Director to the Japan Fair Trade Commission. The draft is expected to pass as it stands, and if passed, the six trade organizations…will look to the Fair Trade Commission for administrative guidance as we implement self-regulating measures.[500] Furthermore, the 1982 Self-Regulating Measures provide that each member "shall exert self-regulation in accordance with these standards, and the Fair Trade Promotion Council shall, under the guidance of the Japan Fair

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[490]Cabinet Order No. 43 of 1979 as reported in JFTC Annual Report 1980, p. 283, US Ex. 79-1.

[491]The report referred to by the United States is an article by Kosugi Misao (signed in his personal capacity), an official at the Trade Practices Department, Distribution Sector Office JFTC, The Status of Distribution of Cameras, Kosei Torihiki, No. 377, March 1982, US Ex. 82-3. See Section II.B.3.(c).(i).

[492]Ibid., p. 8. See Section II.B.3.(c).(i).

[493]According to Japan, the establishment of the DSO led only to sector-specific advisory reports, not any government action.

[494]See Section II.B.4.(a).(i).

[495]See Section II.B.4.(a).

[496]See translation issue 23.

[497]See Section II.B.4.(a).(i).

[498]See Section II.B.4.(a).

[499]Fair Trade Council Established, "An Attempt to Improve the Structure of Industry," Fujimori Masao (Misuzu) Zenren Tsuho, January 1983, p. 4, US Ex. 83-3.

[500]"Six Trade Organizations to Promote Self-Regulating Measures Enhance Normalization of Trade Shashoren's Annual Meeting on 22 April," Nihon Shashin Kogyo Tsushin, 1 May 1982, p. 10, US Answers to First Panel Questions, US Ex. 18.

Trade Commission, issue guidance to them as appropriate and necessary".[501] Unlike the "fair trade councils" previously discussed, which are comprised of representatives of horizontal competitors (e.g., camera manufacturers), the Promotion Council is a vertically-integrated industry association representing photographic materials and equipment businesses at every stage of the distribution system: manufacturers, wholesalers, retailers and photospecialty laboratories.

5.496 The United States further submits that the Promotion Council took action against imported film in 1983 when Nagase Sangyo, Kodak's main importer, devised a promotion strategy for the launch of a special limited edition of Kodak's VR film series, known as Kodak's trial pack. The trial pack included a 12-exposure roll of each speed of VR film (100, 200, 400 and 1000 ASA). It involved a number of innovations: the Kodak VR 1000 was the world's first color negative film offered at such a high speed point[502] and the series contained a new electronically readable bar code. The series and promotion were significant in that they were part of Kodak's most important campaign in Japan during the first half of the 1980s.[503] The promotion plan entailed extensive print and television advertising in order "to have as many people as possible become aware of the merits of the VR Series."[504]

5.497 According to the United States, while the Japanese photographic industry viewed the trial pack as "really smart" and a "good plan" with substantial potential for success,[505] it also saw the campaign as a significant threat -- "an extraordinary new expansion strategy targeting Japan's market.[506] This was so, at least in part, because the VR sold at a 38 percent discount off the standard retail price. The day after Kodak announced its plans for the VR Series, the Japanese photographic retailers association indicated that it considered the pricing of the trial pack as problematic. It was concerned with the impact Kodak's trial pack price would have on the prices of domestic film, particularly at a time when domestic film manufacturers had managed to raise prices.[507]

5.498 The United States explained that members of the Japanese photographic materials industry acted swiftly to block Kodak's campaign. The photographic retailers association, acting through the Promotion Council, moved to prevent implementation of the campaign and asked for the assistance of the JFTC. The JFTC summoned representatives of Kodak to explain the promotion plan. After hearing the comments of Kodak's representatives, the JFTC officials issued administrative guidance to Kodak, instructing Kodak to (1) clarify the limited nature of the offer, identifying the volume of trial packs, the stores carrying them and the terms of the offer; and (2) cut back its second shipment of trial packs and announce at each store counter when the product was no longer available.[508] Kodak complied with the guidance.

5.499 The United States further explained that the Promotion Council and the retailers association convinced Nagase to curtail the trial pack's promotions. In its request, the retailers association urged Nagase to refrain from showing its discount price in advertisements.[509] Furthermore, retail associations

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[501]Self-Regulating Measures Regarding Making Business Dealings with Trading Partners Fair, reprinted in Camera Times, 22 June 1982, p. 3, US Ex. 82-8.

[502]John Babbitt Affidavit, US Ex. 97-7.

[503]Ishikawa Sumio Affidavit, US Ex. 97-10.

[504]Ibid.

[505]Nagase Sangyo, Limited Edition Pack of Four Types of VR Film to Be Sold Simultaneously Nationwide, Camera Times, 14 June 1983, p. 5, US Ex. 83-13.

[506]Photosensitive Materials: Kodak's So-called Commemorative Specially Reduced Prices: An Extraordinary New Market Expansion Policy? Nihon Shashin Kogyo Tsushin, 20 June 1983, p. 6, US Ex. 83-14.

[507]US Ex. 83-11, 83-14, 83-15, 83-22.

[508]Ishikawa Sumio Affidavit, US Ex. 97-4.

[509]Kodak's Trial Pack May Be Packed with "Trouble"? Zenren Fears "Dual Pricing," Like Throwing Cold Water on a Stabilizing Market, Shashin Kogyo Junpo, 20 June 1983, p. 10, US Ex. 83-16.

asked Nagase "not to list prices in newspapers, and among other places." Kodak was forced to minimize its promotion of the trial pack.[510]

5.500 In the US view, the Promotion Council continues to apply pressure on photographic material manufacturers to reduce the number of employees they dispatch to retailers. As recently as July 22, 1996, the Promotion Council issued a "directive" to Kodak stating that the council has "decided in July 1995 to request your [Kodak's] cooperation in continuing to reduce dispatched employees" and that Kodak is to "immediately report the status of your company to this Council".[511]

5.501 For **Japan**, the Promotion Council is a private-sector organization and has no governmental authority. Its action is therefore not subject to the inquiry of the WTO. Generally speaking, the JFTC is consulted by business entities or organizations over issues under the Antimonopoly Law and responds to their inquiries. Indeed, the Promotion Council was established after consultation with the JFTC. These consultations with the JFTC may not delegate any authority to the Council. If the organizations should commit unlawful activities - such as a cartel to restrict importation - , the JFTC will vigorously apply the Antimonopoly Law.

5.502 According to Japan, there has not been a problem of dispatched employees in the photographic film and paper industry. This is probably because the sales method of promotion through manufacturers' employees is, normally, not an effective marketing tool of film products; most consumers choose merchandise on their own, rather than relying on employees' sales talks. On the other hand, photographic paper is marketed to professionals who do not normally rely on dispatched employees.

5.503 Japan argues that membership of the Promotion Council is non-discriminatory and open to domestic and foreign entities. In fact, Kodak is a member through its affiliation with the Camera Manufacturers' Association, and has been in a position to be fully aware of the council's activities.

5.504 Japan notes that the Promotion Council refers to the JFTC's "approval" or "guidance". Although they are free to declare that they will seek the JFTC's approval, or follow its guidance, such reference does not confer on the Council any authority of the JFTC. No law allows the JFTC to delegate its authority to the Promotion Council.

5.505 According to Japan, there is no evidence that the Promotion Council has treated foreign entities in a discriminatory manner. The only case the United States refers to is the VR series case.[512] For Japan, the only role the JFTC played in the VR campaign was that its staff invited Kodak employees and exchanged views on the promotional plan of VR series. Whatever the Promotion Council did in the campaign has nothing to do with the JFTC. There is no alignment between the JFTC and the Promotion Council or Zenren (the retailers association). Officials who were in charge of the matter at the JFTC do not have accurate recollection of the meeting where Kodak allegedly had to explain its promotion plan. Judging from the circumstances, the officials might have heard both parties' position and explained the relevant regulations. In any event, since apparently the promotion by Kodak was and is lawful, the officials could not have exercised any substantial guidance.[513] For Japan, it should be obvious that the JFTC did not impede the VR campaign and it is simply untrue that Zenren, the Promotion Council and the JFTC acted in unison to prevent the VR campaign.

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[510]Zenren Boldly Advances Two Strategies for Rectifying the Increasingly Meaningless Nature of Standard Pricing at its 50th Anniversary Gathering, Zenren Tsuho, November 1983, pp. 8-15, US Ex. 83-22.

[511]Promotion Council Issue No. 8-1, 22 July 1996.

[512]Japan argued that statements contained in Mr. Ishikawa Sumio's affidavit of the United States are not substantiated by objective evidence and therefore are not trustworthy.

[513]Ibid.

5.506 The **United States** submits that Japan's efforts to disassociate itself from the codes and councils it created should be accorded little weight. The "fair trade councils" and "fair competition codes" are the direct result of section 10 of the Premiums Law, which explicitly authorizes businesses and trade associations to create codes relating to premiums and advertising. The Premiums Law further provides the JFTC with oversight authority, allowing the JFTC to subsequently revoke its approval of a code. Moreover, the United States points out that Japan's position that the codes and councils cannot be attributed to the government directly contradicts the position it took in the 1987 *Japan - Liquor Taxes and Labelling Practices Dispute*, where it cited its system of "fair competition codes" under the Premiums Law as a form of "legal regulation." Japan stated in its submission to the Panel that "labelling of alcoholic beverages in Japan is regulated by a range of legal controls as follows.… (iii) fair competition codes in accordance with the said Act [against Unjustifiable Premiums and Misleading Representations.]"[514]

(c) JFTC guidance on dumping and loss-leader advertising[515]

5.507 The **United States** argues that in May 1983, the Director of the JFTC's Premiums and Representations Guidance Division pressed the Promotion Council to expand its operations into new areas: "it is of critical importance to develop rules one by one against dumping and loss-leader advertising."[516] The Division Director explained that, "from the perspective of those of us who apply [the laws,] our position is that we will respect the voluntary standard you establish…so we feel that you need to establish your own voluntary standard."[517] According to the United States, the Promotion Council recognized that dumping cases can be quite difficult to prove and administer, but determined that a charge of misrepresentation may be a better course. As the Promotion Council explained: "If dual pricing can be taken up as a representation issue, we can certainly tackle the problem by communicating closely with the JFTC. It is true that the representation issue rather than prices in and of themselves is better suited to self-regulating measures. There are the fair competition codes based on the Law Against Unjustifiable Premiums and Misleading Representations from which the manufacturers and wholesalers have already made their own Codes on camera premiums. Just like it is with premiums, the issue of price representation is well suited to the concept of voluntary restrictions."[518]

5.508 **Japan** argues that the above-quoted "guidance" was not properly translated by the United States. The proper translation of "it is of critical importance to develop rules one by one against dumping and loss-leader advertising", is, according to Japan, "with regard to unjustifiable low prices and bait advertising, it is important to pile up one by one". For Japan, the meaning of this sentence is not even clear from the context.

(d) 1984 Self-Regulating Standards (developing fees)[519]

5.509 The **United States** submits that the 1984 Self-Regulating Standards prescribed the manner in which prices for film developing and printing could be represented. The standards stipulate "provisions in regard to the representation of photo processing fees for colour negative film … and printing fee[s] for service-size prints for direct orders from general consumers until the Fair Competition Code

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[514]Panel Report on *Japan - Liquor Taxes and Labelling Practices*, adopted 10 November 1987, BISD 34S/83, 86-87, para. 2.7.

[515]See Section II.B.3.(c).(ii).

[516]Yamada Akio, Premiums and Representatives Guidance Division Director, as quoted in Suggestions on How the Fair Trade Promotion Council Should be, Zenren, Tsuho, May 1983, p. 2, US Ex. 83-9. Japan disagrees with the US translation of this phrase. See translation issue 22.

[517]Regarding the Antimonopoly Law and "Fair Trade", Shashoren Lecture Series (Part II), Shashin Kogyo Junpo, 10 June 1983, p. 10, US Ex. 83-11.

[518]Zenren Tsuho, October 1983, pp. 8-9, US Ex. 83-21.

[519]See Section II.B.4.(a).(ii).

[governing such representations on prices] is established". The standards also authorize the Promotion Council to "conduct investigations and provide guidance on the operation of these Standards if necessary".

5.510 According to **Japan**, these standards were adopted when service providers only displayed inexpensive print charges and then charged customers a high developing fee. The intention of the guidelines was to give consumers adequate information of both charges. As such, the guidelines are not related to sales of film products, and the JFTC's role was limited. Incidentally, the guidelines were not effectively implemented because there were too many outsiders. In this respect, Japan also referred to the Code of Practice for Photographic Industry of the United Kingdom which provides that "[t]he retailer will display his prices for developing film and for the main sizes of print" and that "[r]etailers will have on display, or be prepared to indicate to customers, their service times for prints, and will maintain close contact with the processing laboratory".

5.511 The United States submits that since the 1984 Self-Regulating Measures cover "DP representations", or "representation[s] of the photo processing fee for colour negative film", there is a relationship between these measures and photographic materials.

(e) JFTC approval of 1987 Retailers Code and Retailers Council[520]

5.512 For the **United States**, the Retailers Code sets forth numerous requirements for almost all forms of promotions, such as identifying the name of the manufacturer and price of the merchandise. Article 5 requires that, in the event an advertisement compares the price of a camera or related product to other such products, the advertisement must: (1) rely upon the manufacturer's suggested retail price, the importer's suggested retail price or the shop's normal retail price for the comparative rate; and (2) state a discount rate that is based upon the manufacturer's suggested retail price, the importer's suggested retail price or the shop's normal retail price. Article 7 restricts the use of terms like "cheapest" or "very best" in advertising, mandating that "objective factors" be demonstrated in order to do so. Article 10 prohibits, among other things, the use of expressions such as "super cheap," "give-away price" or "super special price" if such expressions will lead the "consumer to believe the offer is better than it actually is." The United States explained that the purpose underlying the establishment of these rules was to inhibit aggressive promotions and price discounts. In this regard, the United States maintained that the Retailers Council Secretary General informed Kodak that the Council "would contribute significantly in particular to stabilize price … ."[521]

5.513 In the US view, Articles 3 and 4 include provisions that, on their face, discriminate against imports with respect to representations concerning the country of origin of the product. Article 3, pertaining to storefront displays, and Article 4, governing fliers, require advertisements to indicate the country of origin for imported merchandise. Advertisements subject to Articles 3 and 4, however, do not have to include a statement indicating that items were made in Japan, unless such domestic merchandise may be confused with imported products.

5.514 For the United States, though it does not explicitly include film within its scope[522], the Retailers Code has been applied to promotions for film and paper products. This expansive application arises from Article 2.2 of the code which provides: "To attain the objectives outlined in the above Article [1], businesses are to respect the spirit of this code even when the products being dealt with do not

[520]See Section II.B.4.(b).

[521]Ishikawa Sumio Affidavit 1, p. 1, US Ex. 97-4.

[522]Article 2 of the Retailers Code states that the code applies to "Cameras and Related Products". Japan disagrees with the US translation of "Kamera-rui". See translation issue 17.

correspond exactly to Cameras and Related Products".[523] According to the United States, application of the code to film and developing and printing was fundamental to securing support for the Retailers Code and the Retailers Fair Trade Council from the retailers association.[524]

5.515 In the US view, the Japanese Government has delegated authority to the Retailers Council to take enforcement actions under both the Retailers Code and the Premiums Law.[525] For the US, the council is just like a subcontractor for the JFTC. This authority was made plain upon commencement of the Retailers Council's operations in June 1987, when the director of the JFTC's Premiums and Representations Division Office remarked that, by approving the Retailers Code, the JFTC had deputized the Retailers Council to take action on its behalf: "The approval of the Code means that the role I play in following up on violations will be left to the Fair Trade Council. If this expectation is not met, [the approval] will have no meaning."[526] The council may provide "directions in connection with the Code", make "adjustments in how the Code is being observed", investigate "the facts when there is suspicion of violation of the Code", take "necessary steps against those who have violated the Code", process "complaints received from the general consumer", and serve as a liaison "with competent authorities". With regard to Article 14-7, the Council is authorized to engage in "[a]ctivities pertaining to making the Act Against Unjustifiable Premiums and Misrepresentations and other laws and ordinances pertaining to fair trade widely understood *and preventing violations thereto*" (emphasis added). For the United States, the language of Article 14-7 delegates authority to the Council to take action to prevent violations of fair trade laws. This language indicates that the Council plays an integral role in enforcing the law. Article 15 provides that the Council may investigate suspected violations of the Code and, if such violations are found, Article 16 states that the Council may punish offenders through fines or other methods of coercion.[527]

5.516 The United States argues that even before the Retailers Code went into effect, the Retailers Council took action to chill competition through restrictions on advertising. As of the time the Code and the Council became fully operational, discounters with large store networks had already "toned down" their representations and even non-participants in the code, or "outsiders", had been "silenced".[528] The United States submits that just as the Promotion Council had used its authority to regulate misrepresentations to suppress Kodak's discount VR campaign, the Retailers Council similarly uses its power over price representations to limit discounting and promote stability among competitors. Ironically, when confronted with a large-scale promotion similar to the VR campaign conducted by a domestic manufacturer, Konica, the Retailers Council took no action.[529]

5.517 According to the United States, a key element of the Japanese Government's enforcement strategy to control the nature and level of promotion competition in the photographic sector was to ensure that the standards established in the Retailers Code applied to the activities of *all* businesses selling

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[523]The United States quoted, for example, the Fair Trade Council vice-chairman as follows: "Cameras and related products does not mean cameras alone but also means [more] broadly products handled by camera shops … Photosensitive materials and developing and printing are never outside of the scope" (Interpretation of the Fair Competition Code Seems Still in Confusion, Shukan Shashin Sokuho, 7 August 1987, US Ex. 87-9).

[524]Discussion on Progress of Fair Trade Council Focuses on Making Fair Competition Code Fully Known, Zenren Tsuho, August 1987, US Ex. 87-7. Japan disagrees in part with the US translation of this article. See translation issue 18.

[525]"Fair Trade Council Established," Operated by Zenren, Will Respect "Fair Competition Code" - Urgent Need to Make Code Known by October Start, Zenren Tsuho, July 1987, p. 3, US Ex. 87-5. Japan disagrees with the US translation of "teki-hatsu" as "enforcement action" in US Ex. 87-5. See translation issue 20.

[526]Ibid., p. 7.

[527]Fair Trade Competition Code Regarding Representations in Camera and Related Products Retail Industry, 1987, US Ex. 87-1.

[528]Don't Give Up Exposing and Forwarding Materials [Regarding Violations] - Japan Fair Trade Commission Probing Non-Members' "Representations Violations", Zenren Tsuho, February 1988, US Ex. 88-2. Japan disagrees with the US translation of a phrase in US Ex. 88-2. See translation issue 21.

[529]Japan argued that Konica's offer of free sample films, referred to by the United States, does not constitute a violation because the Premiums Law does not restrict the distribution of free samples not linked to sales.

photographic items - not just businesses that agreed to adhere to the codes. The United States submits that the JFTC confirmed that it relies upon "fair competition codes" when applying the Premiums Law to "outsiders" and that "outsiders" may be treated more severely than code participants.[530] As recently as 1995, the JFTC confirmed that it relies upon "fair competition codes" when applying the Premiums Law to "outsiders": "The Japan Fair Trade Commission will directly regulate those who do not participate in the Codes, but as long as the Codes are observed and recognized as having been established in accordance with normal business practices, the Japan Fair Trade Commission uses the Fair Competition Codes as reference when it applies the law."[531]

5.518 **Japan** submits that members of the Retailers Code consist of 49 prefecture-wide retailers organizations, which represent 6600 individual business entities. The Retailers Code deals only with representations; premiums are completely outside its scope. The purpose of the code is to "protect the opportunity of general consumers to properly choose merchandises, to prevent undue inducement of customers, and thereby to ensure fair competition".[532] The Code does not hinder normal sales promotion activities of the enterprises, either domestic or foreign.

5.519 In Japan's view, the language of the Retailers Code makes it clear that it applies only to the "camera category" and has never been applied to film and paper.[533] Article 2, paragraph 1, of the Code defines the "camera category" as follows:

> "The 'camera category' of the present code shall mean those which are specified in the implementation rules to the present code".

Article 1 of the implementation rules then defines:

> "The 'camera category' … shall mean (i) portable cameras, substitute lenses, small movie equipments (8-mm cameras, 16-mm cameras, 8-mm projectors and 16-mm projectors), electronic visual equipment (video cameras and still videos) and slide projectors; (ii) photographic electronic flash, photographic filters, photographic attachment lenses, photographic conversion lenses, camera tripods and camera bags.

For Japan, it is obvious from the text that film or paper is not included here.

5.520 Japan argues that although Article 2, paragraph 2, of the Code provides that "business entities should observe the object of the present code with respect to the camera category not specifically included in the scope of the code," the term "camera category not specifically included" means such equipment which was not existent at the time of the adoption of the Code but may be manufactured through technological innovations. Film and paper, on the other hand, are photographic material and do not fall under the "camera category". Japan submits that the JFTC has never allowed and has no intention to allow application of the code to film or paper.[534]

5.521 Japan submits that even assuming that the Code would apply to film and paper, the fact remains that the United States has failed to mention which specific provisions of any "code" or which specific

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[530]See translation issues 24(1) and 24(2) concerning a quotations from: "Consumer Life and the Fair Competition Codes", All Japan Fair Trade Council Federation, US Ex. 95-9; and "Fair Competition Code Regarding Representations in the Camera Category Retailers Industry," US Ex. 87-1.

[531]Shohisha no Kurashi to Kosei Kyoso Kiyaku [Consumer Life and Fair Competition Codes], March 1995, p. 10, US Ex. 95-9. Published by All Japan Fair Trade Council Federation, and commissioned by the JFTC (emphasis supplied).

[532]Article 1 of the Retailers Code.

[533]See also translation issue 17.

[534]In this context, Japan states that it disagrees with a number of respects with the US translation of "Fair Competition Codes, Sweet Fantasies and Illusions Ought to be Taboo, Shashin Kogyo Junpo, 1 August 1987, US Ex. 87-8. See translation issue 19.

activities of any "council" have upset the competitive conditions of imported photographic film and paper.

5.522 Japan also submits that even the substantive rules of the Retailers Code by no means upset the competitive conditions of any imported products. Japan argues that self regulatory rules on advertisement including representations is quite common in North America, Europe, and almost everywhere. Japan mentions the "Distilled Spirits Council of the United States, Inc." and the "Advertising and Marketing Code" among the members of the "Beer Institute" in the United States.

5.523 Japan further notes that the Retailers Council is merely responsible for the observance of the code against misleading representations and has no authority to enforce the Premiums Law nor may it restrict low price offers in any way. For the purpose of implementation, codes normally establish a fair trade council as a voluntary organ to ensure observance of the self-regulation. Some of the codes contain provisions for monetary penalties for non-compliance or for expulsion of parties involved. According to Japan, these measures are designed to ensure effectiveness of voluntary restraint. They do not mean that the JFTC's authority has been delegated to these bodies. In this respect Japan referred to codes with similar enforcement mechanisms in the United Kingdom and Australia.

5.524 Japan argues that the Retailers Council may take measures agreed in the self-regulation against insiders, but may not apply the Code to non-members. Outsiders will not be subjected to any action of the Council for any non-compliance with the Code. The JFTC, in the meantime, makes its own judgment about the conduct of the outsider, and will not take any action unless it is in violation of the Premiums Law. Japan notes that the rule on representations in the codes embodies the Premiums Law, and that there is no fundamental disagreement between the concept of misleading representations under the Premiums Law, and that prohibited by the codes.

5.525 With respect to the US argument that Articles 3 and 4 of the Retailers Code require the representation of the country of origin only with respect to foreign goods but not to domestic goods in general, Japan argues that the concept behind these Articles is fundamentally no different from the JFTC Notification 34 on country of origin of goods. They are intended to provide adequate information to consumers.

5.526 The **United States** emphasizes that it is irrelevant whether the codes and councils govern film and paper *de jure* or *de facto.* What does matter is that Japan has organized the most powerful elements of its domestic photographic industry and allowed them to set standards on how products in their sector may be promoted. For the United States, Japan made a bold contention in suggesting that rules adopted by Japan's leading photographic retailers or wholesalers, which govern the promotion of almost every item these businesses sell, will have no effect on film and paper. The United States also points out that the developing and printing division manager of the Retailers Council explained that film and developing and printing are subject to the Code: "They are not included in the items subject [to the Code], but the spirit of the Code is to recover order in the industry and, in the photosensitive materials and development printing divisions as well, we would like to deal with them by making the most of Article 2 Section 2 of the Code –- that is, 'to respect the spirit of this Code even when the products being dealt with do not correspond exactly to Cameras and Related Products".[535] Indeed, coverage of film and developing and printing was fundamental to securing support for the Retailers Code and the RFTC from the retailers association: "Based upon the explanation given by some executives, we first understood photosensitive materials and development printing to also be included. With that understanding, we persuaded *Zenren* [photographic retailers association] members and they, in turn, with that understanding, contributed funds."[536] It would, "indeed, have been impossible to persuade

[535]Discussion on Progress of Fair Trade Council Focuses on Making Fair Competition Code Fully Known, Zenren Tsuho, August 1987, p. 17, US Ex. 87-7.

[536]Ibid., p. 18.

Zenren members whose main line of business is development printing to contribute if [the regulations] only [apply to] hardware."[537] The vice-chairman of the Retailers Council has confirmed this, stating that: "Cameras and related products does not mean cameras alone but also means [more] broadly products handled by camera shops … Photosensitive materials and developing and printing are never outside of the scope."[538]

7. SUBSEQUENT ENFORCEMENT

5.527 The United States argues that Japan's "promotion countermeasures" have been employed largely through informal enforcement mechanisms - primarily warnings and threats - that leave businesses uncertain as to the scope of the governing laws, codes, rules or standards. The JFTC has initiated relatively few formal enforcement actions, but it has issued many "administrative guidances". These informal procedures often target imports, volume sales stores and other mavericks who threaten to undermine the artificial stability of the Japanese photographic materials market.

5.528 In the US view, the effect of the overlapping enforcement mechanisms - the JFTC, the Promotion Council, the "fair trade councils" and trade associations - coupled with the numerous legal provisions that could stymie a promotion, have had a significant chilling effect on importers like Kodak. Kodak has attempted to implement innovative marketing campaigns within the restrictive confines of the promotion countermeasures. However, these restrictions have repeatedly thwarted Kodak's efforts to promote its products. Kodak has developed many ideas for premiums and prizes, but, according to a general manager of Kodak, "they were removed from the plans if they potentially conflicted with government regulations or the industry's self-regulation … we tried to regulate ourselves before receiving such measures from the JFTC on the Fair Trade Council. In this sense you can surely say that the regulations on premiums and prizes have had an effective deterrent effect and have actually limited Kodak's sales promotional activities". Furthermore, "Kodak has invariably devised its sales strategy and its representations and advertisement while giving consideration to how the Japan Fair Trade Commission on Fair Trade Council would react. In this way, the Japan Fair Trade Commission's regulations and Fair Trade Council's views have had a formidable deterrent effect on Kodak's premium and prizes".[539]

5.529 The United States mentions several examples involving premiums in connection with film developing, prizes and other promotions which Kodak attempted to launch but had to cancel. In 1990, the JFTC intervened in a promotion conducted by a Kodak-affiliated retail outlet. Nakamurabashi Photo Station, a photofinishing laboratory, offered a premium in connection with film developing: a photo album worth around 200 yen. According to the United States, the JFTC found this promotion to be too radical and gave guidance to take sufficient precautions on subsequent promotional activities.[540] In another instance, in 1979, Kodak conducted a contest offering video cassette recorders as prizes worth approximately 100,000 yen. The JFTC informed Kodak that its contest was improper.[541] Later, Kodak attempted to devise joint promotions with McDonald's but was frustrated by the ten-percent limitation on premiums that may be offered to general consumers. Kodak wanted to give away free Kodak Panorama single-use cameras with McDonald's meals. Because of the ten-percent rule, Kodak had to settle for a promotion in which purchasers of a McDonald's meal got a 'luck draw' which gave them a ticket and a chance to win a Panorama camera through a drawing.[542]

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[537]Ibid.
[538]Shukan Shashin Sokuho, 7 August 1987, p. 3, US Ex. 87-9.
[539]Affidavit of Sumi Hiromichi, p. 27, US Ex. 96-10, p. 5 and 6.
[540]Affidavit of Isshi Norito, 1 February 1997, US Ex. 97-5.
[541]Affidavit of Yasuyuki Suzuki, p. 1, US Ex. 97-6.
[542]Affidavit of William Jack, former Kodak vice-president for marketing in Japan, p. 8, US Ex. 97-2.

5.530 For the United States, this "chilling effect" has been compounded by the opaque nature of the operation of the "fair competition codes" and "fair trade councils," which create a kind of cartelization arrangement by which cutthroat competition is avoided and profit levels are maintained. The system of codes and councils elevates industry trade associations, like the retailers association, to quasi-governmental institutions with wide-ranging powers. As a result, Kodak has faced frequent opposition to its proposed promotions from the retailers association (Zenren). The United States cites the example of a 1987 arrangement between the Ministry of Posts and Communications and Kodak according to which Kodak would sell photographic post cards at post offices across Japan at prices undercutting the going retail price. Consumers would be able to charge the cost of the postcards against their savings deposits at the post offices. However, the Ministry withdrew from the arrangement because of pressure exercised by Zenren and issued administrative guidance to Kodak to withdraw from the plan. Kodak was forced to comply because of commercial risks involved in disobeying the ministry's guidance.[543]

5.531 **Japan** submits that in the cases it was aware of actions were taken because premiums involved were in excess of the lawful ceiling. Japan argues that the origin of the product had nothing to do with the JFTC's action, and similar campaigns for domestic products would have been equally held unlawful. Japan argues that premiums regulations have been further relaxed, in particular since 1994, and are subject to the JFTC's continuous review in light of the shifting economic environment. In February 1996, the JFTC announced the result of the review and implemented the "new general premiums rule" applicable to all industries in April of the same year.[544] As the next step, the JFTC is reviewing, since April 1996, premiums regulations applicable to individual industries, including industry-specific JFTC Notifications or private "fair competition codes" in order to ensure consistency with the new general premiums rule. As a result, out of 29 industry-specific notifications, 10 (including the Notification regarding the "Restrictions on Premium Offers in the Camera Industry") have been abolished as of March 1997.[545]

5.532 Japan submits that since film and paper fall outside the scope of any fair competition code, and are not subject to any action by a fair trade council, the US arguments on the "chilling effect" of these codes and councils make sense only in relation to Kodak cameras, and not to film products on which the United States bases its complaint in the present proceeding. According to Japan, Kodak's account of an attempted "post card" campaign is somewhat mysterious. No one in the relevant Japanese government office apparently remembers such an incident. In any case, for Japan, such episode has nothing to do even with the alleged "promotion countermeasures".

[543]Affidavit of Suzuki Mikio, p. 3, US Ex. 97-3.
[544]Kanpo, 16 February 1996, Japan Ex. D-30.
[545]Kanpo, 10 December 1996, Japan Ex. D-31.

VI. LEGAL ARGUMENTS CONCERNING NON-VIOLATION CLAIMS

A. INTRODUCTION TO ARTICLE XXIII:1(b) OF GATT

1. GENERAL PRINCIPLES

6.1 According to **Japan**, when examining the factual and legal claims brought by the United States concerning consumer photographic film and paper in the Japanese market, three general principles for panel proceedings should guide the analysis. First, any interpretation of GATT should be in accordance with customary rules of interpretation under public international law. Second, the recommendations or rulings of this Panel cannot add to or diminish the rights and obligations of the WTO Members. Third, the burden of proof rests with the complaining party. Japan emphasizes that these general principles should guide the Panel's consideration not only of the claims under Article XXIII:1(b), but also with respect to those raised under Articles III and X (discussed in detail in Part VII infra).

6.2 Japan points out that Article 3.2 of the DSU refers to "customary rules of interpretation of public international law" as general principles for interpreting WTO Agreements within the framework of the WTO dispute settlement system. Japan is of the view that Article 31 on the general rules of interpretation and Article 32 on the supplementary means of interpretation of the Vienna Convention on the Law of Treaties represent such "customary rules of interpretation of public international law".[546] Japan requests the Panel in this proceeding to interpret and apply the provisions of the WTO Agreement pertinent to this case in accordance with the relevant rules of the Vienna Convention.

6.3 Japan also urges the Panel to take a cautious approach and to refrain from adding to or diminishing the rights and obligations of the WTO Members under the WTO Agreement in accordance with Articles 3.2[547] and 19.2[548] of the DSU which provides for the same principle with respect to the findings and recommendations of panels and the Appellate Body.

6.4 With respect to Japan's admonition to the Panel that it should not add to or diminish the rights and obligations of the WTO Members under the WTO Agreement, the **United States** notes that in this case Japan appears to be trying to diminish the rights of the United States and all other Members under Article XXIII:1(b) by instructing the Panel to apply certain "rules" in its interpretation and application of Article XXIII:1(b) in this dispute.[549]

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[546]See, e.g., Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline* (*"United States - Gasoline"*), WT/DS2/AB/R, adopted on 20 May 1996 and Appellate Body Report on *Japan - Taxes on Alcoholic Beverages* (*"Japan - Alcoholic Beverages"*), WT/DS8, 10 & 11/AB/R, adopted on 1 November 1996.

[547]In a recent article, Professor John Jackson of the University of Michigan echoed the same concern: "Arguably, [Article 3 of the DSU] resonates in the direction of a caution to the panels to use judicial restraint and avoid being too activist. … So this notion of restraining panels from making changes in the rights and obligations of the nation states is quite prevalent in the system. The United States would likely be one of the most jealous in preserving judicial restraint, yet at the same time it appears to be pushing the envelope in some of its own complaints to the WTO. When, for instance, the United States or another country brings a case that does not involve a violation but instead targets competition policy, the Japanese *keiretsu*, or something else that current treaty texts do not cover, it is likely to be asking a panel to change 'rights and obligations'. In other words, it is saying to a panel, 'We want you to interpret nullification or impairment to embrace some of these results that for policy reasons we would like to see in this case'. That is risky - akin to doing with one hand what the other is trying to prevent. Obviously, this has fundamental long-term implications." John Jackson, The WTO Dispute Settlement Procedures: A Preliminary Appraisal, in: Jeffrey J. Schott (ed.), The World Trading System: Challenges Ahead December 1996, p. 163, Japan Ex. E-10.

[548]Japan notes that Article 19:2 of the DSU stipulates: "… in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

[549]The United States refers in particular to Japan's statement that "in determining whether a benefit is being nullified or impaired, this Panel must focus exclusively on the measures themselves".

6.5 **Japan** submits that under the WTO dispute settlement system, the Member bringing a case has the initial burden of proving its claims. This was a well-established principle under GATT 1947 dispute settlement[550] and has been carried over into the WTO, based on Article 3.1 of the DSU and Article XVI:1 of the Marrakesh Agreement Establishing the WTO.[551]

6.6 Japan emphasizes that in non-violation cases under Article XXIII:1(b), the complaining party is required to bear a particularly heavy burden of proof according to Article 26:1(a) of the DSU, which requires "[t]he complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement". In this connection, Japan notes that this requirement of a "detailed justification" in non-violation cases was incorporated in the 1979 Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement[552] and had been applied by the relevant GATT panels.[553]

2. THE LEGAL TEST UNDER ARTICLE XXIII:1(b)

6.7 The **United States** claims that Japan's liberalization countermeasures detailed in Part V nullify or impair tariff concessions on consumer photographic film and paper within the meaning of Article XXIII:1(b) of GATT. Article XXIII:1(b) provides for dispute settlement under the following circumstances:

> "1. If any [Member] should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . .
>
> (b) the application by another [Member] of any measure, whether or not it conflicts with the provisions of this Agreement . . .".

6.8 The United States recalls that the panel report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins* ("EEC - Oilseeds") noted that the underlying purpose of Article XXIII:1(b) was to safeguard the process of reciprocal tariff concessions under Article II:

> "The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a

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[550]See, e.g., Panel Report on *Japan - Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, adopted on 19 July 1989, BISD 36S/167, p. 198, para. 5.10; Panel Report on *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* ("Canada - Alcoholic Drinks"), adopted on 18 February 1992, BISD 39S/27, p. 75, para. 5.3. See also John H. Jackson, William J. Davey & Alan O. Sykes, Legal Problems of International Economic Relations, 1995, p. 355, Japan Ex. E-2.

[551]Article 3.1 of the DSU affirms that the WTO Members adhere "to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947". Article XVI:1 of the Marrakesh Agreement Establishing the WTO provides that "the WTO shall be guided by the decisions, procedures, and customary practices followed by the CONTRACTING PARTIES to GATT 1947 . . .".

[552]Understanding Regarding Notification Consultation, Dispute Settlement and Surveillance, Annex, adopted on 28 November 1979, BISD 26S/210, p. 216.

[553]A past panel report states that "[a]ccording to the 1979 Understanding on Dispute Settlement, a contracting party bringing a complaint under Article XXIII:1(b) is called upon to provide a detailed justification" (*United States - 1955 Waiver*, BISD 37S/228, 261, para. 5.21). See also Panel Report on *Japan - Trade in Semi-Conductors ("Japan - Semi-Conductors")*, adopted on 4 May 1988, BISD 35S/116, 35S/116, 161, para. 131; and Panel Report on *Uruguayan Recourse to Article XXIII*, adopted on 14 November 1962, BISD 11S/95, 99-100, para. 15.

> reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement".[554]
>
> "The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations".[555]

6.9 The United States cites another panel report to the same effect: "Article XXIII:1(b), as conceived by the drafters and applied by the CONTRACTING PARTIES, serves mainly to protect the balance of tariff concessions".[556] The value that the United States placed on obtaining tariff concessions on photographic film and paper and the attendant expectations of improved competitive opportunities is evident from its continuing efforts to secure improved access to the Japanese film and paper market during three successive rounds of multilateral trade negotiations. The United States assumed that the concessions for which it negotiated would not be systematically offset by the Japanese Government.

6.10 According to the **United States**, prior working parties and panels have applied the following elements in analysing claims under Article XXIII:1(b):

(1) a tariff concession was negotiated;
(2) government measures, whether or not inconsistent with the General Agreement, were introduced which upset the competitive relationship between the bound product and directly competitive products from other origins; and
(3) the measures could not have been reasonably anticipated by the party to whom the binding was made, at the time of the tariff concession.[557]

6.11 In the current case, the United States submits that the consideration of the US claim can be broken down into three separate elements:

(1) whether the United States had a reasonable expectation of improved market access opportunities arising from Japan's tariff concessions;
(2) whether Japanese Government measures upset the competitive relationship between imported and domestic products; and
(3) whether the United States could have anticipated Japan's nullification or impairment of its tariff concessions.

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[554]Panel Report adopted on 25 January 1990, BISD 37S/86, pp. 126-127, para. 144.

[555]Ibid., pp. 128-129, para. 148.

[556]Panel Report on *United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions* (*"United States - 1955 Waiver"*), adopted on 7 November 1990, BISD 37S/228, 261, para.5.21.

[557]*EEC - Oilseeds*, BISD 37S/86, 126-131, paras. 142-152. See also *Report of the Working Party on the Australian Subsidy on Ammonium Sulphate* ("Australia - Ammonium Sulphate"), adopted on 3 April 1950, BISD II/188, 192-193, para. 12; Panel Report on *Treatment by Germany of Imports of Sardines*, adopted on 31 October 1952, BISD 1S/53, 58-59, paras. 16-17; *EEC - Citrus Products*, L/5776 (unadopted) pp. 84-85, para. 4.26; Panel Report on *European Economic Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktails and Dried Grapes* ("EEC - Canned Fruit"), GATT Doc. L/5778, 20 February 1985 (unadopted), p. 15, para. 51.

6.12 The United States claims that each of these elements is present in this case:

(1) The United States negotiated for and Japan granted the United States tariff concessions on photographic film and paper products in successive rounds of multilateral trade negotiations: the Kennedy, Tokyo, and Uruguay Rounds.
(2) Japan enacted, implemented and applied the distribution countermeasures, restrictions on large retail stores, and promotion countermeasures to obstruct market access and alter the competitive relationship between imports and domestic products.
(3) At the time each round of tariff concessions was made, the United States reasonably anticipated that better market access through improved price competition would result from the concessions, and neither the United States nor any of Japan's other trading partners could have foreseen that the Japanese Government would impair the value of those concessions through an intricate web of measures designed to counter the effects of liberalization.

6.13 The United States emphasizes that it provided, in accordance with Article 26.1 of the DSU, a detailed justification establishing its claim that Japan's distribution countermeasures, Large Stores Law and related measures, and promotion countermeasures collectively and individually nullify or impair its

(1) Kennedy Round tariff concessions on black and white film and paper;
(2) Tokyo Round tariff concessions on black and white film and paper and on colour film and paper; and
(3) Uruguay Round tariff concessions on black and white film and paper and on colour film and paper.

6.14 **Japan** submits that the scope of Article XXIII:1(b) in GATT jurisprudence is well defined and may be discerned by reference to three key phrases in the text of the provision:

(1) "any benefit accruing … under this Agreement",
(2) the "application by another [Member] of any measure", and
(3) "is being nullified or impaired".

6.15 First, there must be a "benefit" accruing under this Agreement. This benefit consists of the legitimate expectations of improved competitive opportunities arising out of relevant tariff concessions. For expectations to be legitimate, they must take into account all measures of the party making the concession that could have been reasonably anticipated at the time of the concession. In other words, measures reasonably anticipated at the time of the tariff concession cannot frustrate legitimate expectations, and thus cannot nullify or impair a benefit accruing under this Agreement.

6.16 Second, there must be the application of a measure by another WTO Member. The term "measure" refers to a government policy or action, but not every such policy or action constitutes a measure for purposes of Article XXIII:1(b). Measures must either provide benefits or impose obligations. As to the latter, a measure for non-violation purposes must be a government policy or action which imposes legally binding obligations or the substantive equivalent. Furthermore, there must be an "application" of the measure. This requirement is relevant in the case of measures no longer in effect and measures not applied to products.

6.17 Third, the complaining party must show that the benefit in question "is being nullified or impaired" as the result of the application of the measure. To meet this requirement, the complaining party must demonstrate that the relevant measure is upsetting the competitive position of the imported products subject to the relevant tariff concession.

6.18 With respect to the case at issue, in Japan's view, the US non-violation claims do not meet any of the required elements mentioned above for the following reasons:

6.19 With respect to the first element, Japan notes that for measures to nullify or impair the benefit of tariff concessions, it must be established that they could not have been reasonably anticipated at the time of the relevant concession. Although the United States alleges nullification or impairment of tariff concessions on film and paper in three successive negotiating rounds - the 1967 Kennedy Round concessions (only on black and white film and paper), the 1979 Tokyo Round concessions, and the 1994 Uruguay Round concessions - Japan believes that the "benefits accruing under the Agreement" is limited to the benefits of the Uruguay Round concessions. In Japan's view, the 1994 concessions form a new balance of tariff concessions that were actually negotiated and agreed upon at that time.

6.20 Japan further argues that all of the policies in question were enacted and known to the United States long before the relevant tariff concessions, i.e., those made in 1994 with respect to black and white and colour film and paper. Even if earlier tariff concessions were to be taken into account, the timing problems that plague the US argument would remain. With respect to colour film and paper, the 1967 tariff concessions cannot be relevant at all because there were no tariff concessions on colour film and paper until 1979. Since virtually every government action in this case occurred before 1979, it is inconceivable that these policies could not be reasonably anticipated at the time of the 1979 tariff concessions. Even with respect to the 1967 concessions on black and white film and paper, many policies could be reasonably anticipated at the time of the tariff concessions. Accordingly, in Japan's view, all of the alleged measures could have been reasonably anticipated by the United States at the time of those tariff concessions.

6.21 With respect to the second element, in Japan's view, the United States claims that MITI's distribution modernization policies during the 1960s and '70s directed the private sector to restructure distribution practices so as to disadvantage imports. Furthermore, according to Japan, those policies did not impose any legally binding obligations or the substantive equivalent, and thus were not measures within the meaning of Article XXIII:1(b). However, those policies ended years ago, and thus, in Japan's view, are not currently actionable under Article XXIII:1(b). In the case of the Large Scale Retail Store Law, Japan argues that the United States fails to allege specific applications which nullify or impair a benefit. Japan concludes that the absence of any "application" of a measure renders the US claims regarding this law legally insufficient.

6.22 With respect to the third element, Japan contends that the government policies in question do not upset the competitive conditions relating to any of the distinct products subject to this dispute: black and white film, black and white paper, colour film, and colour paper. With respect to each of the three sets of policies at issue Japan submits that: (i) none of these government policies distinguishes between the imported and domestic products concerned or imposes any inherent disadvantage on imports; (ii) there is no causal connection between the alleged measures and any unfavourable competitive conditions; and (iii) the alleged measures as they exist today are unchanged or more favourable to imports as compared to the time of any relevant tariff concession.

6.23 The **United States** contends that the legal criteria suggested by Japan have no basis in the text of Article XXIII:1(b) or other WTO Agreements, any subsequent agreements of the Members, or the negotiating history of Article XXIII:1(b). To the extent that prior panel decisions support the application of Japan's rules, the United States contends that the disputes involved in those panel decisions presented significantly different facts and circumstances than those present in this dispute.

6.24 The United States suggests that Japan's purpose in proposing these rules is to preclude the Panel from seriously examining the liberalization countermeasures at issue in this dispute and thereby permitting Japan to evade responsibility for the measures that have impeded market access in Japan for imported film and paper for thirty years. In contrast, the United States proposes that the Panel

consider this dispute in the manner in which panels always have resolved disputes: on a case-by-case basis in consideration of all of the relevant facts and circumstances.

6.25 The United States notes that the Appellate Body in *Japan - Taxes on Alcoholic Beverages* stressed the importance of case-by-case analysis.[558] While the Appellate Body's comments were directed specifically at how a panel should conduct an Article III:2 inquiry, the United States argues that those comments, consistent with past precedent, are relevant to all disputes.[559] The United States alleges that Japan would prefer that the Panel avoid substantive consideration of the facts and circumstances in this dispute by applying Japan's fabricated, mechanical rules or adopting findings from other cases that are based on completely different facts and circumstances. The United States urges the Panel to address this dispute on its own merits in light of Article XXIII:1(b) and a thorough examination of the relevant facts and circumstances in this dispute.

3. SYSTEMIC IMPLICATIONS FOR WTO DISPUTE SETTLEMENT

6.26 In **Japan**'s view, this case has important implications for the WTO dispute settlement mechanism. Japan submits that the US non-violation claims are urging a dramatic expansion of what has historically been an exceptional and limited remedy. Japan notes that with one exception all previous non-violation cases involved tariff concessions and subsequent government actions that essentially undid the benefits accruing from those concessions.[560] In all these cases, the measures in dispute were essentially either tariff or product-specific subsidies which provided direct financial benefits to specific products. Therefore, it was obvious that the measures affected the competitive conditions of the products concerned. In all prior panels which found non-violation nullification or impairment, the complaining party showed a clear connection between the alleged measures and the unfavourable competitive position of the imported products.

6.27 The **United States** rejects Japan's accusation that the United States is seeking a "dramatic expansion" of the non-violation remedy under Article XXIII:1(b). The United States argues that what Japan claims to be a "dramatic expansion" is in fact nothing more than the legitimate exercise of the US right of redress under Article XXIII:1(b). In the US view, Article XXIII:1(b) of GATT provides a right of redress to a Member who considers that any benefit accruing under the Agreement is being nullified or impaired by the application of *any measure* whether or not it conflicts with the provisions of the Agreement. The United States emphasizes that the language of Article XXIII:1(b) could not

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[558]"[W]e believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. … Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. . . . *In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case"* (*Japan - Alcoholic Beverages*, WT/DS8/AB/R, p. 29, emphasis added).

[559]See, e.g., Panel Report on *European Economic Community Restrictions on Imports of Dessert Apples, Complaint by Chile*, adopted on 22 June 1989, BISD 36S/93, 123, para. 12.1 ("[The Panel] would take into account … the particular circumstances of this complaint"); *Japan - Semi-Conductors*, BISD 35S/116, 154, para. 108 ("The Panel recognized that not all non-mandatory requests could be regarded as measures within the meaning of Article XI:1. Government-industry relations varied from country to country, from industry to industry, and from case to case and were influenced by many factors"); Panel Report on *Canada - Withdrawal of Tariff Concessions*, adopted on 17 May 1978, BISD 25S/42, 48, para. 17 ("The Panel came to the conclusion that a correct and reasonable interpretation of the GATT, in the particular circumstances applying in this case …."); *Australia - Ammonium Sulphate*, BISD II/188, 192-193, para. 12 ("[T]he inequality created and the treatment that Chile could reasonably have expected at the time of the negotiation, after taking into consideration all pertinent circumstances, including the circumstances mentioned above…were important elements in the working party's conclusion").

[560]The exception is the case of the Panel Report on *European Economic Community - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* ("EEC - Citrus Products"), GATT Doc. L/5776, 7 February 1985 (unadopted), p. 85, para. 4.27, which dealt with unbound tariffs on some products, and bound tariffs on other products.

be written any more clearly, i.e., it sets *no* limitations on the types of measures that can be subject to scrutiny. Nor would such a limitation serve the purposes of Article XXIII:1(b). As noted by the *EEC - Oilseeds* panel, Article XXIII:1(b) provides a "right of redress" in the event that another Member nullifies and impairs a tariff concession.[561] Absent this right of redress, drafters feared that Members would be reluctant to make tariff concessions and GATT would no longer be useful as a legal framework for incorporating the results of trade negotiations.[562] Therefore, contrary to Japan's argument, the United States contends that it would be detrimental to the WTO system if the non-violation "remedy" were artificially limited to cases involving only subsidies and tariffs.

6.28 **Japan** states that neither contracting parties nor panels pushed to extend the non-violation concept beyond a limited range of cases, and the concept was applied consistently and with discipline only when specific requirements were met. Both the contracting parties and panels were justifiably concerned about the policy implications of an undisciplined expansion of the concept. The non-violation remedy was used as a tool to preserve the integrity of negotiated tariff concessions. If, however, the remedy were applied without proper restraints, in Japan's view, it could degenerate into a mechanism not for maintaining the agreed balance of tariff concessions between parties, but for imposing a de facto rearrangement of the established balance of tariff concessions in the complaining party's favour without any formal tariff negotiations. Thus, Japan argues that overuse of the non-violation remedy could perversely undermine, rather than preserve, the integrity of tariff concessions.

6.29 Japan concurs with the position taken by the United States in the *EEC - Oilseeds* proceeding, i.e. that the non-violation remedy should remain an exceptional concept and that any change of governmental policies, even if it has harmful trade effects, is not necessarily actionable under Article XXIII:1(b):

> "114. *The United States concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept.* Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept. *The United States did not consider that any change of governmental policies, even if it has harmful trade effects, constitutes non-violation nullification or impairment.* A contracting party does not have a reasonable expectation that a contracting party which grants it a tariff concession will not change general income tax rates."[563]

6.30 Moreover, Japan notes that in that case, the EEC also took the position that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty".[564]

6.31 The **United States** notes that it continues to believe that the non-violation remedy remains an "exceptional concept" in that it provides a right of redress whether or not a measure conflicts with the GATT. There should be a "cautious approach" in applying this concept and that such caution is achieved by the Members' exercise of self-restraint and panels' application of the "detailed justification" requirement in Article 26.1 of the DSU. After 50 years, there have been only 8 cases *(i.e., Ammonium Sulphate, Sardines, Uruguayan Recourse, Citrus, Canned Fruit, Oilseeds, Semiconductors, and Sugar)* in which panels have substantively considered Article XXIII:1(b), and in three of those cases *(i.e., Uruguayan Recourse, Semiconductors, and Sugar)* the panel applied the "detailed justification" requirement that now appears in Article 26.1 of the DSU to dismiss frivolous non-violation claims. According to the United States, the EC made a similar argument in the *EEC - Oilseeds* case that an

[561]See *EEC - Oilseeds*, BISD 37S/86, 126-127, para. 144.
[562]Ibid., pp. 126-128, paras. 144 and 148.
[563]Ibid., pp. 117-118, para. 114 (emphasis added).
[564]Ibid., p. 117, para. 113

affirmative finding under Article XXIII:1(b) would "plunge" the world "into a state of precariousness and uncertainty,"[565] which a decade later has not turned out to be the case. Most importantly, the United States continues to believe that panels should determine whether particular government policies constitute non-violation nullification or impairment on a case-by-case basis in light of all the relevant facts and circumstances. In this case, the United States emphasizes, the issue is not whether some unrelated social or economic policy is having an incidental effect on the film market. Rather, this case is about a concerted and coordinated effort by the Japanese Government directed at protecting its domestic film industry from import competition.

6.32 **Japan** points out that when the non-violation remedy is applied, the losing party - although it has fully complied with all of its GATT obligations, - must nonetheless make a "mutually satisfactory adjustment", i.e., either change policies or offer compensation, or else face the suspension of concessions by another WTO Member. Thus, the non-violation remedy has the practical effect of imposing a range of constraints on Members with respect to GATT-consistent measures similar to that which applies to measures that violate the GATT. Japan emphasizes that past panels have consistently construed the remedy narrowly, and applied the remedy in exceptional circumstances. Japan argues that these reasons apply with even greater force in the WTO framework which reaffirmed the limited nature of non-violation remedies.

a. First, Article 26.1(a) of the DSU imposes important limitations on the application and scope of the non-violation remedy. It makes clear the non-violation remedy should apply only when the complaining party has provided a "detailed justification in support of any complaint". Thus, the complaining party must meet a particularly high standard of justification for its complaint. In Japan's view, however, the US non-violation claims in this proceeding transparently fail to meet any of the established requirements for application of Article XXIII:1(b).

b. Second, even if a panel accepts the non-violation claim, the party complained about does not have to withdraw the measure at issue. Rather, Article 26.1(b) of the DSU specifically indicates that "there is no obligation to withdraw the measure". In Japan's view, the WTO Members were correctly wary of applying the extraordinary non-violation remedy unless there was a clear, compelling, and unambiguous basis for doing so; even then, they were not willing to oblige the party complained against to withdraw the measure.

6.33 The **United States** responds that the Panel should interpret Article XXIII:1(b) correctly, not broadly or narrowly, but consistently with the customary rules of international law. Thus, the United States argues that the Panel's task in this case is not different than in any other WTO dispute.

6.34 **Japan** submits that the reasons for a narrow construction of the non-violation remedy have grown even more cogent with the addition of other multilateral agreements to the GATT. Under GATT 1947, the non-violation remedy served the function of protecting GATT contracting parties' expectations with respect to tariff concessions from frustration by measures not subject to multilateral discipline. Now, as more and more areas have come within the scope of multilateral discipline, and the gaps in the scope of multilateral discipline have narrowed considerably, the need for the protection of benefits accruing under GATT 1994 by the non-violation remedy has become correspondingly less. For Japan, given the broad range of WTO agreements now in force, restraint in application of the non-violation remedy is more appropriate than ever before.

6.35 The **United States** replies that Japan's opinion on the utility of Article XXIII:1(b) is irrelevant to this Panel's determination of whether the US claim satisfies Article XXIII:1(b). Although the scope of the WTO disciplines has expanded beyond the original GATT disciplines, in the US view, the non-

[565]Ibid.

violation "safety net" is still needed for those measures that do not violate the WTO Agreements.[566] The United States emphasizes that the Uruguay Round negotiators recognized this need by adding a non-violation remedy to the GATS and the TRIPS Agreement (although the non-violation remedy will not be available under the TRIPS Agreement until the year 2000).

6.36 **Japan** contends that the US non-violation claims in this proceeding urge a dramatic expansion of the non-violation remedy because, in Japan's view, the United States asks that this exceptional remedy be applied beyond recognized and appropriate limits:

- not only to measures subsequent to the most recent tariff concessions, but also to alleged measures taken earlier and stretching back three decades;
- not only to measures unanticipated at the time of the relevant tariff concessions, but also to alleged measures already in effect and/or known about at the time the concessions were made;
- not only to government measures, but also to private conduct allegedly encouraged by government action;
- not only to legally binding requirements and their substantive equivalents, but also to non-mandatory requests and government reports;
- not only to current measures, but also to the allegedly continuing effects of past measures which are no longer in effect;
- not only to measures that draw distinctions between products and disadvantage imports, but also to alleged measures that make no distinctions between imported and domestic products;
- not only to measures which disadvantage imports, but also to measures which have no causal connection with competitive conditions unfavourable to imports;
- not only to adverse changes in policy since the time of the relevant tariff concessions, but also to policies that have stayed the same or even been liberalized.

6.37 Japan emphasizes that no binding GATT rules concerning private business practices or market structures has ever been established. The 1948 Havana Charter for an International Trade Organization (ITO) included a chapter on restrictive business practices, with obligations on governments. The ITO never came into existence and those rules were not carried over into the GATT. In 1958, the Contracting Parties decided to appoint a group of experts to study and make recommendations with regard to restrictive business practices in international trade. In 1960, the Report of the Group of Experts on "Restrictive Business Practices" was adopted by the Contracting Parties. In the Report, the Group was divided on the nature of further measures to be recommend but the majority first noted that there was no multilateral agreement on restrictive business practices.[567] Of greater relevance in this proceeding is the Report's further admonition for caution in this area.[568] Having considered the Report, the Contracting Parties adopted a Decision on Arrangements for Consultations in 1960, which did not refer

[566]As noted by Professors Jackson, Davey and Sykes in their textbook: "The discovery of new protective devices appears to be an endless process. As soon as the international system establishes restraints or regulations on a particular protective device, government officials and human ingenuity seem able to turn up some other measures to accomplish at least part of their protective purposes", Legal Problems of International Economic Relations, op. cit., p. 377.

[567]"The necessary consensus among countries upon which such an agreement could be based did not yet exist, and countries did not yet have sufficient experience of action in this field to devise an effective control procedure." Report of the Group of Experts on Restrictive Business Practices: Arrangements for Consultations, L/1015, adopted on 2 June 1960, BISD 9S/170.

[568]"However, the majority were convinced that, regardless of the question whether Article XXIII could legally be applied, they should recommend to the CONTRACTING PARTIES that they take no action under this Article. Such action would involve the grave risk of retaliatory measures under the provisions of paragraph 2 of that Article, which would be taken on the basis of judgments which would have to be made without adequate factual information about the restrictive practice in question, with consequent counter-productive effects on trade." Ibid., p. 172.

to Article XXIII.[569] Japan further mentions that the WTO Members only took a tentative step to addressing issues such as competition and investment policies at the Singapore Ministerial Conference in December 1996. The Ministers reached a compromise to establish a working group to address the emerging issue of the interaction between trade and competition policy.[570] Japan recalls that there is still no consensus among the WTO Members on how to deal with the issue of the relationship between certain private business practices and their impact on trade. According to Japan, in particular the US claims regarding "distribution countermeasures" boil down to an attack against vertical relationships, e.g., single-brand wholesale distribution of film. However, vertical relationships may be pro-competitive or anticompetitive, depending on the circumstances of each case. While there is widespread consensus that horizontal agreements to fix prices are anticompetitive, and that they should be subject to legal restrictions, there is no such consensus about vertical restraints.[571] Accordingly, Japan urges the Panel to take a cautious approach in the examination of the US claims concerning alleged "distribution countermeasures" and not to engage itself in a rule-making exercise in this respect.

6.38 The **United States** responds that it is not challenging "private business practices" or "market structures" in this dispute, but measures of the Japanese Government. The specific measures at issue in this dispute are those listed in the US response to a Panel question (see Section III.A. supra). The term "any measure" in Article XXIII:1(b) is broad enough to encompass measures designed, promulgated, and applied by Councils, Committees, Centers, trade associations, and other quasi-governmental entities that have included private sector participants, acting under the authority or in concert with Japanese Government ministries and agencies. Although a market structure is not a measure *per se* within the meaning of Article XXIII:1(b), the steps taken by the Japanese Government to create and maintain an exclusionary market structure in the Japanese photographic materials sector do constitute measures. To this end, the characteristics of the market structure in the Japanese consumer film and paper market are clearly relevant in this dispute and provide compelling evidence of the Japanese Government's systematic efforts to impede market access for imported film and paper.

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[569]Decision on Restrictive Business Practices: Arrangements for Consultations, adopted on 18 November 1960, BISD 9S/28. Japan notes that experts from the United States were part of the majority in that working party, and thus participated in making this specific recommendation.

[570]Specifically, the Singapore Ministerial Declaration states:

"Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken *shall not prejudge whether negotiations will be initiated in the future*, we also agree to: . . .

- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, *in order to identify any areas that may merit further consideration in the WTO framework …*

The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. *It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations"*. Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN (96)/DECEMBER, (emphasis added).

[571]Japan notes that this uncertainty has led Professor F.M. Scherer of Harvard University to conclude:

"Vertical restraints are recognized by both economists and competition policy authorities to have both benefits and competition-impeding costs. It is difficult to draw neat lines between those that should be allowed and those that should be prohibited. Even when those lines have been drawn, as my analysis of US antitrust policy toward automobile parts distribution has shown, enforcement of the vertical restraints law has been a muddle. *If nations have difficulty determining the correct policies and enforcing them within their own borders, it will surely be much more difficult to adjudicate such policies internationally.* This pessimistic conclusion may leave an occasionally significant barrier to international trade untouched. But wisdom in public policy analysis begins with the recognition that not all problems can be solved." F.M. Scherer, Retail Distribution Channel Barriers to International Trade, October 1995, p. 30, Working paper presented at a Columbia University Conference entitled The Multilateral Trading System of the 21st Century, Japan Ex. A-19. (emphasis added)

4. REMEDIES

6.39 The United States argues that in GATT jurisprudence, the remedy available depends upon the legal theory at issue: For "violation" disputes, DSU Article 19.1 provides that where the panel concludes that a measure is inconsistent with a covered agreement, it "shall recommend that the Member concerned bring the measure into conformity with that agreement". It is Japan's decision in the first instance to determine what steps it will take to eliminate the nullification or impairment resulting from its violation. In accordance with Article 19.1 of the DSU, however, the Panel could suggest that Japan take steps to undo the exclusionary aspects of the distribution system for photographic materials that its measures have brought about.

6.40 For disputes concerning non-violation nullification or impairment, Article 26.1 of the DSU provides that where the panel finds that a measure is nullifying or impairing benefits, it "shall recommend that the Member concerned make a mutually satisfactory adjustment". Pursuant to Article 26.1(c) of the DSU, an arbitrator may suggest "ways and means of reaching a mutually satisfactory adjustment". A mutually satisfactory adjustment in this dispute could involve either an effort by the Japanese Government to restore the competitive relationship between imported and domestic products or to grant compensation to the United States for the nullification or impairment of tariff benefits, although Japan has no obligation to withdraw the measures or provide compensation. If the parties fail to reach a mutually satisfactory adjustment, the panel's finding of nullification or impairment under Article XXIII:1(b) would entitle the United States to restore the original balance of concessions between the parties by suspending the application of appropriate obligations or concessions under the GATT 1994 and other WTO Agreements.

6.41 The United States submits that this Panel need not attempt to assess the quantum of nullification or impairment. In violation disputes, this becomes an issue only if the responding party pays compensation or the complaining party suspends concessions in accordance with Article 22.6 of the DSU, in which case the parties have recourse to arbitration if the level of suspension proposed is contested. In non-violation disputes, however, either party may request arbitration, in accordance with Article 26.(1)(c) of the DSU, to determine the level of benefits which have been nullified or impaired.

6.42 In **Japan's** view, the United States seems to be essentially requesting a type of affirmative action whereby primary wholesalers handling domestic brands, including Konica's subsidiaries, are forced to deal with Kodak as the "mutually satisfactory adjustment" in the case of non-violation claims or means to "bring the measures into conformity with the agreement" in the case of Article III claims. This is an extraordinary remedy which would involve this Panel in the restructuring of the Japanese distribution sector. For a Panel to make such a decision would be a radical expansion of the authority granted under the DSU.

B. RELEVANT TARIFF CONCESSIONS

1. GENERAL CONSIDERATIONS

6.43 The **United States** submits that Japan granted the following tariff concessions to the United States on photographic film and paper products in the Kennedy, Tokyo, and Uruguay rounds of multilateral trade negotiations.

ROUND	FILM		PAPER	
	B&W	**Colour**	**B&W**	**Colour**
Pre-Kennedy Round	30 %*	40%*	25 %*	40%*
Kennedy Round (1967)	15 %	40%*	12.5%	40%*
Tokyo Round (1979)	7.2%	4%	6.6%	4%
Uruguay Round (1994)	Free	Free	Free	Free

(* = Applied, not bound)

6.44 The United States claims that the three sets of policies - (i) distribution modernization policies, (ii) restrictions on large retail stores, and (iii) restrictions on promotional and marketing activities - individually and collectively "nullify or impair", within the meaning of Article XXIII:1(b), each of the tariff concessions that Japan granted on black and white and colour photographic film and paper in the Kennedy Round, Tokyo Round, and Uruguay Round.

6.45 **Japan** submits that the United States does not establish how the required elements for an non-violation claim are met with respect to the relevant tariff concessions on each of the four distinct products subject to this proceeding. In Japan's view, as regards black and white film as well as black and white paper, and the tariff concessions on these products, there is neither argument nor evidence how any of the alleged measures or the alleged results of these measures upset the competitive conditions for these products. The United States has not addressed these products specifically in terms of the alleged measures, the applicability of the alleged measures to the products or the effect of the alleged measures on the products. Japan argues that these products have unique characteristics from a retailing and marketing perspective. Furthermore, Japan emphasizes that imports of black and white film and paper rose dramatically almost immediately after the Kennedy Round tariff concessions, continued to rise throughout the period of the alleged liberalization "countermeasures" and did not peak until at least a decade after the last of the alleged measures. With foreign market share of black and white film peaking at 41.4 percent in 1985 and foreign market share of black and white paper peaking at 54.0 percent in 1989, Japan alleges that the United States tries to obscure any focus on these specific products.

6.46 Japan also contends that the United States has not distinguished the alleged measures and their effects on colour paper from the alleged measures and their effects on colour film. In Japan's view, the distribution system for colour paper differs significantly from that for colour film. Colour paper is sold to photofinishers, not retailers. For Japan there is no credible evidence that the alleged measures creating the market structure for film even addressed the market structure for distribution of colour paper.[572] Moreover, Japan asserts that there is no evidence that the US claims regarding large scale retail stores are applicable to colour paper. Thus, Japan contends that to the extent that the United States has tried to establish non-violation case, that case relates only to colour film, but fails to satisfy even a single element required under Article XXIII:1(b).

[572]Japan submits that the only allegations relevant to paper are claims about SMEA financing to photofinishers. In Japan's view, even the United States admits this point. However, Japan recalls that it has raised procedural objections against these claims.

6.47 The **United States** argues that paragraph 1(b)(i) of GATT 1994 incorporated all of the protocols and certifications relating to tariff concessions that had entered into force under the GATT 1947 before the effective date of the WTO Agreement, including Japan's tariff concessions in the Kennedy and Tokyo Rounds. Thus, the United States asserts that the benefits accruing to it under these concessions, as well as the concessions arising from Japan's schedule attached to the Marrakesh Protocol, are GATT 1994 benefits. The United States argues that, in each Round, it bargained for the concessions and anticipated improved competitive opportunities. On each occasion, Japan granted a concession, but in the US view, then systematically sought to undermine its benefits, and the competitive relationship between imported and domestic photographic materials has been, and continues to be, upset as a result of Japan's measures.

6.48 **Japan** explains that the benefits of tariff concessions consist of the legitimate expectation of better market access opportunities created by the reduction of bound tariff rates as well as the legitimate expectation that the value of the concession will not be frustrated. Since the negotiation of successive tariff concessions provides an opportunity for any alleged frustration of expectations created by prior tariff concessions to be addressed, in Japan's view, it should be presumed that such frustration will also be taken into account by the parties during subsequent negotiations. Therefore, as long as the new balance of tariff concessions has been actually negotiated and agreed upon, the result of the latest tariff negotiation should be deemed to have created a new expectation concerning the balance of tariff concessions and to have replaced any reasonable expectation that arose under a prior tariff negotiation. Since the tariff concessions on photographic film and paper in the present case have been actually negotiated and granted at reduced rates under three successive rounds, the Uruguay Round tariff concessions should be deemed to have replaced all previous expectations and formed a new balance of tariff concessions. Japan thus argues that the presumption should be that any alleged frustration of expectations relating to prior concessions has already been incorporated into the new balance of tariff concessions as the result of the latest tariff negotiations under the Uruguay Round. Therefore, as to the issue whether rights and expectations from the earlier concessions survive even when during each subsequent round further tariff reductions are negotiated and granted, Japan believes that the "benefit accruing … under the Agreement" is limited to the benefit of the Uruguay Round tariff concessions. Accordingly, in Japan's view, the benefits of the Kennedy Round and Tokyo Round negotiations are irrelevant in this case.

6.49 Japan also maintains that the results of the latest tariff negotiations in the Uruguay Round have removed any reasonable expectations of the benefits that arose under prior tariff negotiations and have created new expectations concerning the balance of tariff concessions. The benefits of (or the expectations relating to) the tariff concessions of 1967 and 1979 themselves should, in Japan's view, be deemed to be past benefits (or expectations) under GATT 1947. Accordingly, Japan argues that their nullification or impairment (or their alleged frustration) cannot constitute a situation where "any benefit accruing … under this Agreement [i.e., GATT 1994] is being nullified or impaired".

6.50 As to the relevance of different protocols embodying tariff concessions, the **United States** submits that Article XXIII provides that a Member has a "non-violation" claim if it considers that "any *benefit* accruing to it directly or indirectly under this Agreement is being nullified or impaired …". Article 31 of the Vienna Convention on the Law of Treaties instructs that this language "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". According to Article 31, the ordinary meaning of a treaty term is to be interpreted in context and by taking into account "any subsequent agreement between the parties regarding the interpretation of the treaty of the application of its provisions".

6.51 The United States claims that the "benefits" at issue in this dispute are the market access opportunities arising from Japan's Kennedy Round, Tokyo Round, and Uruguay Round tariff concessions on consumer photographic film and paper. In the US view, nothing in the Kennedy Round, Tokyo Round or Uruguay Round tariff protocols suggests that the tariff concessions attached thereto would

be "deemed" to have expired or to have been withdrawn at a specific time or as a result of a specific event or by virtue of a subsequent tariff agreement.

6.52 The United States further explains that the object and purpose of the non-violation remedy is to encourage tariff concessions under Article II of GATT. In the US view, a finding by this panel that a Member's reasonable expectations from an existing tariff concession are extinguished as soon as it receives a new tariff concession would have the opposite effect. Members would be reluctant to enter into new negotiations and the negotiations themselves would become impossibly burdensome. Members would be compelled to initiate and complete non-violation disputes on all suspected instances of nullification or impairment prior to negotiating new tariff concessions. Alternatively, Members would abandon the formulaic approach to tariff cuts first adopted in the Kennedy Round in favour of product-by-product negotiations to redress the nullification or impairment of prior concessions and attempt to pursue further tariff liberalization simultaneously.

6.53 **Japan** requests that the United States should not be allowed to rely on tariff concessions arising from previous rounds of tariff negotiations because this would undermine the integrity and stability of negotiated tariff concessions. Japan points out that a country may adopt a measure which is consistent with the WTO Agreement but somehow nullifies or impairs a benefit accruing to another WTO Member. In that case, an "aggrieved" country could sit on its rights for decades. Round after round of subsequent tariff negotiations on the product in question would have occurred, and still the "aggrieved" party would do nothing. And yet, decades later, the "aggrieved" party could at long last decide to assert its rights and expect a panel to find in its favour.

6.54 The **United States** rejects Japan's suggestion that, if this Panel affirms that tariff concessions and reasonable expectations arising therefrom continue to exist unless the concession is modified or withdrawn under Article XXVIII, Members would "sit on their rights for decades". The United States responds that the purpose of WTO dispute settlement is remedial, not punitive, and therefore WTO dispute settlement provides only prospective relief. As a consequence, Members have no incentive to delay in bringing a dispute once they discover that another Member is violating an agreement or otherwise nullifying or impairing its tariff concessions within the meaning of Article XXIII:1(b). While, in the US view, this discovery could take years, a Member's right of redress should not be extinguished because the nullifying and impairing measures are hard to detect.

2. PAST GATT PANEL REPORTS

6.55 The United States submits that two prior panels have found nullification or impairment of tariff benefits that were granted in a tariff negotiation that was succeeded by multilateral tariff negotiations, i.e., *EEC - Canned Fruit*[573] and *EEC - Oilseeds*.[574] According to the United States, these two panel decisions support its position and there are none to the contrary. The United States explains that the panel on *EEC - Canned Fruit* found that the United States had a reasonable expectation arising from the EC's 1974 tariff concessions pursuant to Article XXIV:6 negotiations and 1979 Tokyo Round tariff concessions.[575] In the view of the United States, the panel on *EEC - Oilseeds* found that the United States had a reasonable expectation arising from the EC's 1962 Dillon Round tariff concessions.[576] The United States notes that these disputes were initiated in 1982 and 1988, respectively, subsequent to the 1979 Tokyo Round multilateral tariff negotiations. The United States also mentions that neither the EC nor the panels questioned whether the Tokyo Round negotiations created a new balance of tariff concessions that extinguished US reasonable expectations with respect to prior tariff concessions. Rather,

[573]GATT Doc. L/5778, 20 February 1985 (unadopted).

[574]Adopted on 25 January 1990, BISD 37S/86.

[575]The panel found separately that the United States could have anticipated certain subsidies in respect of the 1979 tariff concessions. See *EEC - Canned Fruit*, L/5778, p. 17, para. 49.

[576]See *EEC - Oilseeds*, BISD 37S/86, pp. 126-128, paras. 144-146.

the EC argued only that it had withdrawn tariff concessions pursuant to Article XXIV:6 and Article XXVIII negotiations and thereby extinguished US reasonable expectations with respect to those particular concessions. The United States concludes that these findings would not have been possible if subsequent multilateral tariff agreements or enlargement agreements were deemed to extinguish wholesale the tariff concessions in prior tariff schedules.

6.56 In **Japan**'s view, its position with respect to the relevant tariff concessions to be considered in an non-violation case is consistent with the reasoning of the panel on *EEC - Oilseeds*. The facts before that panel were that the tariff concessions for oilseeds (duty-free tariff bindings) had been originally made in 1962. During successive tariff negotiations under Article XXIV:6 of GATT 1947, these duty-free tariff bindings were maintained at the same level. The panel examined "whether benefits accruing to the United States under the tariff concessions presently in force [at the time of the panel deliberations] include the protection of expectations that prevailed in 1962 when tariff concessions … were originally incorporated" into the Schedule.[577] Noting that "[Article XXIII:1(b)], as conceived by the drafters and applied by the CONTRACTING PARTIES, serves mainly to protect the balance of tariff concessions", that panel found that:

> "… the answer to the question of whether the expectations of 1962 continue to be protected depend on whether the concessions on oilseeds resulting from the subsequent renegotiations under Article XXIV:6 were part of a *new balance of concessions* or whether the reinstitution of the concessions at the same rate after the successive enlargements of the Community meant that the balance of concessions originally negotiated in 1962 was to be continued … The result of the Article XXIV:6 negotiations following the successive enlargement of the Community was not the creation of a new common external tariff but the extension of the existing tariff concessions …".[578]

6.57 Japan distinguishes the facts in the *EEC - Oilseeds* case from those in the present one as follows: In the *EEC - Oilseeds* case, the balance of tariff concessions originally granted with duty-free tariff bindings was continued throughout the successive tariff concessions. In the present case, by contrast, Japan agreed to reduce its bindings on colour film, black and white film, and colour paper from 3.7 percent to zero, and its binding on black and white paper from 6.6 percent to zero in the Uruguay Round tariff negotiations. The *EEC - Oilseeds* panel also suggested that a new balance of concessions would involve a "global reassessment of the value" of all of a party's concessions.[579] The Uruguay Round was a process of such a "global reassessment of value" of tariff concessions. Therefore, in Japan's view, the reasoning of the panel on *EEC - Oilseeds* leads to the conclusion that the result of the Uruguay Round tariff negotiations was the creation of a new balance of tariff concessions on the products at issue in this case.

6.58 The **United States** submits that the first *EEC - Oilseeds* case of 1989 focused on the expectations flowing from a 1962 concession by the EC (the zero binding on oilseeds). The EC argued that because negotiations had been conducted since 1962 under Article XXVIII procedures (through the route of Article XXIV:6) concerning the EC Schedule, the expectations that had to be taken into account were the expectations as of the most recent such negotiation in 1986. According to the United States, the panel on *EEC - Oilseeds* correctly rejected that argument, noting that the practice of the Community in each enlargement had been to extend the application of its pre-existing common customs tariff (CCT) to include the territory of its new member States. Where the application of the CCT resulted in the impairment of tariff concessions in the schedules of the acceding member States, the Community (acting on behalf of its member States) discharged its obligations under Article XXVIII and paid compensation by lowering duty rates on certain items for the EC as a whole. However, none of the enlargements

[577]Ibid., pp. 126-127, para. 144.
[578]Ibid., pp. 126-127, paras. 144-145 (emphasis added by Japan).
[579]Ibid., pp. 126-127, para. 145.

ever modified or withdrew the particular CCT concession on oilseeds made in 1962. Thus, even though the EC substituted successive Schedules for the 1962 Schedule of the EEC of Six, the concession on oilseeds made in 1962 had never itself been modified or withdrawn. For the United States, it was therefore the expectations of 1962 that were relevant, not the expectations of 1986 or any other year after 1962.

6.59 **Japan** contests the US conclusion that the panel on *EEC - Oilseeds* rejected the EC argument that the expectations which had to be taken into account were the expectations of the most recent tariff negotiation under Article XXIV:6 because none of the enlargements ever modified or withdrew the particular common customs tariff concession on oilseeds made in 1962. Japan explains that the findings of the panel on *EEC - Oilseeds* need to be looked at in the proper context. From the reference that "the answer to the question of whether the expectations of 1962 continue to be protected depends on whether the concessions on oilseeds resulting from the subsequent renegotiations under Article XXIV:6 were part of a new balance of concessions or whether … the balance of concessions originally negotiated in 1962 was to be continued", it is clear for Japan that the panel focused on the issue of whether or not a new balance of concessions was created, and not on the issue of the procedures and the formalities of the tariff negotiation. Japan maintains that the panel on *EEC - Oilseeds* also referred to the issue of whether or not the tariff negotiation at issue involved a "global reassessment of the value of all the Community's concessions". Japan insists that its argument is consistent with this analysis by the *EEC - Oilseeds* panel, while the US argument is not.

3. THE TYPES OF TARIFF NEGOTIATIONS UNDER GATT

6.60 As to the issue whether the legal relationship between tariff concessions bound in the Uruguay Round, Tokyo Round and Kennedy Round schedules differs depending on whether tariff bindings derive from tariff negotiations or re-negotiations under Articles XXIV:6, XXVIII and XXVIII*bis*, the **United States** describes its position as follows: Under the GATT 1947, each new Schedule of a contracting party coexisted legally with all prior Schedules. Each of the concessions in each Schedule remained legally binding except to the extent it had been modified or withdrawn under Article XXVIII. Since the GATT 1947 Schedules were incorporated into the GATT 1994, the concessions in the GATT 1947 Schedules remain legally binding and coexist with the concessions in the Uruguay Round schedules and all subsequent schedules entered into under the GATT 1994.[580]

6.61 With respect to the legal relationship among Article XXIV:6 negotiations, the modification of Schedules under Article XXVIII, and the types of tariff negotiations stipulated by Article XXVIII*bis*, **Japan**'s view is that the legal nature of tariff negotiations or the modification of schedules in relation to non-violation complaints needs to be evaluated based on the substance of whether the new balance of concessions has been formed.

(a) Article XXVIII

6.62 The **United States** points out that GATT provides only one generally-available legal means for modifying or withdrawing, i.e. "re-negotiating" a tariff concession, which is Article XXVIII. A Member may invoke Article XXVIII only under specifically defined circumstances. The United States elaborates that a Member may modify or withdraw a concession by negotiation and agreement under Article XXVIII:1-3 during the triennial "open season". A Member may enter into negotiations for modification or withdrawal of a concession under Article XXVIII:4 if so authorized. A Member may modify or withdraw a concession in accordance with the procedures of Article XXVIII:1-3 if it has made a timely reservation of rights to do so under Article XXVIII:5.

[580]The United States also mentions that the initial negotiating rights attached to GATT 1947 concessions remain in force today and that the party which initially negotiated any given concession, even a concession from 1947, retains a right to be consulted and compensated if that concession is modified or withdrawn today.

6.63 The United States contends that Japan has made various sets of tariff concessions in various Schedules attached to protocols after trade negotiating rounds. The later concessions have not had the legal effect of modifying or withdrawing the earlier concessions, because Japan has never invoked Article XXVIII with respect to its concessions on film and paper. The United States maintains that all of Japan's concessions on film and paper therefore remain in effect, and the expectations attached to each remain protected by Article XXIII:1(b).

6.64 With regard to the modification or withdrawal of the concessions on specific products contained in the schedule of an individual WTO Member made under Article XXVIII, **Japan** explains that the Member which proposes to modify or withdraw the concession negotiates compensation with respect to other products with other Members in order to "maintain a general level of reciprocal and mutually advantageous concessions". Therefore, the legal nature of modification or withdrawal under Article XXVIII should be deemed as the continuation of the balance of tariff concessions as a whole. Japan also states that the procedure set forth in Article XXVIII also applies to the modification of the schedules for the Article XXIV:6 negotiations.

(b) Article XXIV:6

6.65 The **United States** submits that Article XXIV:6 permits a Member which has entered into a customs union and which proposes to increase a rate of duty above bound levels to modify or withdraw that concession under the procedures of Article XXVIII.[581] The United States points out that Article XXIV:6 thus does not provide an independent route to modification of concessions with independent procedures, but merely a means to invoke the standard procedures of Article XXVIII outside of an "open season".

6.66 **Japan** contends that the negotiations under Article XXIV:6 are conducted to extend the existing common external tariff of a customs union to their new member(s), on the premise that "the duties … shall not on the whole be higher or more restrictive than the general incidence of the duties … applicable in the constituent territories" (Article XXIV:5). Although the negotiations will lead to the modification of the part of the schedules of the customs union, the legal nature of the negotiations under Article XXIV:6 should be deemed as the continuation of the prior balance of tariff concessions as a whole. In this connection, Japan points out that the panel on *EEC - Oilseeds* found that "the result of the Article XXIV:6 negotiations following the successive enlargements of the Community was … the extension of the existing tariff concessions of the Community to the new member States" and that the balance of tariff concessions originally made was to be continued.

[581]The United States elaborates that Article XXIV:6 was added to the General Agreement in 1948 to accommodate a customs union between France and Italy. Analytical Index (1995), p. 810. At the time, the text of Article XXVIII barred any modification of schedules until 1 January 1951. See: Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Vol. 1, pp. 61-62. France sought the addition of Article XXIV:6 because of the timing element in Article XXVIII. France needed to be able to invoke the procedures of Article XXVIII immediately so that it could raise duties consistent with its legal obligations.

(c) Article XXVIII*bis*

6.67 The **United States** argues that, by its terms, Article XXVIII*bis*[582] provides a legal basis for adding concessions to Schedules, but not a basis for modifying or withdrawing pre-existing concessions.[583] Tariff negotiating rounds in GATT were always conducted as occasions for reducing or eliminating tariffs, not as opportunities for contracting parties to throw the pre-existing level of trade liberalization into uncertainty and renegotiate their schedules. When concessions have been modified or withdrawn during a round of trade negotiations, the modification or withdrawal has taken place through invocation of Article XXVIII itself, not Article XXVIII*bis*.[584] According to the United States, there are only two exceptions to the general rule that tariff negotiations add, and do not subtract, concessions, but these exceptions prove the rule:

6.68 First, the Protocol Embodying the Results of the 1960-61 Tariff Conference ("Dillon Round Protocol") included a special paragraph found in no other GATT tariff protocol. Under this paragraph, in each case where certain schedules provided for treatment for a product less favourable than that provided in a pre-existing schedule applicable to the same contracting party, the provision in the earlier schedule would be terminated.[585] However, there is no similar provision in the Kennedy Round protocol or Tokyo Round protocol, and, in any event, this circumstance would not apply to Japan's reductions of its tariffs for photographic film and paper.

6.69 Second, during the Uruguay Round, certain developing country participants offered to make ceiling bindings on all products or entire product sectors in their schedules. During the final tariff negotiations in the spring of 1994, in almost all instances these participants agreed not to modify or withdraw pre-existing bindings at lower duty rates in their GATT 1947 schedules. However, four participants did modify or withdraw such bindings: Egypt, Peru, South Africa and Uruguay. To provide the legal basis for such modification or withdrawal, paragraph 7 was added to the Marrakesh Protocol, using language borrowed from the Dillon Round Protocol. Paragraph 7 provides that these four Members "shall be deemed to have taken appropriate action as would otherwise have been necessary under the relevant provisions of GATT 1947 or 1994". The United States concludes that paragraph 7 of the Marrakesh Protocol was legally necessary to ensure that the more favourable earlier concessions of Egypt, Peru, South Africa and Uruguay would not continue to be legally binding, and to make it possible for these four Members to liquidate their prior inconsistent tariff concessions. However, the United States emphasizes that this provision by its terms applies only to the four Members listed therein, whereas all other countries continue to be bound by all prior concessions in GATT 1947 schedules.

6.70 In **Japan**'s view, the types of tariff negotiations stipulated by Article XXVIII*bis* are "directed to the substantial reduction of the general level of tariffs", "with due regard to the objectives of the GATT and the varying needs of individual Members", as opposed to the modification and withdrawal

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[582]Article XXVIII*bis* was added to the GATT in 1955 and entered into force on 7 October 1957.

[583]Concessions also have been added to Schedules under other legal bases: through the four rounds of tariff negotiations that took place before 1957, through exchanges of concessions in accession tariff negotiations, and through the Procedures for Modification and Rectification of Schedules (which were utilized, for example, in the case of the recent Information Technology Agreement). See 26 March 1980, CONTRACTING PARTIES' Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions, BISD 27S/25.

[584]The United States mentions the following examples:

(i) The EC's 1994 modification of its concession on bananas was carried out not under the authority of the Punta del Este Declaration but pursuant to an invocation of Article XXVIII. Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, circulated on 22 May 1997, para. 3.31; Article XXVIII notification in SECRET/343, referenced in Analytical Index (1995) p. 979.

(ii) The negotiation of the common external tariff of the EEC which took place in the Dillon Round took place in accordance with the provisions of Articles XXVIII:1-3 and XXIV:6. BISD 8S/112, para. 18.

(iii) When Denmark, Ireland and the United Kingdom acceded to the EC in 1972, the EC carried out negotiations under the procedures of Article XXVIII (invoked through Article XXIV:6), not as part of the Tokyo Round tariff negotiations.

[585]BISD 8S/8, 9, para. 4.

under Article XXVIII, which is a process of "maintaining a general level of reciprocal and mutually advantageous concessions". Tariff negotiations under Article XXVIII*bis* should be deemed to be conducted from scratch, taking into account the various circumstances at the time regarding the products concerned. When the reduction or elimination of tariff concessions are negotiated and agreed upon in those tariff negotiations, they should be deemed to have created a new balance of concessions, and a new expectation concerning the balance of tariff concessions created by the latest negotiations should be deemed to have replaced any previous expectation under prior concessions. In particular, any multilateral trade negotiation round like the Kennedy Round, the Tokyo Round and the Uruguay Round, should be deemed a process of creating a "new balance of concessions" as a whole, by making a global reassessment of the value of the concessions through the comprehensive tariff negotiations on a broader basis. Accordingly, Japan maintains that the measures existing prior to the new concessions, which should be deemed to be taken into account during such negotiations, will not nullify or impair benefits under Article II of GATT.

6.71 The **United States** responds that Japan's argument that Article XXVIII*bis* negotiations - but not Article XXVIII or XXIV:6 negotiations - create a new balance of tariff concessions that extinguishes previous expectations under prior concessions is exactly backwards. In the US view, Article XXVIII*bis* negotiations do create a new balance of tariff concessions with new expectations relating to tariff concessions arising out of those negotiations. However, because Article XXVIII*bis* negotiations cannot and do not withdraw or modify prior tariff concessions, such negotiations cannot extinguish or affect the expectations relating to those prior tariff concessions. In contrast, when a Member withdraws or modifies a tariff concession under Article XXVIII - either directly under Article XXVIII or through the route of Article XXIV:6 - the Member may be changing the legal obligation that the tariff concession represents and as a consequence the reasonable expectations associated with those concessions would necessarily change and a new balance of concessions would be achieved with respect to that round of tariff concessions.

6.72 The United States submits that the panel report on *EEC - Oilseeds* fully supports its position:

> "In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstitution of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962."[586]

For the United States, the quoted text shows that the panel on *EEC - Oilseeds* found that even though the tariff concessions on oilseeds had been withdrawn and re-instituted intact, pursuant to

[586]*EEC - Oilseeds*, BISD 37S/86, 127-128, para. 146.

Articles XXIV:6/Article XXVIII (actions that cannot occur under Article XXVIII*bis*), no new balance of concessions had been achieved.

6.73 **Japan** responds that the parties differ with respect to the criterion of judgement over when a new expectation should be deemed created regarding tariff concessions. In Japan's view, the United States refers to the procedures and the formalities of whether or not a tariff negotiation was conducted in accordance with Article XXVIII of GATT and whether or not a bound tariff rate was increased. Japan considers what the United States points out may only mean that certain tariff concessions will result in the expectation that customs duties will not be applied in excess of the bound rates, and that such expectations can continue unless the concessions will be modified or withdrawn under Article XXVIII. Japan does not disagree, since it certainly would not argue that a Member can negate its commitments on tariff bindings unilaterally. On the contrary, Japan believes that every Member is bound by its tariff concessions irrespective of the procedures and the formalities followed.

6.74 However, which expectations created by previous tariff concessions should be taken into account in the examination of non-violation claims, in Japan's view, is a completely different issue. In this respect, Japan takes the position that the criterion to be used should not be whether or not the level of the tariff binding has been increased or reduced, but whether or not a new balance of tariff concessions has been created as a result of multilateral or sector-specific tariff negotiations, in which various circumstances including non-tariff measures (e.g., domestic subsidies) relating to the products subject to negotiation are taken into account. In Japan's view, what needs to be examined regarding the expectation arising out of certain tariff concessions in relation to the issue of the "benefit" for the purpose of a non-violation case is the following: When the surrounding situations are changed because of the introduction of a certain measure, which expectations created by previous tariff concessions should be taken into account in evaluating the impact of the change in situations.

6.75 Japan reiterates that the *Oilseeds* panel stated that "the answer to the question of whether the expectations of 1962 continue to be protected depends on whether the concessions on oilseeds resulting from the subsequent renegotiations under Article XXIV:6 were part of a new balance of concessions or whether … the balance of concessions originally negotiated in 1962 was to be continued". From this reference, in Japan's view, it is clear that the panel focused on the issue of whether or not a new balance of concessions was created and not on the issue of procedures and the formalities of the tariff negotiation. Japan also emphasizes that the *Oilseeds* panel also referred to the issue of whether or not the tariff negotiation at issue involved a "global reassessment of the value of all the Community's concessions".

4. THE INCORPORATION CLAUSE OF GATT 1994

6.76 The incorporation clause of GATT 1994 provides in the relevant parts:

> "1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of: …
>
> (b) the provisions of the legal instruments set forth below that have entered into force under GATT 1947 by the date of entry into force of the WTO Agreement:
>
> (i) protocols and certifications relating to tariff concessions; …
>
> (d) the Marrakesh Protocol to GATT 1994".

6.77 The **United States** submits that prior to the Uruguay Round, Japan made tariff concessions on film and paper in the Kennedy Round and Tokyo Round. Those concessions are now part of GATT 1994 by virtue of paragraph 1(b)(i) of GATT 1994, which incorporated all of the protocols and certifications relating to tariff concessions that had entered into force under the GATT 1947 before the effective date of the WTO Agreement, including Japan's tariff concessions in the Kennedy and

Tokyo Rounds. Therefore, the United States claims that the benefits accruing directly or indirectly under GATT 1994 within the meaning of Article XXIII:1 include the benefits that the United States reasonably expected to receive from Japan's Kennedy Round and Tokyo Round concessions, as well as the concessions arising from Japan's schedule attached to the Marrakesh Protocol. All of them give rise to expectations of improved market access for which the General Agreement provides a right of redress in the event that expectations are frustrated under Article XXIII:1(b).

6.78 In support of its position that the only tariff concessions embodied in the Uruguay Round Schedule can be relied on for purposes of non-violation complaints under Article XXIII:1(b), **Japan** submits that paragraph 1 of the GATT 1994 provides that the GATT 1994 shall consist of, among others, "protocols and certifications relating to tariff concessions" which "entered into force under the GATT 1947" (paragraph 1(b)(i)), but also includes sub-paragraph (d), which refers to "the Marrakesh Protocol to GATT 1994". In Japan's view, this provision means that the effective concessions included in the Schedules of the Members annexed to these prior protocols and certifications, and the concessions newly agreed as a result of the Uruguay Round negotiations, as a whole, constitute tariff concessions which are applied under the GATT 1994.

6.79 Japan argues that, since paragraph 1 does not provide for a hierarchy among sub-paragraphs (a) to (d), it must be read as a whole so that each sub-paragraph is applied and interpreted in a manner consistent with the others. Accordingly, paragraph 1 must be read so that the earlier protocols and certifications referred to in paragraph 1(b)(i) of GATT 1994 do not undermine the most recent balance of concessions agreed among the WTO Members and included in their Schedules to the Marrakesh Protocol. Therefore, when there is any difference between the concessions contained in the schedules annexed to the Marrakesh Protocol and those in the schedules annexed to prior protocols and certifications referred to in paragraph 1(b)(i) of GATT 1994 (e.g., when the concessions on the same products are different), in Japan's view, the concessions contained in the schedules annexed to the Marrakesh Protocol prevail as a later agreement and shall be applied to WTO Members pursuant to Articles I and II of GATT. For Japan, allowing prior protocols and certifications to alter the agreed balance of concessions in the Marrakesh Protocol would detract from stability and certainty among the parties to GATT in their trading relations.

6.80 The **United States** responds that Japan, in arguing that concessions in the schedules annexed to the Marrakesh Protocol prevail over concessions in other tariff protocols as a "later agreement", appears to be relying on the principle provided in Article 30 of the Vienna Convention on the Law of Treaties, although it does not state this affirmatively. Article 30(1) of the Vienna Convention deals with "the rights and obligations of parties to successive treaties relating to the same subject-matter" and provides generally that where the earlier treaty has not been terminated, "the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty". However, the United States contends that Article 30 does not apply to the situation before this Panel because this case is not about "successive treaties" but about coexisting treaties which must be interpreted so as to give effect to each.

6.81 The United States explains that the effect of the GATT 1994 incorporation clause was to create a new legal instrument, the "GATT 1994"[587] which was contemporaneous with the other legal instruments attached to the WTO Agreement. Under the GATT 1994 incorporation clause, "GATT 1994" is composed of a number of elements including, *inter alia*, the Marrakesh Protocol and other tariff

[587]The United States explains that it was for this reason that the General Interpretative Note to Annex 1A was inserted into the text of the WTO Agreement in the fall of 1993, as part of the decision to include the GATT in the WTO Agreement through an incorporation clause. The negotiators wished that Annex 1A agreements other than the GATT 1994 take precedence over the GATT 1994 in the event of conflict. Absent the General Interpretive Note to Annex 1A, this would not have occurred because the effect of the incorporation clause was to make the entire "GATT 1994" contemporaneous with the other agreements, so that Article 30 of the VCLT would not have achieved the desired result.

protocols. Through the GATT 1994 incorporation clause, WTO Members agreed anew to each element of "GATT 1994" and each such element is contemporaneous with each other such element. Although GATT 1947 has been terminated, the tariff protocols done under GATT 1947 remain legally binding solely because they are part of GATT 1994. Thus, Article 30(3) of the Vienna Convention does not apply to the relationship between these tariff protocols and the other elements comprising GATT 1994. Therefore, for the United States neither Article 30 of the Vienna Convention nor the principle expressed therein establishes any hierarchy between the various tariff protocols within "GATT 1994". In any event, the United States points out that the general principle reflected in Article 30 of the Vienna Convention cannot be read to override the specific rule established by the GATT 1994 incorporation clause. In the US view, even if Article 30 did apply, the concessions annexed to the Marrakesh Protocol are fully compatible with the concessions in the other tariff protocols in GATT 1994, because there is no "conflict" between tariff concessions unless a subsequent concession is less favourable than a prior concession.

6.82 According to the United States, Japan argues that the GATT 1994 incorporation clause does not constitute an express agreement between Members to ensure the continuing existence of tariff concessions relating to GATT 1947. The United States responds that paragraph 1(b)(i) of that clause cannot be read so as to undermine paragraph 1(d) which refers to the Marrakesh Protocol of GATT 1994. The United States emphasizes that no subsequent instrument suggested that the Members had agreed to the withdrawal of Japan's Kennedy Round and Tokyo Round tariff concessions. In the US view, the GATT 1994 incorporation clause provides to the contrary. In the US view, Japan has presented no reasons why this Panel's recognition that Japan's Kennedy Round and Tokyo Round tariff concessions on film and paper continue to exist would undermine the Marrakesh Protocol. For the United States, to reach any other conclusion defies the ordinary meaning of the GATT 1994 incorporation clause and Article XXIII:1 of GATT 1994.

5. CERTIFICATION OF MODIFICATIONS AND RECTIFICATIONS

6.83 **Japan** submits that the Certification of Modifications and Rectifications to Schedule XXXVIII - Japan to GATT 1994, dated 8 February 1996, states that "[t]his Schedule replaces all prior Schedules XXXVIII to the General Agreement on Tariffs and Trade 1994 … on the date that this Schedule becomes effective". This Certification, containing Japan's Schedule annexed to the Marrakesh Protocol, as modified in accordance with the 1996 Harmonized Commodity Description and Coding System ("Harmonized System"), is a part of the WTO Agreement. The provisions of the Certification, including the reference to the replacement of prior schedules, are legally effective. Japan further notes that no objection was raised by any Member to this specific provision during the procedures of the modifications and rectifications to Schedule XXXVIII - Japan, which has been completed in accordance with a Decision on Procedures to Implement Changes in the Harmonized System.[588] Accordingly, Japan claims that its schedule currently legally effective under GATT 1994 has "replaced" the prior tariff concessions under GATT 1947.

6.84 According to the **United States**, Japan argues that the 1996 "Certification of Modifications and Rectifications to Schedule XXVIII - Japan to the GATT 1994" constitutes a subsequent agreement between the parties to the effect that Japan was withdrawing all of its prior tariff concessions. However, in the US view, this Certification may replace Japan's prior schedules - but it does not withdraw its prior concessions as attested to by Japan's representation that the certification was made "in conformity with the 8 October 1991 CONTRACTING PARTIES Decision on Procedures to Implement Changes in the Harmonized System (8 February 1991)". This decision makes clear that the parties did not intend for schedules submitted to implement changes in the Harmonized System to have any substantive effect on prior tariff concessions. In the US view, the submission of a Schedule pursuant to this Decision

[588]L/6905, Decision of 8 October 1991, BISD 39S/300.

does not substitute for a proper invocation of Article XXVIII. The United States further maintains that Japan did not invoke Article XXVIII to modify or withdraw tariff concessions on consumer photographic film and paper.

6. CONCLUSIONS

6.85 The United States submits that Japan has made various sets of tariff concessions in various Schedules attached to protocols after trade negotiating rounds. The fact that the concessions given in a prior multilateral round have been succeeded by concessions in a subsequent multilateral round does not extinguish either the prior concessions, or the expectations arising from those prior concessions. In the US view, the later concessions have not had the legal effect of modifying or withdrawing the earlier concessions because Japan never has invoked Article XXVIII to explicitly give notice of its intent to modify or withdraw its prior tariff concessions on photographic film and paper. Thus, Japan - as well as the United States - continue to be legally bound by their GATT 1947 concessions and the reasonable expectations attendant upon those receiving the concessions, as well as by the legal obligations incidental to those concessions, including compensation obligations connected with initial negotiating rights. Similarly, the United States argues, Japan's 1996 schedule proposed as a rectification to incorporate changes in the Harmonized System does not affect the scope of any of Japan's prior tariff concessions. Therefore, in the US view, all of Japan's Kennedy Round, Tokyo Round and Uruguay Round concessions on consumer photographic film and paper remain in effect and continue to exist in parallel. Accordingly, the United States claims to have retained its expectations of improved market access arising from each concession and thus retains the right to redress under Article XXIII:1(b) to protect those reasonable expectations.

6.86 **Japan** maintains that only the benefit accruing from the Uruguay Round tariff concessions are relevant in this case, because a new balance of tariff concessions on photographic film and paper has been actually negotiated and agreed upon under the type of tariff negotiations stipulated by Article XXVIII*bis*, and the result of the latest tariff negotiation should be deemed to have created a new expectation concerning the balance of tariff concessions, and to have replaced any reasonable expectation that arose under a prior tariff negotiation. In Japan's view, the criterion of judgement should be a substantive one, i.e., whether or not a new balance of tariff concessions has been created as a result of tariff negotiations, in which various circumstances at the time of the tariff concessions were taken into account. Japan requests the Panel to examine the US non-violation complaints before it on that basis.

C. GOVERNMENTAL MEASURES

1. THE LEGAL TEST

6.87 According to the **United States**, by the terms of Article XXIII:1(b), "the application … of any measure, whether or not it conflicts with the provisions of [the General Agreement]", may give rise to an Article XXIII:1(b) claim. The ordinary meaning of the term "any measure" as it appears in the Article suggests that it includes all manner of government policies and actions. This reading of the term is reinforced by the object and purpose of Article XXIII:1(b), which, GATT Panels have found, is to provide a right of redress in situations outside the scope of other GATT articles.

6.88 The United States argues that all of the measures that it has specifically challenged are "measures" within the meaning of Article XXIII:1(b). The United States notes that the phrase "any measure" has never before been the subject of controversy in an Article XXIII:1(b) dispute. Nor has any GATT panel attempted to define the term "any measure". The United States further notes that Japan goes to great lengths to craft a definition that would not only exonerate Japan in this dispute, but also would place Japanese administrative guidance beyond the reach of the WTO.

6.89 **Japan** submits that in the context of a non-violation claim, the complaining party must establish the existence of an application of a measure by another WTO Member. For Japan, this textual requirement means the following three criteria:

(1) First, since the measure must be a government measure, private conduct is outside the scope of Article XXIII:1(b). When a government does nothing more than make formally and substantively non-binding recommendations, the decision whether to comply is a private and voluntary one.

(2) Second, not every government policy or action constitutes a measure for non-violation purposes. A measure must either provide a benefit or impose legally binding obligations or their substantive equivalent. With respect to the latter, any policy or action allegedly regulating private conduct must impose legally binding obligations or their substantive equivalent.

(3) Third, there must be a current and actual application of the measure to the products in question. In particular, there can be no application of a measure that is no longer in effect.

6.90 Japan suggests that the United States seems to agree with the first and the third requirements,[589] but that the parties differ, however, with respect to the second criterion.

6.91 The **United States** responds as follows:

(1) The United States is not challenging purely private conduct in this proceeding. Its claim is based on actions taken by, at the direction of, or in concert with, the Government of Japan in order to achieve government objectives.

(2) There is no requirement under Article XXIII:1(b) that a measure impose legally binding obligations or provide a benefit. The cases cited by Japan, i.e., *Japan - Restrictions*

[589]Japan points out that with regard to the first requirement, the United States admits that "[t]he term 'any measure' in Article XXIII:1(b) does refer to government policies and actions". With regard to the third requirement, Japan asserts that the United States only argues that the measures at issue in this case are still in effect.

on Imports of Certain Agricultural Products ("Japan - Agricultural Products")[590] and *Japan - Trade in Semiconductors ("Japan - Semiconductors"),*[591] are not applicable here with respect to what constitutes a measure under Article XXIII:1(b), although they are applicable to the extent they stand for the general proposition that administrative guidance can be a measure.

(3) All of the measures challenged by the United States in this proceeding are either still in effect today, or have been superseded by other measures that carry forward their objectives and policies. Virtually all of the measures challenged by the United Sates in this proceeding remain in effect today. The few that have been revoked, such as JFTC Notification 17 of 1967, were redundant in that their objectives are still achieved though measures remaining in effect.

(a) Administrative guidance

6.92 The United States submits that when the Japanese Government gives guidance to industry, it is expressing the Government's policy and taking action to develop, disseminate, and enact that policy. Japan should be just as accountable for the effects arising from this type of measure as for the effects arising from a measure which is "binding". The United States points out that two GATT panels, i.e., the panels in *Japan - Agricultural Products* and *Japan - Semiconductors*, have found that administrative guidance has "played an important role in Japan" and is a "traditional tool of Japanese Government policy based on consensus and peer pressure," noting further that administrative guidance has operated within the context of the "special characteristics of Japanese society."[592] These panels have found that these administrative guidances constituted "measures" in both of those cases. The Japanese Government is able to rely on its traditionally close relationship with industry and its extraordinary power and influence over industry to achieve its goals through measures that are not formally binding.

6.93 The United States explains that Japan defines the term "administrative guidance" as "guidance, recommendation, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or designated functions, certain feasance or non-feasance on the part of specified persons in order to realize administrative aims, where such acts are not dispositions".[593] Although in a technical sense "administrative guidance" does not have a formal legal consequence attached to non-compliance, "administrative guidance is a form of government regulation which imposes some kinds of rules of conduct on private individuals or enterprises".[594] What differentiates "administrative guidance" from a request made between two private entities is the extraordinary power of the entity making the request, i.e., the Government of Japan.[595] This power is enhanced manifold because in Japan "the government often represents the consensus of the industry in which the rule of conduct should be enforced".[596] Thus, what might be seen by outsiders as nothing more than policy guidelines or recommendations are in fact accepted within Japan as tantamount to governmental directives. Ministries like MITI may

[590]*Japan - Restrictions on Imports of Certain Agricultural Products*, adopted on 22 March 1988, BISD 35S/163.

[591]*Japan - Trade in Semiconductors*, adopted 4 May 1988, BISD 35S/116.

[592]*Japan - Agricultural Products*, BISD 35S/163, para. 5.4.1.4, quoted in *Japan - Semiconductors*, BISD 35S/116, para. 107.

[593]Article 2(6) of the Administrative Procedure Law, Public Law No. 88 (1993). MITI's legal authority to issue administrative guidance arises out of its organic enabling legislation, the MITI Establishment Law (Public Law 275, 1952), US Ex. 52-2. "Government agencies, especially the MITI, have emphasized that administrative guidance is allowed by the 'establishment law' even though there is no specific provision in the authorization law". Matsushita Mitsuo, op. cit., p. 65.

[594]Ibid. p. 60.

[595]Ibid. p. 61.

[596]Ibid.

pressure or induce regulated enterprises into compliance with "guidances".[597] "[A]dministrative guidance can put irresistible pressure upon the addressee".[598]

6.94 In **Japan**'s view, the United States ignores critical distinctions among types of administrative guidance and distorts Professor Matsushita's analysis. Japan emphasizes that MITI issues different types of administrative guidance: MITI's guidance varies from "soft" guidance (i.e., mere suggestions) to "hard" guidance (i.e., guidance issued in place of more formal regulatory measures). Japan explains that Professor Matsushita has divided administrative guidance into three distinct types, which provide a useful analytical framework for understanding the nature of administrative guidance, and the importance of evaluating administrative guidance on a case-by-case basis. *Regulatory* administrative guidance covers guidance used by government agencies to regulate the conduct of business enterprises and persons, often as a substitute for a more formal order. Administrative guidance used in this way is a substitute for legal compulsion. This is the kind of guidance which the United States would assert as the universal norm. Aside from regulatory guidance, however, there is also *promotional* administrative guidance, which covers advice and information given to enterprises to advance and promote their own interests. This category describes the 1970 Guidelines perfectly: MITI was advising film manufacturers and distributors on ways to make their businesses more efficient and competitive, not imposing some obligation on them in furtherance of a public policy objective. Finally, *adjudicatory* administrative guidance, not relevant here, covers guidance used to help private enterprises to solve disputes among themselves.[599]

6.95 The **United States** argues that Japan's argument that administrative guidance must be "binding" was rejected by the panel in *Japan - Semiconductors* and *Japan - Agricultural Products* and should be rejected here. Any type of Japanese administrative guidance -- whether regulatory, promotional, or adjudicatory -- can be a "measure" within the meaning of Article XXIII:1(b). When the Japanese Government is giving "promotional guidance" to industry, it is expressing the Japanese Government's policy and taking action to develop, disseminate, and enact that policy. The Japanse Government should be just as accountable for the effect arising from this type of measure as for the effects arising from the measure for which it imposes a criminal penalty. In either case, the Japanese Government has taken action to influence the market consistent with the special circumstances in Japan. The two situations illustrate a difference in degree as to how far the government needs and is willing to go to achieve the desired effects -- not any substantive difference in whether the government has taken purposeful action. The two GATT panel decisions noted offer strong support for the US position.[600]

6.96 The United States further argues that the important question regarding administrative guidance in Japan is its operation and effect -- not the labels that may be used to describe it. Professor Hiroshi Shiono, described by Japan in its first submission as "a leading scholar of Japanese administrative law," stated: "[t]he three categories mentioned above are not necessarily exclusive to one another … . Even if assistance-related administrative guidance is issued, it involves an aspect of leading the parties concerned to a certain direction laid out by the administrative body, and thus it cannot be denied that

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[597]Ibid. pp. 61-62, 67.

[598]Ibid. p. 69.

[599]See Mitsuo Matsushita, op. cit., pp. 61-64, Japan Ex. E-7; Mitsuo Matsushita and Thomas Schoenbaum, Japanese International Trade and Investment Law 31-41 (1989), Japan Ex. E-8. A Japanese administrative law professor also adopts these three categories. Hiroshi Shiono, Gyoseiho I (Administrative Law I), (2d ed. 1994) pp. 166-167, Japan Ex. B-6. Other commentators also recognize the three categories. See, e.g., Ken Duck, Comment: Now That The Fog Has Lifted: The Impact of Japan's Administrative Procedure Law on the Regulation of Industry and Market Governance, 19 Fordham Int'l. L.J. 1686, 1709 (1996), Japan Ex. E-9.

[600]See *Japan - Agricultural Products*, para. 5.4.1.4 (finding that "the practice of 'administrative guidance' played an important role" in Japanese Government policy-making and is a "traditional tool of Japanese Government policy based on consensus and peer pressure"): *Japan - Semiconductors*, para. 108 (recognizing that non-mandatory measures of the Government of Japan can be measures within the meaning of Article XI).

it has a regulatory aspect as well."[601] Further, the Japanese Government itself has promulgated an official definition of administrative guidance in the Administrative Procedure Law which does not differentiate among different types of administrative guidance.[602] The United States concludes that, regardless of how one might sub-categorize each particular administrative guidance in this case, it is clear that the guidance played a critical role in the achievement of the objectives of the Government of Japan.

(b) Past GATT panel reports

6.97 **Japan** argues that GATT precedent confirms that not all administrative guidance qualifies as a "measure" for GATT purposes, and that the relevant distinction is whether the guidance in question amounts, in substance if not formally, to the imposition of a binding obligation. Specifically, the panel on *Japan - Semi-Conductors*[603] considered whether formally non-mandatory administrative guidance, namely, requests that Japanese semiconductor producers eliminate dumping in third country markets, could constitute "measures" for purposes of Article XI. Japan points out that there is no explicit distinction made between a "measure" for purposes of Article XI and a "measure" for purposes of non-violation claims. Absent a reason to the contrary, in Japan's view, a term used in one provision of GATT may be construed to have the same meaning when it is used in another provision. Japan argues that there is nothing to suggest that the term "measure" was intended to have a broader meaning in Article XXIII:1(b) than in Article XI. For Japan, the textual interrelation between Article XXIII:1(b) and Article XXIII:1(c) also supports the conclusion that the non-violation remedy is not available in the case of formally and substantively non-binding recommendations. Specifically, Article XXIII:1(b) applies to "measures", while Article XXIII:1(c) then allows parties to complain about "any other situation". In Japan's view, "measures", as opposed to the all-encompassing "any other situation", has a limited meaning, referring to government measures, not to private decisions whether or not to follow non-binding recommendations.

6.98 The **United States** responds that the criteria advanced by Japan would render administrative guidance - a traditional tool of Japanese Government policy - beyond the reach of GATT disciplines. According to the United States, Japan's argument is not supported by the text of Article XXIII:1(b) and, if accepted, would defeat the purpose of that provision. The United States explains that throughout GATT, the drafters used a variety of terms to describe government policies or actions in the context of distinct rules aimed at particular concerns.[604] Article XI:1 refers to "prohibitions or restrictions …

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[601]Article 2(6) of the Administrative Procedure Law provides Japan's official definition of administrative guidance.

[602]Hiroshi Shiono, Administrative Law I, p. 167, Japan Ex. B-6. The United States also notes that Japan submitted only one part of student Ken Duck's law review article to contend that the distinctions among types of administrative guidance dramatically change the legal effects of the guidance, the article actually does not support that premise. The article also stated that:

"The non-transparent and anti-competitive regulatory methods of Japan's economic bureaucracy impede new entrants to Japanese markets. Japan's regulatory system emphasizes close, informal contacts between the regulators and the firms they regulate. Gyosei shido, or administrative guidance, the process by which ministries used implied threats of future action or inaction in seeking a party's compliance with an administrative goal, is the primary regulatory method in Japan. Japan's informal style of regulatory governance, including administrative guidance, evolved from informal means of governance in Japanese history. The Japanese legal system and other institutional arrangements, like the amakudari [descent from heaven retirement] system and the shingikai councils, which emphasize close, informal ties between government and business, perpetuate Japan's informal regulatory system and enhance compliance with administrative guidance."

Ken Duck, Comment: Now That The Fog Has Lifted: The Impact of Japan's Administrative Procedure Law on the Regulation of Industry and Market Governance, 19 Fordham Int'l L.J. 1686 (1996), Japan Ex. E-9.

[603]BISD 35S/116, adopted 4 May 1988.

[604]For example, Article I:1 refers to "customs duties and charges of any kind;" Article III:2 refers to "internal taxes or other internal charges of any kind"; Article III:4 refers to "all laws, regulations, and requirements"; Article VIII:1 refers to "[a]ll fees and charges of whatever character … imposed … in connection with importation or exportation"; Article IX:2 refers to "laws and regulations relating to marks of origin"; Article X:1 refers to "[l]aws, regulations, judicial decisions and administrative rulings of general application".

on the importation … or on the exportation … of any product". In comparison, the United States underscores that Article XXIII:1(b) refers to "*any measure",* reflecting the drafters' intent that Article XXIII:1(b) should be a safety net potentially providing redress for any government policy or action that nullifies or impairs benefits under the General Agreement. Had the drafters intended Article XXIII:1(b) to cover only those government policies and actions which directly conferred a benefit or imposed a legal obligation, they could have done so by selecting words to convey those limitations just as they selected words to limit the scope of other Articles.

6.99 **Japan** contends that although the panel on *Japan - Semi-Conductors* recognized the special importance of administrative guidance as a tool of Japanese government policy,[605] it nonetheless made clear that "not all non-mandatory requests could be regarded as measures".[606] The panel emphasized that the issue would have to be decided on a case-by-case basis.[607] The panel identified two "essential criteria" that would need to be met for non-mandatory requests to qualify as "measures" for Article XI purposes:

(1) "there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect"; and

(2) the fulfilment of the government requests "was essentially dependent on Government action or intervention".[608]

In *Japan - Semi-Conductors*, the panel found that these two criteria were met. The panel found that the official commitment by the Japanese Government in a formal agreement to eliminate third country dumping created reasonable incentives or disincentives for Japanese producers to perform appropriately, and thus fulfilled the first criterion. The panel noted, however, that this circumstance alone was not sufficient to ensure compliance, since subsequent to the conclusion of the United States - Japan Semiconductor Arrangement in September 1986 (in which this commitment was made) some producers and exporters continued to engage in dumping. By requiring the submission of price and cost data and instituting regular supply and demand forecasting, the Japanese Government secured effective compliance. The panel thus determined that the Japanese Government created an administrative structure "which operated to exert maximum possible pressure on the private sector" to comply with non-mandatory administrative guidance. Accordingly, the panel found that the only difference between this guidance and formal legally binding obligations "amounted to a difference in form rather than substance",[609] and that the administrative guidance therefore constituted "measures" for Article XI purposes.

6.100 The **United States** contends that GATT precedent does not confirm that administrative guidance must be "binding" to constitute a measure within the meaning of Article XXIII:1(b). In the US view, the only precedent that Japan cites for this proposition is *Japan - Semi-Conductors* which it attempts to argue is relevant here because there is no distinction between the terms "any measure" in Article XXIII:1(b) and "other measures" in Article XI. In the US view, however, the panel should not apply the two part test used in that case to determine whether the distribution countermeasures at issue in this dispute are measures within the meaning of Article XXIII:1(b).

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[605] *Japan - Trade in Semiconductors*, BISD 35S/116, p. 154, para. 107.
[606] Ibid. p. 154, para. 108.
[607] Ibid.
[608] Ibid. p. 155, para. 109.
[609] Ibid. p. 158, para. 117.

6.101 First, according to the United States, Japan argued in that dispute that the non-mandatory "measures" complained of were not restrictions within the meaning of Article XI:1.[610] In contrast, the question in this dispute is whether the measure complained of are "any measures" that nullify or impair benefits within the meaning of Article XXIII:1(b). Second, the meaning of the term "measures" under Article XXIII:1(b) should not be confused with the question of whether a measure is having an effect that GATT intends to prevent. The panel in *Japan - Semi-Conductors* focused on whether the measure had the effect of prohibiting or restricting exportation of semiconductors. Thus, it looked at whether the Japanese Government's actions prohibited manufacturers from exporting at dumped prices or gave them incentives not to do so. In the US view, this is a different inquiry from that needed to decide whether distribution countermeasures had the effect of upsetting the competitive relationship between imported and domestic products. A non-mandatory measure may not be able to have the same effect as a "restriction or prohibition" under Article XI:1 if it is not legally binding or does not impose an equivalent obligation. But a non-mandatory measure can certainly have the effect of adversely affecting the competitive opportunities for imported products.

6.102 **Japan** responds that since both the *Japan - Semi-Conductors* case and the present case deal with non-mandatory administrative guidance, the finding of the *Japan - Semi-Conductors* panel provides a useful benchmark for the present case in determining what constitutes a "measure" for the purpose of non-violation complaints. Japan deems US efforts to distinguish Article XI from Article XXIII unpersuasive because in both provisions, the term "measure" is then followed by a qualification that relates the "measure" to the operative purpose of that provision and there is no explicit distinction being made between "measures" for purposes of Article XI and a "measure" for Article XXIII:1(b) purposes. Japan further notes that although the United States argues that the *Semiconductor* panel does not support Japan's argument because it found that "any measure … was covered, irrespective of the legal status of the measure," the panel further stated that "not all non-mandatory requests could be regarded as measures within the meaning of Article XI:1" and applied its "two essential criteria" to the "non-mandatory requests."

6.103 Japan further submits that the question of whether Japanese administrative guidance constituted a "measure" also arose in the panel report on *Japan - Agricultural Products*.[611] The issue arose under Article XI:2(c)(i), which provides an exception to Article XI for import restrictions on agricultural products that are necessary to the enforcement of "measures" which operate to restrict domestic production. The panel found that production restrictions pursuant to administrative guidance did constitute "measures" within the meaning of the provision. In Japan's view, this kind of regulatory guidance, in which the subjects are urged to act contrary to their commercial self-interest, is clearly distinguishable from the promotional guidance at issue in this case. Japan further notes that non-compliance with the guidance in *Japan - Agricultural Products* resulted in loss of eligibility for government subsidies and loans.[612]

6.104 In response to Japan's argument that the administrative guidance at issue before the panels on *Japan - Agricultural Products* and *Japan - Semi-Conductors* urged industry to act contrary to its self-interest, the **United States** argues that a government action or policy need not be adverse to industry interest to be a measure. The United States contends, if that were the case, none of the prior Article XXIII:1(b) cases involving subsidies would have been successful. In the US view, the real significance of the issue raised by Japan is that a government may use less formal, less intrusive means to achieve its policies if industry is receptive to those policies. The fact that the government can more

[610]Ibid., pp. 153-154, para. 106. The Panel noted "that Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure". Ibid.

[611]Adopted on 22 March 1988, BISD 35S/163.

[612]Ibid., pp. 234-237, paras. 5.3.5.1, 5.3.8.1.

easily achieve its goals because of an industry's receptiveness does not absolve a government of responsibility for the changes in the conditions of competition resulting from its measures. In the US view, Japan admitted that MITI's administrative guidance on distribution countermeasures was in the interest of manufacturers who would benefit from systematized distribution channels.

6.105 The United States also argues that when the Japanese Government gives guidance to industry, it is expressing the Government's policy and taking action to develop, disseminate, and enact that policy. Japan should be just as accountable for the effects arising from this type of measure as for the effects arising from a measure which is "legally binding," as that term is used by the Government of Japan. A contrary finding would make acceptable all collaboration between government and industry, effectively immunizing Japanese administrative guidance, concerted adjustment, and industrial policy from attack at the WTO. Such an outcome would give WTO sanction to a careful and calculated plan to offset and undermine tariff concessions. This could cause numerous countries that made difficult concessions in the Uruguay Round to question why they should honour their commitments. It would have been an open invitation for nation's to practice new forms of import-inhibiting industrial policy and protectionist government intervention.

(c) Governmental attributability of measures

6.106 **Japan** argues that MITI advisory committee reports, plans, and manuals and the formation of codes and councils that regulate promotions are not measures within the meaning of Article XXIII:1(b), because these measures are attributable to the private sector, not the Japanese Government.

6.107 The **United States** responds that it is not challenging private business practices, but measures of the Japanese Government. The term "any measure" in Article XXIII:1(b) is broad enough to include not only actions of the government, but measures designed, promulgated, or applied by a number of Councils, Committees, Centres, trade associations, and other quasi-governmental entities that have included private sector participants, acting under the authority of or in concert with Japanese Government ministries and agencies. In each of the principal areas in which Japan applied liberalization countermeasures, i.e., distribution countermeasures, the Large Stores Law and related measures, and the promotions countermeasures, the Japanese Government made extensive use of quasi-governmental agencies to implement government policy. These entities are not acting independently of governmental authority or direction. Measures developed or applied by these entities are measures within the meaning of Article XXIII:1(b).

6.108 According to the United States, for Japan's restructuring of the photomaterials distribution system to succeed, "a close relationship between government and business [was] necessary".[613] The government and private sector cooperate well because "there has historically been a close relationship between the government and business community" and "[t]here is a strong desire among the business community to avoid confrontation with the government even if the business community feels that the administrative agency has acted without legal authority".[614] Given the strong ties between the government and business community, the Japanese Government has been able to rely upon informal methods as well as formal measures in imposing its policies.[615] The United States argues that MITI frequently relies on informal administrative guidance to achieve its policy objectives.[616]

6.109 The United States argues that the Japanese Government actively promoted as part of its industrial policy mechanism the close government-private sector relationship based on the approach described

[613]Matsushita Mitsuo, International Trade and Competition Law in Japan (Oxford: Oxford University Press, 1993) p. 276, US Ex. 93-1.

[614]Ibid. pp. 67, 276.

[615]Ibid. p. 277.

[616]Ibid. p. 60.

in a MITI document entitled "The Formation of a New Industrial Order."[617] This document introduced the concept of "concerted adjustment" between the government and private sector to formulate and implement industrial policy and liberalization countermeasures. And, in fact the MITI History notes the importance of the New Industrial Order initiative in implementing the liberalization countermeasures:

> "As the new industrial order is shaped, it might be effective that the specific target is set by the cooperation between government and businesses, businesses make efforts to achieve the target, and in the process of businesses achieving its target, the government takes preferential measures with respect to taxation and financing. Of course, in this process, persuasion and assertions would repeatedly be held between government and businesses, and this effort should be continued until both sides are satisfied."[618]

6.110 Although the Japanese Diet did not pass the "Special Measures Law For Promoting Designated Industries" that was based on "The Formation of the New Industrial Order," MITI did take alternative action to implement the New Industrial Order initiative and the concept of concerted adjustment. In June 1964, MITI Minister Takeo Fukuda presented a policy statement to the Cabinet entitled "The Future Policy after the Failure of the Proposed Special Measures Law for Promoting Designated Industries," which the Cabinet accepted.[619] The statement outlined how MITI would implement this government-private sector coordination system discussed in the Formation of the New Industrial Order. MITI's official history, published in 1990, confirms that Japan did implement the New Industrial Order approach to government and private sector coordination:

> "the realization was sinking in that the time had arrived to undertake liberalization countermeasures and work on creating a new industrial order. Thus, the decision was made to realize the ideal of public-private sector cooperation on an industry-by-industry basis through administrative guidance."[620]

6.111 The United States further argues that under the concerted adjustment process, the close involvement of industry at the early stages of the policy development process helps ensure that the actual implementation can later be achieved through informal measures such as administrative guidance without the Japanese Government having to rely on more formal laws or regulations. The participation of industry associations, advisory councils and other quasi-governmental policy entities, in turn, enhances the "peer pressure" generated in the industrial policy process to ensure compliance with the adopted measures.

6.112 The United States argues that given that the domestic industry is an active participant and its self-interest is fully considered at the initial stage of developing the measures, the measures often take on the characteristic of confirming actions that are already being taken in the marketplace by domestic firms. The United States believes that only when it is impossible to implement measures through this approach does MITI apply formal measures. To this end, the United States contends that an important part of implementing administrative guidance is continued follow-up by the government to ensure that the desired actions have been taken, to assist some segments of the private sector in acting on their own interest, and to continue pressuring companies that may be inclined to stray from the guidance. The United States notes that a common method of such follow-up is to continue to survey industry and to publicly identify and criticize those companies that are not complying.

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[617]MITI, Formation of the New Industrial Order, US Ex. 62-5.

[618]Ibid., p.9, US Ex. 62-5.

[619]MITI, History on Industrial Policy, Vol. 10, 31 March 1990, pp. 82-83, US Response to Supplemental Panel Questions, US Ex. 7.

[620]Ibid.

6.113 For the United States, the use of the "concerted adjustment" method in this case, including the application of administrative guidance, echoes the findings of the panel in *Japan - Agricultural Products*, which stated that administrative guidance has "played an important role" in Japan and has been "a traditional tool of Japanese Government policy based on consensus and peer pressure."[621]

6.114 **Japan** asserts that the United States attempts to paint a picture of Japan as an unusual country with unique practices unlike those anywhere else in the world. In Japan's view, the United States has focused particular attention on government-business relationships and suggests that any governmental interaction with business is somehow strange. Japan responds that the United States tries to distort and exaggerate the government-business relationship in Japan. In reality, all governments, including the US Government interact with business.[622] The government-business interaction in Japan is not unusual, in particular since the United States itself acknowledges playing such a role with its private sector.

(d) Measures "applied" and measures "in effect"

6.115 Japan points out that many of the US allegations in this case concern "measures" that are no longer in effect (i.e., distribution modernization policies during the 1960s and '70s) or past application of currently existing measures (i.e., the Large Scale Retail Store Law and the Premiums Law). Japan emphasizes that the WTO dispute settlement process is designed to resolve differences over present policies that affect trade, not to serve as an historical tribunal or to attempt to punish or undo alleged past transgressions.

6.116 Japan argues that the language of Article XXIII:1(b) makes clear that the non-violation remedy is designed to apply when a benefit is being nullified or impaired by the application of any measure, whether or not it "conflicts" with the provisions of GATT. Given that the text contemplates nullification or impairment in the present tense, caused by the application of a measure in the present tense, the ordinary meaning of this provision, with its use of present tense verbs, in Japan's view, limits the non-violation remedy to measures that are currently being applied. According to Japan, this conclusion is reinforced by Article 26.1 of the DSU which provides that even when a measure is found to nullify or impair benefits under Article XXIII:1(b), "there is no obligation to withdraw the measure". In Japan's view, this language clearly contemplates the ongoing existence of the measure in dispute.

6.117 According to Japan, since the GATT 1994 "is legally distinct from" the GATT 1947, as Article II:4 of the WTO Agreement provides, GATT 1994 should not be applied retroactively to many of the alleged "measures" which were no longer in effect before its entry into force on 1 January 1995. This position is in line with Article 28 of the Vienna Convention on the Law of Treaties regarding the general principle of non-retroactivity of treaties.[623]

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[621] *Japan - Agricultural Products*, adopted on 22 March 1988, BISD 35S/163, para. 5.4.1.4.

[622] In a presentation at the OECD in 1968, the United States explained:
"The Department of Commerce is at the centre of the Government's relations with business. Over the years the Department has been accused of speaking for business within the Government. This is clearly not the case at the present time: the Department talks with and to business, rather than for business, and the difference is far from being merely verbal. It is now considered the Department's task to identify those things which need to be done in the public interest and to which the business community has not given sufficient attention or with which business cannot deal because it is not properly organized for that purpose. The Department brings together people from industry to discuss such matters - some of which, it might be added, businessmen are reluctant to explore within their own private groupings because of the anti-trust laws".
See US Industrial Policies: Observations Presented by the US Delegation before the Industry Committee at its 6th Session (OECD, 1968), p. 38, para. 113 (emphasis original). Japan Ex. F-3.

[623] Article 28 of the Vienna Convention provides "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

6.118 Japan further submits that GATT precedent supports the rejection of the US non-violation claims regarding past Japanese measures. In *United States - Gasoline*, the panel stated clearly that it would not rule on measures that were not in effect and were unlikely to be renewed.[624]

6.119 The **United States** does not disagree with Japan's basic argument that the measures must be in effect to nullify or impair tariff concessions within the meaning of Article XXIII:1(b), although it does disagree with some of Japan's legal reasoning and Japan's factual conclusion that the measures at issue in this dispute are no longer in effect. In fact, the United States has demonstrated that all of the measures being challenged are in effect and are being reinforced by the Japanese Government. The United States has demonstrated that Japan has engaged in a continuing course of conduct over more than 25 years and that Japan's more recent actions should properly be viewed as ancillary measures reinforcing the distribution countermeasures, as well as evidence that those original measures and the policies underlying them continue to be implemented by the Japanese Government. Recognized principles of state responsibility lend additional support to the conclusion that Japan should properly be held accountable for its actions as a result of its continuing course of conduct.[625]

6.120 The United States also points out that some panels have even ruled that measures, prior to their revocation, were contrary to GATT rules, even though they were no longer in effect at the time of the panel's deliberations.[626] This is not the case with the measures at issue in this dispute.

6.121 The United States explains that Japan's reliance on the *United States - Gasoline* decision in support of its arguments is misplaced. That dispute involved a measure that had never been applied and that had affirmatively and officially expired before the panel was established. The complaining parties argued that the non-application of the measure should not prevent the panel from ruling on it because "the mere existence of [the measure] might have inhibiting effects on commercial and investment decisions" and "the possibility of its future application was sufficient to establish an Article I violation".[627] In the view of the United States, the critical facts in the *United States - Gasoline* dispute are significantly different from the critical facts in this dispute. First, the distribution countermeasures were and are being applied, whereas the "75 percent rule" at issue in *Gasoline* lapsed without ever being applied. Second, the distribution countermeasures do not have a specified expiration date, whereas the lifetime of the 75 percent rule was clearly stated in the regulations. And third, the distribution countermeasures continue to have an effect, even after the panel's terms of reference were established, whereas the *Gasoline* panel found the 75 percent rule not to have an effect subsequent to its expiration.

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[624]"The Panel observed that it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective". WT/DS2/R, pp. 37-38, para. 6.19. *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted on 20 May 1996, pp. 37-38, para. 6.19.

[625]See, e.g., Draft Articles on State Responsibility, Article 25:2, which provides:

"2. The breach of an international obligation, by an act of the State composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated."

Yearbook of the International Law Commission, 1980, Vol. II, Part. II, p. 32-33 (United Nations 1981). See also Yearbook of the International Law Commission, 1978, Vol. II, Part. II, p. 89-97 (United Nations 1979) (for commentary on Article 25).

[626]See, e.g., Panel Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses ("United States - Wool Shirts")*, adopted on 23 May 1997, WT/DS33/R, p. 77, para. 8.1; Panel Report on *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49; Panel Report on *United States - Prohibition on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91, 106, para. 4.3.

[627]*United States - Gasoline*, WT/DS2/R, p. 7, para. 3.10. The United States adds that the panel did not examine the measure under Article I:1 for a variety of reasons, including that "the Panel's terms of reference were established after the [measure] had ceased to have any effect". Ibid., pp. 37-38, para. 6.19.

6.122 The United States further argues that prior panels considering the question of measures no longer in force were presented with measures that were unquestionably no longer in force which, in the US view, is not the case in this dispute. The United States maintains that virtually all of the measures applied by Japan remain in force today and Japan has not made any showing to the contrary.

6.123 The United States further explains that Japan's distribution countermeasures that block foreign film from the principal wholesale distribution channels, the Large Stores Law that buttresses these measures and limits alternative routes to market through large stores and the promotion countermeasures that restrict innovative and effective promotion to Japanese consumers continue to have the effect of severely curtailing competitive opportunities for imported products today.

6.124 According to the United States, through the distribution countermeasures, Japan established an exclusionary wholesale distribution system that could operate in perpetuity with little additional government intervention given the oligopolistic structure of the Japanese film sector and the Government's ongoing enforcement of the Large Stores Law and the Premiums Law and related promotion countermeasures.

6.125 The United States further contends that, notwithstanding the self-perpetuating nature of the exclusionary system established by the distribution countermeasures, Japan is continuing to reinforce and supplement these measures. First, it is continuing to enforce the Large Stores Law and promotion countermeasures. Second, the Japanese government is continuing to support the structure of the system through business assistance programs. Third, Japan's passage of the Business Reform Law and its initial designation of the photographic materials sector for assistance under this broad measure demonstrates Japan's ongoing effort to buttress the structure of the system whenever the need arises. In the US view, these actions by the Japanese government demonstrate ongoing, active efforts to reinforce the system established by the initial distribution countermeasures so that it remains a bulwark against penetration by imports.

6.126 The United States emphasizes that this Panel's determination as to whether the distribution countermeasures are in effect will send an important signal to Members considering using informal and ephemeral means to accomplish protectionist purposes. Members should be held accountable for measures which may superficially appear to be short-lived but in reality achieve lasting distortions in the competitive relationship between domestic and imported products. To excuse Members in these circumstances would create an important exemption to the WTO rules and disciplines.

6.127 **Japan** also argues that in relation to the requirement in Article XXIII:1(b) that nullification or impairment of a benefit needs to be the result of the "application" of a measure, the complaining party must show how the "application" of a measure to specific products nullifies or impairs benefits with respect to those products. Since the benefit consists of legitimate expectations concerning the competitive opportunities for imported *products*, it follows that for a measure to nullify or impair that benefit, it must "apply" to the products in question. In Japan’s view, given the basis of the non-violation remedy in tariff concessions on goods, it is not enough to name a law and assert some economic impact on specific products.

(e) Measures and market structure

6.128 The **United States** submits that the ongoing application of distribution countermeasures, the Large Retail Stores Law and the promotion countermeasures has continued to operate to nullify or impair US benefits, due to: (1) foreclosure from the primary wholesale channels of distribution as a result of the distribution countermeasures; (2) sharp diminution of alternative channels (i.e., large stores, secondary wholesalers); and (3) inability to price and promote products effectively and competitively as a result of restrictions under the Premiums Law and Antimonopoly Law. In the view of the United States, these measures nullify or impair benefits accruing to the United States not only from the Uruguay Round, but the Tokyo and Kennedy Rounds as well.

6.129 **Japan** responds that the United States is in fact complaining about the market structures, in particular, the decisions by the primary wholesalers of the domestic film manufacturers not to carry other brands of film, and affiliations between domestic manufacturers and photofinishing laboratories, that have been in place since the mid-1970s. According to Japan, the United States makes no allegation of any additional measures since that time which allegedly encourage single-brand distribution.[628] To Japan it appears that the United States considers the continued existence of a market structure - i.e., single-brand distribution - allegedly encouraged by policies in the past to constitute "ongoing application" of measures. Japan argues that a market structure should not be deemed a measure. Since a "measure" must be applied by a WTO Member, the term "measure" must refer exclusively to the policies and actions of a government.[629] In Japan's view, the decisions of certain primary wholesalers to purchase film only from particular suppliers are as such a matter of purely private conduct. Japan concedes that the United States may believe that these private company decisions constitute restrictive business practices. However, for Japan it is beyond contention that allegedly restrictive business practices are not covered by the current dispute settlement system under GATT.

6.130 Japan contends that the United States has not identified any government-imposed or legal obstacle that prevents wholesalers from buying other brands of film or that prevents photofinishing laboratories from switching to other brands of paper. Japan argues that the United States has not even tried to point out any ongoing active involvement by the Japanese Government in continuing to encourage or maintain the market structures it complains about. Accordingly, in Japan's view, the US claims about "ongoing application" of "distribution countermeasures" boil down to allegations about private business practices which are wholly outside the scope of Article XXIII:1(b).

6.131 The **United States** responds that it is not claiming in this dispute that market structure is a measure, only that Japan's bottle-necked distribution system provides compelling evidence of the Japanese Government's systematic efforts to impede market access for imported film and paper. Although a market structure is not a measure *per se* within the meaning of Article XXIII:1(b), the steps taken by the Japanese Government to create and maintain an exclusionary market structure in the Japanese photographic materials sector constitute measures. Therefore, the United States argues that the characteristics of the market structure in the Japanese consumer film and paper market are clearly relevant in this dispute. Whereas the continued existence of the exclusionary market structure, in the US view, reflects the ongoing application of measures, the United States emphasizes that it is not claiming in this dispute that purely private conduct is a measure. Rather, the United States is claiming that measures

[628]Japan emphasizes that the alleged "distribution countermeasures" during the 1960s and '70s are no longer in effect. According to Japan, the United States itself mentions in passing the 1990 Guidelines. In Japan's view, given the fact that the United States itself has urged Japanese industry to follow those guidelines, it is not surprising that the United States mentions these guidelines only in passing and does not make any effort to incorporate these guidelines into its legal theory.

[629]Article II of the Marrakesh Agreement Establishing the World Trade Organization describes the WTO as providing the framework for conducting trade relations "among its Members" (Article II:1), and explains that the agreement is "binding on all Members" (Article II:2). The focus of WTO remedies should also be on the Members - in other words, governments.

designed, promulgated or applied by a number of councils, committees, centres, trade associations and other quasi-governmental entities that have included private sector participants, acting under the authority of or in concert with Japanese government ministries and agencies, constitute measures. In each of the principal areas in which Japan applied liberalization countermeasures, the United States argues that the Japanese Government made extensive use of quasi-governmental entities to implement government policy. In the US view, these entities are not acting independently of governmental authority or direction.[630] Accordingly, in the US view, measures developed or applied by these entities are measures within the meaning of Article XXIII:1(b).

6.132 **Japan** contends that Article XXIII:1(b) focuses on "measures" because the WTO applies only to *governmental* actions, not private actions. The requirement of a "measure" thus creates a fundamental dividing line between actions subject to WTO discipline and actions beyond the scope of WTO obligations. The WTO properly reflects the absence of any international consensus to go beyond governmental acts to reach private sector conduct. Japan argues that the alleged "measures" identified by the United States are merely advisory bodies' analysis or suggestions and the industries' self-regulation, which is a purely private sector conduct.

2. DISTRIBUTION "COUNTERMEASURES"

6.133 The **United States** specifies the following distribution countermeasures as subject to its claim under Article XXIII:1(b):

(1) 1967 Cabinet Decision;
(2) 1967 JFTC Notification 17;
(3) 1968 Sixth Interim Report of the Industrial Structure Council Distribution Committee;
(4) 1969 Seventh Interim Report of the Industrial Structure Council Distribution Committee;
(5) 1969 Survey on Transaction Terms;
(6) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film;
(7) 1971 JFTC Rule 1 (International Contract Notification);
(8) 1971 Basic Plan of the Distribution Systemization Promotion Council;
(9) 1975 Manual of the Distribution Systemization Development Center;
(10) 1976 JDB funding for Konica's wholesalers;
(11) 1977 SMEA funding for photoprocessing laboratories.

These measures and the background leading to their adoption are described in detail in Section B of Part II and in Section A of Part V above.

6.134 The United States contends that the foregoing measures are governmental measures and that they are effectively still in force.

6.135 **Japan** responds that they are not governmental measures for purposes of Article XXIII:1(b) and that they are not currently in effect.

[630]See Panel Report on, *Review Pursuant to Article XVI:5*, adopted on 24 May 1960, BISD 9S/188, 192, para. 12 (explaining that "the GATT does not concern itself with such action by private persons acting independently of their governments") (emphasis added by the United States).

(a) Attributability to the government

6.136 Japan concedes that four of the foregoing items, i.e.,

(2) JFTC Notification 17;
(7) International Contract Notification;
(10) JDB funding;
(11) SMEA funding.

were once "measures". Japan notes, however, that all four of these items were raised by the United States for the first time in its first submission to the Panel and thus, are subject to procedural objections by Japan.

6.137 In Japan's view, the 1967 Cabinet Decision (item 1) was not a "measure" because it was merely a policy statement issued by the Cabinet and addressed to government agencies and did not legally obligate anyone outside of the government to do anything. Only subsequent actions by the agencies could constitute measures, depending on the particular circumstances of each action.

6.138 The **United States** counters that the Cabinet Decision contained both broad and specific direction of the Japanese Government to implement the liberalization countermeasures, and that the Decision specifically referenced problems related to liberalization of the distribution sector.[631] Further, the United States has also demonstrated that the other documents and actions referenced by Japan also constitute "measures" within the meaning Article XXIII:1(b).[632]

6.139 According to **Japan**, the remaining items listed by the United States did not impose binding obligations or the substantive equivalent. They offered recommendations, to be followed or not on a voluntary basis. Japan contends that the United States tries to blur a wide range of actions into a single catch-all category of "administrative guidance". For Japan, however, it is critical to keep in mind that in fact there is only one item of administrative guidance in the US list, i.e., the 1970 Guidelines (item 6). In Japan's view, the other items identified by the US do not even rise to the level of administrative guidance.

6.140 More specifically, Japan argues that the five remaining alleged "measures" relating to distribution policies are reports or surveys:

(3) 1968 Sixth Interim Report of the Industrial Structure Council Distribution Committee;
(4) 1969 Seventh Interim Report of the Industrial Structure Council Distribution Committee;
(5) 1969 Survey on Transaction Terms;
(8) 1971 Basic Plan of the Distribution Systemization Promotion Council;
(9) 1975 Manual of the Distribution Systemization Development Center.

6.141 Japan emphasizes that none of these reports by advisory councils represents an official statement or policy of MITI or the Japanese Government. Advisory councils merely fill an advisory role and their reports merely analyze issues and make recommendations to the government of possible policy responses. Private organizations, such as the Institute for Distribution Research (1969 Survey), undertake research and analysis, and provide information to the government as appropriate. Therefore, Japan concludes that these reports cannot be considered to be administrative guidance.

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[631]See para. 2.9 of Section II.B.1.

[632]See sub-sections VI.C.1.(a) and (c) on "Administrative guidance" and "Governmental attributability of measures," in particular paras. 6.94 and 6.108.

6.142 Japan explains that reports by advisory councils, such as the Industrial Structure Council and the Distribution Systemization Promotion Council, reflect not official government policy, but steps in the process of formulating policy. They analyze issues and make recommendations of possible policy responses. Although these reports shed light on MITI's decision-making process in pursuing distribution modernization, the reports themselves do not decide anything because the authorizing legislation of the Industrial Structure Council allows the Council only to submit its opinions to the MITI minister. Thus, according to Japan, there is no delegation of decision-making authority. Japan points out that under its law, administrative agencies are not legally bound to follow the opinion of their advisory councils. As noted by a leading scholar of Japanese administrative law:

> "[G]enerally speaking, the raison d'être of councils is to democratize administration, to introduce professional knowledge, to ensure fairness of administrative acts, and/or to adjust among interested parties … A council is different from an independent administrative committee. It does not express the intent of the government to the public. Although the administrative agency must respect the Council's opinions as a natural consequence, the agency is not legally bound by the opinions".[633]

Japan explains that in practice, agencies sometimes adopt their councils' suggestions and recommendations, and sometimes do not. Therefore, Japan concludes that its reports are not formal statements of the Japanese Government and, accordingly, they cannot constitute "measures" within the meaning of Article XXIII:1(b).

6.143 As to Japan's contention that the Panel should not consider the various surveys, reports, and actions other than the Guidelines to be measures of the Japanese Government, the **United States** responds that each of the quasi-governmental organizations carrying out the studies, reports, or other actions had close links to the government and in many respects acted as an arm of the government in the "concerted adjustment" process. In many cases, MITI made clear that the reports and other documents were to be seen as official government policy, often by repeatedly republishing the survey or study under MITI's name and with clear indication that the document represented MITI policy.

6.144 For example, with respect to the Industrial Structure Council, MITI's official historians have explained that:

> "The council was generally made up of representatives of relevant industries and groups of people of experience or academic standing (such as scholars, journalists, and former bureaucrats), and the responsible MITI bureau or division would serve as the Secretariat office. To this council, the materials from MITI would be presented, policies indicated, pertinent opinions from relevant industries are heard, experts make the adjustments, and then the information is compiled by the relevant bureaus. This was the normal process. Because of their large size and influence, which was a result of being related to trade and industry, the Industrial Structure Survey Committee and Industrial Rationalization Council were integrated in 1964, creating the Industrial Structure Council (ISC). When necessary, a number of committees were set up. This structure made it possible to gain consensus within industry, or between industry and the government; and functioned as an effective organization for obtaining cooperation between the public and private sectors."[634]

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[633]Hiroshi Shiono, Gyoseiho I (Administrative Law I) (2d ed., 1994) p. 265, Japan Ex. B-6.

[634]MITI, MITI History: "Public-Private Sector Cooperation, Volume 1 (May 31, 1991), p. 62, US Ex. 69 and First Panel Meeting, US Response to Supplemental Panel Questions, Attachment 22.

6.145 The United States further notes that Japanese scholars confirm the policy role played by quasi-governmental entities in obtaining cooperation between the public and private sectors:

> "These councils tend to be criticized as being captive to the ministry, and certainly the bureaucrats work to see that deliberations come out to reflect their opinions. In practice, however, it is not the case that only things desired by the ministry are reflected in the groups' reports, for on issues that directly affect the interests of firms, industry representatives do speak out strongly. In fact, on such issues, the councils take on the coloration of a forum in which parties can adjust proposals to reflect their joint interests. Thus, proposals that are passed through these councils, that is, that have been negotiated to reflect vested interests, can be afterwards implemented relatively smoothly, at least in terms of the industries represented on the relevant councils. In this sense, the Shingikai [deliberative council] process is one explicitly democratic development in postwar Japanese Government. One point that needs to be emphasized regarding such councils is their role in the exchange of information and obtaining consensus on policy matters.[635]

(i) 1970 Guidelines: background, publication and follow-up

6.146 The United States argues that in order to develop and implement its industrial policy, the Japanese Government relies heavily on different types of quasi-governmental entities including deliberative councils, advisory committees, study groups, research institutes, chambers of commerce, and trade associations. These organizations have played a central role in Japan's use of the government-industry cooperation method (kanmin kyocho seido) to implement its liberalization countermeasures. The participation of these entities in the "concerted adjustment" process increases the "peer pressure" on these entities to comply with the industrial policies adopted by the government.

6.147 The United States reports that in 1963, MITI directed the four domestic photographic film and paper manufacturers to establish the Natural Colour Photography Promotion Council (NCPPC) to counter foreign competition. MITI officials, including the official responsible for the photosensitive materials sector, attended the Council's meetings, and MITI officials recommended specific policies to help the Council achieve its objectives. According to the United States, throughout the mid-1960's, MITI worked to develop the "government-private sector cooperation system" in the consumer photographic film and paper sector, and laid the groundwork for working with the domestic manufacturers to restructure the distribution system to resist foreign competition after the liberalization of formal trade and investment restrictions.

6.148 The United States submits that in 1968, following the Sixth Interim Report by the Distribution Committee, MITI commissioned the Institute for Distribution Research, a MITI-affiliated organization, to make a survey of transaction terms in several sectors including photographic film which was completed in 1969. It reported that foreign manufacturers posed a threat to the oligopolistic distribution system dominated by Fuji and Konica, and emphasized that rationalizing and standardizing transaction terms was important to address this concern.

6.149 According to the United States, based on the 1969 survey, MITI Business Bureau prepared transaction terms guidelines for the photographic sector which were published in a photo industry journal in September 1969. The draft guidelines advocated each of the three transaction terms important for distribution keiretsu-nization, i.e., shortening of payment terms, and greater use of volume discounts and progressive rebates. The United States notes that although Japan disputes promoting progressive rebates, these published draft Guidelines stated, "[w]ith regard to rebates, progressive rebates should be aggressively promoted in order to facilitate large volume transactions".

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[635]Ryutaro Komiya, Industrial Policy of Japan (Academic Press Japan, Inc. 1988) pp. 15-18, US Ex. 59.

6.150 The United States continues that in March 1970, MITI published the final Guidelines for Standardization of Transaction Terms for Photographic Film[636] that called for the standardization[637] of transaction terms in order to "prevent disruption of the established order of trade by foreign capital". The final Guidelines noted that the terms between manufacturers and wholesalers already were in a desirable state, but as between primary wholesalers and secondary wholesalers and retailers, the final Guidelines repeated the call for shortened payment terms and volume discounts.

6.151 **Japan** concedes that the 1970 Guidelines did constitute a form of administrative guidance. However, in its view, that fact alone does not establish that they were "measures" for purposes of non-violation complaints. In this regard, Japan recalls its argument that the United States relies on a distorted characterization of administrative guidance in the Japanese system because the United States attempts to lump all administrative guidance into one catch-all category of informal but nonetheless binding regulations. Japan contends that not all administrative guidance is the same. With regard to the issue of whether administrative guidance constitutes the substantive equivalent of formally binding regulation, the panel on *Japan - Semi-Conductors* found that each set of guidance must be evaluated on a case-by-case basis and not based on a mechanical rule.[638]

6.152 In Japan's view, an examination of the contents of the 1970 Guidelines makes clear that the government action in this instance was nothing more than recommendations. Japan emphasizes that MITI merely issued promotional guidance with (1) no government-provided benefit attached to compliance, and (2) no government sanction attached to non-compliance. Accordingly, the administrative guidance reflected in the 1970 Guidelines does not meet the two criteria outlined in *Japan - Semi-Conductors*. Japan explains the difference between the administrative guidance in *Japan - Semiconductors* and the 1970 Guidelines as shown in the table below:

[636]MITI, "Guidelines for the Standardization of Transaction Terms for the Photofilm Industry", 1970, reprinted in Zenren Tsuho, July 1970, US Ex. 70-4.

[637]Japan notes that the United States consistently translates "tekisei(-ka)" as "standardization" rather than the more accurate alternative "rationalization." In Japan's view, if the Japanese original had meant "standardization", it would have used the term "Ityoujun-ka".

[638]*Japan - Semiconductors*, BISD 35S/116, 154, para 108.

COMPARISON OF ADMINISTRATIVE GUIDANCE IN *JAPAN - SEMICONDUCTORS* AND THE 1970 GUIDELINES

Semiconductors Panel	1970 Guidelines
specific request to companies not to export semiconductors at prices below the cost of production to third country markets (paras. 99, 115)[639]	several general suggestions of basic principles to rationalize trade terms, no single specific instruction for which the Government of Japan could verify compliance
mandatory data collection requirements imposed on each individual semiconductor producer (para. 99)	one time factual survey before Guidelines; no data collection system after the Guidelines was developed to measure compliance
The Government of Japan created "statutory requirement" to provide data, and created "heavy penalties" for non-compliance, including fines and prison terms (paras. 99, 113)	no penalties at all for non-compliance; some suggestions were followed, others were not followed; no legal basis for any penalties
systematic price and cost monitoring for "precise identification" of individual companies not complying with dumping requirements (paras. 99, 113)	no specific follow up at company level; only a one time request that the association report generally on what was being done; only 1 of 3 associations replied
more stringent export licensing practices, in order to improve the effectiveness of the monitoring efforts (paras. 112, 116)	no effort to expand scope of some other law to improve compliance, or bring industry within the scope of other regulatory regimes
created a new system of quarterly supply and demand forecasts, with the Government of Japan playing the "decisive role" in implementing the system (paras. 99, 114)	no new system of developing data to help guide the industry, or to monitor compliance
implementing formal international arrangement, with formal government commitment to "ensure" no third country dumping (para. 110)	no formal international agreement to pursue rationalization of trade terms; no formal commitments to another country
the Government of Japan itself had touted in writing the effectiveness of measures in meeting its obligation "to ensure" no third country dumping (paras. 112, 116)	no written claims given to other countries about the effectiveness of the 1970 Guidelines in realizing objective.

[639]References to paragraph numbers are to the panel report in the *Japan - Semiconductors* case. BISD 35S/116.

6.153 Japan explains that the text of the 1970 Guidelines and their transmittal letter to the film industry make clear that compliance with the guidelines, although obviously recommended, was purely voluntary. According to Japan, in some instances, specifically with respect to curtailing rebates, industry flatly ignored the guidelines. Furthermore, Japan points out that no government benefit was contingent upon following the recommendations of the 1970 Guidelines and that MITI did not prod compliance with its recommendations.[640] The Japanese Government had made no formal agreement with another foreign country committing to distribution modernization. Japan emphasizes that MITI did not establish any ongoing institutional mechanism that was "essential" for achieving compliance. Thus, in Japan's view, MITI's 1970 Guidelines were fundamentally different from MITI's efforts to control semi-conductor pricing. In the semi-conductor situation, MITI was attempting to pressure private parties to act contrary to their perceived interests in furtherance of a public policy goal, i.e., honouring Japan's formal commitment to the United States. However, with respect to the 1970 Guidelines, the recipients of the Guidelines were asked to submit a one-time progress report on their implementation of the Guidelines' recommendations, but whether to submit a report or not and the content of the report was left to their discretion. Japan argues that when it became apparent that some of the Guidelines' recommendations were being ignored, MITI did nothing. For Japan, the fact that two decades later, MITI was still addressing the same traditional business practices in its 1990 Guidelines shows the difference between MITI's suggestions and actual legally binding obligations. Japan argues that if the 1970 Guidelines were legally binding, the problematic business practices would have been eliminated and there would have been no need for the 1990 Guidelines. Japan concludes that there was no indication of an ongoing monitoring and enforcement system established and administered by MITI.

6.154 In response to Japan's argument that the 1970 Guidelines were merely suggestions that its industry could chose to adopt or reject as it saw fit, the **United States** submits that the 1970 Guidelines were preceded and followed by a near continuous series of measures, including surveys and studies carried out at the behest of the Japanese Government by organizations it controlled or dominated, reports and monitoring by MITI of implementation of its Guidelines, and promulgation of standard contracts and specific industry guides to bring about industry acceptance and implementation of the measures.

6.155 The United States questions Japan's contention that MITI did nothing to follow-up its issuance of the 1970 Guidelines. It notes that when publishing the Guidelines in an industry journal, MITI explained that the Guidelines were "abstract" and "the greatest common denominator" and that industry associations were asked to formulate and implement more specific transaction terms based on the Guidelines and to report back to MITI by November 1970. The United States submits that, in response to MITI's demand, the photospecialty wholesalers association promptly published a "Transaction Outline" to implement the association's own transaction terms based on the MITI Guidelines and reported it to MITI. With respect to payment terms, the Outline gave specific content to the Guidelines' call for shortened payment terms. As for rebates, the Outline stated, "with regard to quantity-related [volume] rebates, these will be adopted toward mass distribution of products under sound and fair competition". The United States argues that, although the Outline did not mention standardization of transaction terms, nonetheless, the Outline in itself amounted to an exercise of standardization because it was an outline by an industry association of business practices that the association intended to pursue.

6.156 The United States further submits that in 1971, MITI republished the 1969 survey report on transaction terms in the photo film sector originally written by the Institute for Distribution Research.[641] The new publication contained in addition an extensive report setting forth the particular transaction terms in use between manufacturers and each primary wholesaler (identified generically) and between each primary wholesaler and secondary wholesalers. In the US view, the publication of this specific information supported the standardization of transaction terms by allowing the primary wholesalers

[640]Japan notes that the cover letter, accompanying the 1970 Guidelines, said, "[W]e expect that the transaction parties understand the need for trade rationalization and make voluntary efforts for such a purpose."

[641] MITI Business Bureau, Actual Conditions of Transaction Terms in the Wholesale Industry, 21 August 1971, US Ex. 20.

to know what terms their competitors were offering. The United States underscores that the republication of the survey under MITI's name emphasized that the survey and its recommendations reflected MITI policy.[642]

6.157 **Japan** notes that information such as examples of actual transaction terms is quite common in such factual surveys. There is no indication the survey evaluated any specific terms either favourably or unfavourably, and thus they could not be "targets."

6.158 The **United States** underlines that, as part of MITI's effort to systematize distribution, in 1971 MITI commissioned the Chamber of Commerce, along with the MITI-established Transaction Terms Standardization Committee and domestic photographic materials trade associations, to draft a "Model Contract" based upon the standardized transaction terms outlined in the 1970 MITI Guidelines for the photographic film sector. When publishing the standard transaction contract for photographic film in spring of 1972, the Chamber emphasized that its actions were pursuant to a MITI mandate.[643] For the United States, this emphasis on MITI policy was important, because the Chamber in Japan has broad authority to act on behalf of MITI in many government programs, including the administration of subsidies and other government benefits.

6.159 According to the United States, MITI continued to promote standardized transaction terms. In 1973, MITI published under its name materials by the quasi-governmental Transaction Terms Stabilization Committee.[644] In republishing this material from the Committee, MITI noted that it too "plan[ned] to move forward with measures for standardizing transactions". Accordingly, MITI commissioned the Chamber to publish, in 1975, a compilation and commentary, entitled "Recommendation on Standardized Contracts for Transactions" (the "Chamber Guidance").[645] The Chamber Guidance also addressed payment terms and discounts, among other terms of the standard contract. Regarding payment terms, the Chamber Guidance elaborated on the need for monthly payment in cash, and for the use of notes with fixed terms and interest - again pushing for short payment terms. It also called for cash discounts to reward the prompt payment of accounts. Regarding volume discounts and rebates, the Chamber Guidance stated that the volume discounts in the film sector operated "the same as rebates". The Chamber stated that the terms of such discounts should be stipulated, but it did not otherwise call for their alteration or elimination.[646]

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[642]The United States notes that the republished version of the survey bluntly notes that the photo film industry "has established a distribution system where oligopolistic manufacturers lead". It then continues to cite as two threats to this oligopolistic system: "As future problems, we can cite first the 'growth of retail routes (especially regular chains and supermarkets) other than the photo retail route and changes in transaction terms due to this leadership,' and secondly the 'effects of full participation of Eastman Kodak'". According to the United States, the survey focused on transaction terms as the response to these challenges. With respect to rebates, the survey stated that there was too much emphasis on rebates that accord significant discretion to the sellers, and not enough emphasis on progressive rebates with clear standards that function as volume discounts. However, the United States claims that there is a mistranslation of the passage on rebates in Japan Ex. B-1. The United States supplied the corrections in US Ex. 20, pp. 308-09.

[643]"The drafting of a standard transaction contract for photographic film, which was commissioned to the Japan Chamber of Commerce and based on MITI's 'Transaction Standardization Guidelines for Photographic Film,' was completed and published". Nihon Shashin Kogyo Tsushin, 1 July 1972, p. 20, US Ex. 24.

[644]The Committee's findings stated that "the standardization of transaction terms is essential for … systematizing distribution activities as well as countermeasures against foreign capital".

[645]The Chamber Guidance reiterated that the reasons for promoting standardized transaction terms included, "to establish the standards for proper transaction terms in order to prevent disorder in transactions arising from capital liberalization". Japan Chamber of Commerce, Recommendations on Standardized Contracts for Transactions, Commission by Ministry of International Trade and Industry, July 1975, p. 3, US Ex. 32. The Chamber noted that it prepared the 14 standard contracts in cooperation with the "involved industries based on the [MITI] Guidelines" and expressed its "expectation that such measures will expand even more so that the idea underlying the Guidelines will become diffused among the general business community". Ibid., p. 4.

[646]The United States submits that in 1975, the Chamber published a commentary on standardized contracts, which discussed the connection between discounts and rebates in the photographic film sector. The standard contract also provided for dispute settlement by arbitration before the Japan Commercial Arbitration Association. The United States points out that the Chairman

6.160 The United States argues that, while the Chamber's standard contract did not mention standardization of transaction terms, the very publication of a standard contract by Japanese industry amounts in itself to an exercise in standardization. The United States notes that regarding payment terms, the Chamber's standard contract called for payment in cash on a monthly basis which is a short time frame for settling accounts. Regarding discounts, the standard contract called for the use of volume discounts, and for discounts to reward the prompt payment of accounts. Moreover, to follow up on dissemination and implementation of the standard contract, in 1974 and 1975 the Chamber, in cooperation with trade associations, conducted "Standardized Contract Dissemination Explanation Sessions" in several cities.

6.161 In the US view, the implementation and standardization of the transaction terms advocated by the Japanese Government was in the manufacturers' interest. However, unifying the transaction terms of different manufacturers can be difficult, as competition for wholesalers can lead manufacturers to strike different bargains. The United States emphasizes that Government monitoring of specific transaction terms and government support for their "standardization" can provide a discipline against any wholesaler or retailer resistance to these terms. Given that the particular transaction terms advocated by MITI did not necessarily serve the interest of wholesalers,[647] in the US view, the Japanese government would have to extend more effort at "concerted adjustment" with the wholesalers in order to implement standardized transaction terms at that level of the distribution process. The United States emphasizes that the implementation of MITI's transaction terms policies would least benefit the retailers.[648] Therefore, the strongest resistance could be expected from retailers and, accordingly, the greatest need for the Japanese Government to create strong rewards or punishments to retailers to earn their compliance in the system. Given this background, according to the United States, Japan took a variety of steps to implement and standardize the transaction terms in the photographic film and paper sector.

6.162 The United States emphasizes that the extensive interaction between government and the private sector, e.g., regarding transaction terms, demonstrates that the Japanese Government went to great lengths to ensure that its policies were adopted. The repeated advocacy and monitoring built peer pressure and served as a constant reminder that the Government was watching and pushing for these changes. Moreover, in the classic "concerted adjustment" method, MITI did not proclaim from on high, but involved the interested industry groups in the study, monitoring, and implementation process in order to build consensus. The United States claims that MITI also applied pressure to the process where necessary, completed with specific information on the transaction terms applied by individual companies that exposed the extent to which the industries were falling short of MITI's policies. The United States stresses that public exposure and embarrassment is one of the tools MITI uses to enforce its administrative guidance. Moreover, the exposure of this company-specific information facilitated standardization by allowing each company to have a sense of the terms offered by its competitors. In the US view, MITI also applied pressure through the Chamber of Commerce which disposes of significant authority to influence the dispensing or withholding of government benefits, and frequently acts as an information-gathering arm for MITI. For these reasons, the United States maintains that medium and small enterprises would have thought twice before ignoring the Chamber's Guidance on transaction terms. Finally, the United States points out that MITI used widespread fear over liberalization of investment in the photographic sector, to pressure industry into adopting the transaction terms policies

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and executive director of the Arbitration Association are also executives of the Chamber, that its offices are located within the Chamber, and that the Arbitration Association has been a retirement entity for MITI officials. The Japan Commercial Arbitration Association, Dantai Meikan, p. 427, US Ex 86.

[647]The manufacturers' shortening of their payment terms would increase financial pressure on the wholesalers, and the use of rebates and volume discounts could tie them to a particular manufacturer and limit their supplier options. On the other hand, if the wholesalers were able to impose the same sort of system further downstream, they would reap the same benefits with respect to the retailers as the manufacturers would gain from applying those terms to the wholesalers.

[648]Retailers would suffer the upward shift of economic power and loss of autonomy without having another lower-down level in the distribution system to turn to.

it advocated.[649] Therefore, the United States concludes that MITI very effectively ensured that industry implemented its guidelines.

6.163 **Japan** responds that no steps were taken to ensure that the 1970 Guidelines were followed, no monitoring of the extent to which the guidelines were adopted took place, and no sanction or other pressures were imposed by MITI even though the Guidelines were not followed. Japan notes, for example, that the "standard contract" presented by the Japan Chamber of Commerce and Industry was made to encourage the private sector to use written forms and to make contracts more transparent, and standardizing any specific transaction terms was not intended. Japan also notes that in any event, there is a serious timing problem to link the 1970 Guidelines and the actual reform of transaction terms or the development of single-brand distribution as alleged by the United States.

(ii) 1975 Manual

6.164 The **United States** further submits that in 1975 the MITI-affiliated Distribution Systemization Development Center published the Manual for the Systemization of Distribution by Industry (Camera-Film)[650] which was prepared in collaboration with industry groups, camera manufacturers, film manufacturers, camera and film wholesalers, camera and film retailers, and camera and film industry publishers. The 1975 Manual reported in detail on the distribution trends in the industry, and made several specific recommendations to combat increased competition from Kodak, including the standardization of transaction terms, including discounts and rebates, the establishment of the Photosensitive Materials Committee for the Systemization of Distribution by Industry (Camera-Film) under the Distribution System Promotion Council,[651] and the promotion of computer linkages (implemented by MITI in subsequent years).[652]

6.165 **Japan** points out that the 1975 Manual is a report prepared by a public corporation, but not by MITI, and thus cannot be considered either "administrative guidance" or a statement of official Japanese governmental policy. MITI commissioned the work in furtherance of its policy of encouraging distribution modernization. Japan points out that there is nothing either in the Manual itself or in the history of subsequent industry action to suggest that the recommendations of the report were adopted by MITI and then imposed as formally or informally binding obligations. Although the Manual was completed, Japan emphasizes that MITI never formally issued the Manual to the industry. According to Japan, the most compelling evidence of industry ambivalence about the 1975 Manual comes from the industry's response to information systemization. Fuji did not establish computer links with its primary wholesalers until 1989.

[649]As an industry journal article from 1976 submitted by Japan states, "this is the year [of] 100 percent capital liberalization of the film manufacturing industry … the most feared development by photosensitive material makers". The United States also reports that the article goes on to state that in anticipation of Kodak's possible investment in Japan, Japanese industry had implemented countermeasures "to the point of perfection".

[650]See sub-section II.B.2.(e) above, in particular paras. 2.23-2.25, and US Ex. 75-5.

[651]See sub-section II.B.2.(d) for a description of Distribution System Promotion Council, in particular para. 2.20.

[652]See sub-section VI.D.3.(f) on "Electronic information links" infra for a discussion of MITI's promotion of computer linkages, in particular paras. 6.380-381.

(b) Current effectiveness

6.166 With respect to the specific distribution measures at issue, Japan emphasizes that only one of the items specifically identified by the United States (i.e., international contract notification) was still in effect at the beginning of the Panel proceedings.

(i) Reports, surveys, plans and manuals

According to Japan, the following five reports or surveys were never government actions at all:

(3) 1968 Sixth Interim Report of the Industrial Structure Council Distribution Committee;
(4) 1969 Seventh Interim Report of the Industrial Structure Council Distribution Committee;
(5) 1969 Survey on Transaction Terms;
(8) 1971 Basic Plan of the Distribution Systemization Promotion Council;
(9) 1975 Manual of the Distribution Systemization Development Center.

Moreover, any substantive relevance of these reports ended when the advice was either acted upon or ignored.

(ii) JDB/SMEA funding and international contract notification

6.167 With respect to four of the items challenged by the United States, Japan concedes that they were once "measures", i.e.,

(2) 1967 JFTC Notification 17;
(7) 1971 International contract notification;
(10) 1976 JDB funding;
(11) 1967 SMEA funding.

6.168 As to their current effectiveness, Japan points out that the allegations about SMEA financing in 1967 and the JDB loan to Konica in 1976 were both factually specific events that happened and were finished more than two decades ago.

6.169 According to Japan, the requirement for international contract notification was technically still in effect as of 20 May 1997, but there was already a pending proposal to repeal this measure. This law was in fact enacted and became effective in June 1997, making it unnecessary for any international contracts to be notified to the JFTC. Simultaneously, the JFTC Rule No. 1 under Article 6 of the Antimonopoly Law was abolished. Moreover, in Japan's view, this measure never favoured Japanese domestic film or paper.

6.170 The **United States** emphasizes that Japan can point to just two distribution countermeasures that it purportedly revoked, JFTC Notification 17 and the 1967 Cabinet Decision. The extent to which these measures are inoperative and no longer in force, however, is far less clear than Japan claims.

(iii) 1967 JFTC Notification 17

6.171 **Japan** submits that JFTC Notification 17 was formally abolished in April 1996, thus cannot be in effect and, therefore, falls outside the scope of the present proceedings.

6.172 While the **United States** concedes that Notification 17 has been repealed, it maintains that there are other provisions that make the repeal of Notification 17 meaningless. According to the United States, premiums from manufacturers to wholesalers are still subject to JFTC Designation 9 of JFTC Notification 15 of 1982, i.e., the provision governing the use of "unjust inducements" under the

Antimonopoly Law. That designation prohibits premium offers in excess of "normal business practice". Given that Notification 17 set industry practice for 19 years, for the United States, it is uncertain at best as to whether present restrictions under Designation 9 will differ at all from the situation under Notification 17.

6.173 **Japan** responds that JFTC Designation 9 does not violate the WTO Agreements. Moreover, Japan contends that the United States raises a measure or a policy that was not listed in its panel request. Thus Japan encourages the Panel to dismiss the US claims concerning all measures and policies that were not specifically identified in the US panel request, including the claims made concerning JFTC Designation 9.

(iv) 1967 Cabinet Decision

6.174 Japan submits that the 1967 Cabinet Decision was formally repealed on 26 December 1980.

6.175 While the **United States** concedes that the 1967 Cabinet Decision has been repealed, it argues that the repeal affects only that portion of the decision relating to controls on international investment in Japan. The United States is, however, unaware of any evidence to suggest that the 1980 decision revoked the distribution policies and liberalization countermeasures directed by the 1967 decision. The 1980 decision mentions only steps that will be taken to lift restrictions on inward foreign investment in line with the OECD, but not countermeasures or distribution policies. The distribution countermeasures arise from a much broader and more recent set of measures than only the 1967 Cabinet Decision. Finally, the United States claims that the 1990 MITI Guidelines have not changed MITI's restrictive policies and measures.

6.176 **Japan** responds that there is ample evidence demonstrating that none of the distribution policies by the United States are currently in effect, and it is impossible to adequately respond to this contention because the United States did not specify which measures it believes resulted from the 1967 Cabinet Decision. However, in Japan's view, if the United States implies that the Cabinet Decision resulted in government actions other than those listed in the US request for a panel, those actions are not properly before this Panel.

(v) 1970 Guidelines and 1990 Guidelines

6.177 While Japan concedes that the 1970 Guidelines[653] were a governmental act relating to the film industry, it explains the reasons why this specific past government action is no longer in effect as follows: In Japan's view, the 1970 Guidelines never had any binding effect, either formal or informal, and thus never were "measures" within the meaning of Article XXIII:1(b), because these guidelines were not "in effect" even from the beginning. In the alternative, even if it were accepted that the 1970 Guidelines were once "measures" within the meaning of Article XXIII:1(b), Japan argues that they are clearly no longer in effect given that after almost thirty years, the business environment has changed so much over this long period that neither MITI nor the private industry considers the 1970 Guidelines as having any current relevance or effect.

6.178 Japan further submits that subsequent events confirm that the 1970 Guidelines have long since lost any relevance. By 1984, rationalizing trade terms was no longer a priority issue. The Report by the Industrial Structure Council entitled, "Distribution in the 1980s"[654], does not even mention the various trade rationalization guidelines issued over the 1970 to 1972 period. The report puts special emphasis on responding to the needs of consumers and supporting small and medium-sized companies.

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[653]Japan Ex. B-24 and US Ex. 70-4. See sub-section II.B.2.(c) above.

[654]Industrial Structure Council, 80 Nendai no Ryuutsuu Sangyou Bijon (Distribution Vision for the 1980s) January 1984, Japan Ex. F-6.

6.179 According to Japan, during the talks on the United States - Japan Structural Impediments Initiative (SII), when the United States argued for a renewed effort to encourage the Japanese distribution system to abandon traditional practices for more economically rational practices, MITI issued a new set of distribution guidelines in 1990.[655] According to Japan, if the earlier 1970 Guidelines were still in effect in any sense, one would have expected the 1990 Guidelines to discuss the earlier suggestions, but they did not. In Japan's view, it is not credible that these MITI suggestions from 27 years ago continue to be a current government action properly subject to WTO review today.

6.180 The **United States** responds that none of the arguments raised by Japan leads to the conclusion that the distribution countermeasures are no longer in effect and that MITI's restrictive policies and measures have changed. The United States maintains that Japan has never stopped intervening in the distribution system for the photographic materials sector. According to the United States, Japan can point to just two distribution countermeasures that it purportedly revoked, i.e., JFTC Notification 17 and the 1967 Cabinet Decision. The United States asserts that the revocation of two distribution and promotion countermeasures does not mean that all of the measures falling within those two groups of measures are no longer in effect. Nor does the issuance of a later guideline retract the prior guidelines and distribution countermeasures. Accordingly, the United States does not agree that these specific measures, and in particular the policies underlying them, have been revoked.

6.181 In **Japan**'s view, the 1990 MITI Guidelines addressed exactly the same kinds of "irrational" business practices as those targeted by the 1970 Guidelines, e.g., rebates, returns and dispatched employees. Yet for the 1990 Guidelines, encouragement of imports was the guiding purpose for targeting these practices. Japan points out that these guidelines had their origin in the Structural Impediments Initiative (SII). In the Final Joint SII Report, MITI made the following commitment: "As to trade practices concerning distribution, an improved environment will be sought from the standpoint of promoting competition and securing market openness".[656] Later in the report, MITI elaborated its plans to issue guidelines on distribution practices.[657]

6.182 Japan emphasizes that in 1990, MITI issued distribution guidelines encouraging the reform of "irrational" trade practices, at the direct request of the United States, to render the Japanese market more accessible to imports. In the current dispute, however, the United States argues that guidelines from 20 years earlier, covering the same subject matter and making the same recommendations, were somehow involved in impeding imports. For Japan it is inconceivable that the same recommendations could be anti-import policies in 1970 and then somehow transform themselves into pro-import policies in 1990.

6.183 The **United States** rejects Japan's contention that MITI's 1990 Guidelines reveal that MITI's distribution policies for the last three decades have not aimed at promoting exclusive, vertically oligopolistic distribution. The United States confirms that the 1990 Guidelines arose out of international pressure on Japan to increase market access, including SII talks between Japan and the United States. Only in reaction to that pressure, the United States argues, Japan introduced guidelines indicating that "international harmony is required" and businesses "must give consideration so as not to have their business practices become obstacles to others [including foreign suppliers]".[658] The United States points out that this statement contrasts with Japan's repeated calls to take countermeasures "in order to prevent disorder arising from" the incursion of foreign capital enterprises, stated in many of the key documents

[655]US Ex. 90-5, Japan Ex. B-22.

[656]Final Report on the Japan - US Structural Impediments Initiatives (SII), Actions on the Government of Japan Side, 28 June 1990, p. III-1", Japan Ex. B-30.

[657]Ibid. p. III-14, Japan Ex. B-30.

[658]1990 Guidelines, p. 2, US Ex. 90-5.

from the late 1960s and early 1970s. The United States concludes that the 1990 Guidelines depart in an important respect from the many policy documents in the late 1970s addressing transaction terms.[659]

6.184 The United States explains that based on positive statements by Japan in the context of the SII, the United States has taken the position that the 1990 Guidelines have the potential to help improve market access in the distribution sector (as Japan promised), if Japan in fact implements the policies indicated in these positive statements. However, in the United States view, Japan has not implemented these policies in the photographic materials sector or in any other sector. In light of Japan's failure to implement these policies, the United States stated in its November 1996 submission to Japan on deregulation matters,[660] that Japan should implement the contents of these Guidelines. As a result of this failure of implementation, the United States has concluded that Japan in fact has not changed its basic policies on distribution, and in fact has not implemented the positions stated in the 1990 Guidelines to correct the restrictive structures in the distribution system for photographic film and paper.

6.185 For the United States, in considering the implementation of the 1990 Guidelines, it is important to bear in mind that Japan implemented its distribution policies, beginning in the 1960s and 1970s, not by a mere announcement of Guidelines in 1970, but based on the back-and-forth process of "concerted adjustment" between government and industry. That process spanned years and involved continuous government surveying and consulting with the domestic industry, building consensus, issuing reports and guidelines, following up with more surveys and guidance to industry. The United States emphasizes that it would take even greater efforts by MITI to undo what it has done, particularly because the formation of limited foreign access to the Japanese distribution system was in the interest of Japanese manufacturers, whereas its dismantling would pose a direct challenge to the two-company oligopoly of Fuji and Konica.

6.186 The United States claims that to the best of its knowledge, Japan has undertaken no actions in the photographic film and paper sector to follow-up on the 1990 Guidelines. Specifically, the United States submits that MITI has not pursued any meaningful actions to reverse its policies on transaction terms or to address the restricted structure of the distribution system for photographic film and paper in Japan. Moreover, according to the United States, the exclusionary distribution system remains in force in the form it existed in 1990, and an elaborate system of rebates and discounts continues at various levels of the distribution system in this sector.[661] Japan's interpretation of the Antimonopoly Law continues to provide that the use of transaction terms departing from standard industry terms can be an unfair trade practice, and the Antimonopoly Law continues to require reporting of all contracts between foreign manufacturers and Japanese distributors.

6.187 Therefore, the United States concludes that - although the 1990 Guidelines were different from the 1970 Guidelines in their intention to avoid some adverse effects of keiretsu - Japan has not implemented the Guidelines in a way to achieve results, as Japan did with the 1970 Guidelines. The United States takes the position that there is nothing inconsistent with the United States calling for Japan to implement the policies announced in the 1990 Guidelines, while noting that so far Japan has failed to do so.

6.188 As to the US view that the 1990 Guidelines are in direct conflict with the claim about the 1970 Guidelines, **Japan** refers to the US request to the Japanese Government in the latest US

[659]Specifically, regarding rebates, the 1990 Guidelines emphasize that: "It is desirable for manufacturers to voluntarily refrain from offering rebates aimed at maintaining a keiretsu-based relationship in order to prevent manufacturers from exercising excessive influence over the business of retailers". 1990 Guidelines, p. 8, US Ex. 90-5.

[660]Submission by the US Government to the Japanese Government Regarding Deregulation, Administrative Reform and Competition Policy in Japan, 15 November 1996, Japan Ex. B-23.

[661]Actual Rebate Conditions: Fuji Photo Film Co., Ltd. Versus Eastman Kodak, Co., Toyo Keizai (24 July 1995), US Ex. 90.

recommendations on deregulation issued pursuant to the US - Japan Framework Agreement.[662] In Japan's view, the United States is simultaneously urging Japanese businesses to follow current administrative guidance on reforming irrational business practices of 1990 and urging before this Panel that similar guidance of 1970 has violated US rights under the GATT. In Japan's view, the 1990 Guidelines are no different from the 1970 Guidelines in promoting "a free, transparent and competitive distribution system".

(vi) Conclusions

6.189 In Japan's view, the US claims focus on the past, not the present. Japan contends that those specific items that the United States identified are no longer in effect. MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution practices. These recommendations were made decades ago, and private businesses followed them or ignored them at their own choosing. According to Japan, the five reports or surveys were never government actions at all, and any substantive relevance of these reports ended when the advice was either acted upon or ignored.

6.190 Japan concedes that the requirement for international contract notification in JFTC Rule No. 1 was technically still in effect as of 20 May 1997, but there is a pending proposal to the Diet to repeal this measure that becomes effective June 1997. Japan adds that this law was in fact enacted in June 1997, making it unnecessary for any international contracts to be notified to the JFTC. Simultaneously, the JFTC Rule No. 1 under Article 6 of the Antimonopoly Law was abolished.

6.191 Japan points out that the allegations about SMEA financing (1967) and the JDB loan to Konica (1976) were both factually specific events that happened and were finished more than two decades ago. In Japan's view, the United States has not disputed this fact.

6.192 Japan further submits that the 1996 National Trade Estimate Report on Foreign Trade Barriers ("NTE Report") by the Office of the US Trade Representative provides that "[t]he liberalization countermeasures were implemented between 1967 and 1984".[663] Thus, in Japan's view, the United States implied that the distribution policies at issue ended about 13 years ago. Japan further notes that in this NTE Report, the term "liberalization countermeasures" appears to refer to MITI's distribution policies and investment restrictions.[664] However, according to Japan, the United States has not and cannot point to any current MITI action or policy concerning the distribution sector that in any way nullifies or impairs any tariff concessions. Japan points out that the United States does not identify a single item that occurred after 1977, i.e., almost twenty years ago, and before the first tariff concessions on colour film and paper in the 1979 Tokyo Round results.

6.193 The **United States** argues that the longevity of the distribution countermeasures does not dictate that they are no longer in effect. The United States contends that Japan's position would suggest that mandatory legislation codified long ago is to be deemed revoked if no enforcement actions are taken under it after some period of time has lapsed. The United States contest this proposition because it overlooks the possibility that a law can be self-enforcing if no party is violating it. Therefore, the United States rejects Japan's assertion that virtually all the distribution and promotion countermeasures are no longer in force.

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[662]"Monitor and report on adherence by the Japanese business community to the MITI 1990 Guidelines on Business Practices in order to promote a free, transparent and competitive distribution system". Submission by the US Government to the Japanese Government Regarding Deregulation, Administrative Reform and Competition Policy in Japan, 15 November 1996, p. 7, Japan Ex. B-23.

[663]United States Trade Representative (USTR), National Trade Estimate Report on Foreign Trade Barriers (NTE Report) (1996) issued in March 1996, before the United States began this Panel proceeding,

[664]USTR, 1996 NTE Report, p. 209, Japan Ex. F-5.

6.194 In the view of the United States, Japan is continuing to reinforce and supplement these countermeasures in several key ways. First, it is continuing to enforce the Large Stores Law and promotion countermeasures which prevents erosion of the system by restricting the competitive pressures that large retailers and manufacturers attempting to break into the system would provide in the absence of these ongoing restrictions. Second, the Japanese government is continuing to support the structure of the system through business assistance programs. Third, Japan's passage of the Business Reform Law and its initial designation of the photographic materials sector for assistance under this broad measure demonstrates Japan's ongoing effort to reinforce the structure of the system established by the initial distribution countermeasures so that it remains a bulwark against penetration by imports.

6.195 The United States emphasizes that the actions needed to maintain the exclusionary distribution structure are different from the measures needed to create the structure in the first instance. For example, once Konica had received a JDB subsidy and built a new joint distribution center with its wholesalers, it had established a new, closer degree of integration with those wholesalers, accomplishing the purpose of the subsidy. From that point on, it no longer needed a subsidy for this purpose. Similarly, the amount of effort the Japanese Government expended to assist in the initial information link-up of Fuji with its wholesalers exceeds what is currently needed for Fuji to maintain those information links and the control over the distribution system.

6.196 The United States maintains that with respect to the promotion of joint distribution facilities and information links between manufacturers and distributors there is no indication that the policy underlying Japan's actions has changed and it continues to be governmental policy of Japan.[665] The fact that Fuji and Konica have built these systems and facilities in conformity with Japan's policies, and that they therefore currently might need less assistance and promotion from the Japanese Government, proves only that these companies have complied with their Government's wishes. According to the United States, there were no meaningful efforts by Japan to suggest to either of these companies to change its course regarding information links and joint distribution facilities.

6.197 The United States further argues that in the case of transaction terms, there is no indication that Japan has changed its policies in favour of standardized transaction terms, and Japan has made no meaningful efforts to implement any changes in rebate and discount practices in the photographic film sector. According to the United States, Fuji continues to maintain a highly complex rebate and discount scheme. In the absence of forceful implementation of a change in policy by Japan, Fuji's rebate scheme will continue to favour "channel exclusivity", standardized transaction terms will continue to provide a benchmark against which to judge whether non-standard terms are "unfair trade practices", and the JFTC's international contract notification rules will continue to allow automatic scrutiny of contracts between foreign manufacturers and Japanese wholesalers.[666]

6.198 In summary, the United States concurs with Japan on the proposition that a finding of non-violation nullification and impairment may be based only on measures that are currently in force. The United States does not believe, however, that Japan has presented credible evidence that its intervention in photographic material distribution is merely a fact of the past.

6.199 **Japan** argues that the United States may be of the position that the alleged measures, even if not in effect any more, are still actionable, because their "effects" or "consequences" are sustained by other items which are not included in the terms of reference. In Japan’s view, however, the United

[665]The United States notes that the JDB program that provided the loan to Konica remains in place, and Japan generally has continued to advocate and financially support joint distribution facilities and electronic information ties between manufacturers, wholesalers and retailers. See e.g., MITI's 1990 Guidelines, p. 9, US Ex. 90-5 and Photo Industry Information System Manual, US Ex. 96.

[666]Japan contends that a bill to repeal the international contract notification requirement was passed in June 1997, and simultaneously JFTC Rule No. 1 under Article 6 of the Antimonopoly Law was abolished.

States should not be allowed to make such an argument. Japan stresses that what matters should be whether the alleged measures listed by the United States are *themselves* in effect or not. Any items outside the terms of reference for this panel cannot substitute for the items within them. Japan notes that the United States did not argue that the alleged measures inside the terms of reference and items outside of it in combination have had certain alleged effects. If the United States believes that the alleged measures (in the terms of reference) are still in effect, it should have presented a "detailed justification" for claiming the alleged measures remain in effect by themselves. In Japan's view, the US attempt to point out other items does not meet the requirement of "detailed justification."

3. PROMOTION "COUNTERMEASURES"

(a) The Councils and Codes

6.200 As far as the JFTC related issues are concerned, **Japan** agrees with the United States that the following are governmental "measures" within the meaning of Article XXIII:1(b):

(i) the Premiums Law (as amended);
(ii) the JFTC Notifications; and
(iii) the approval by the JFTC of fair competition codes.

6.201 The **United States** submits that the private sector plays an important role in enforcing Japan's promotion countermeasures by virtue of the system of so-called fair competition codes and fair trade councils. Japan is alleged to have deputized fair trade councils as enforcement surrogates for the JFTC under the Premiums Law. The United States asserts that industry trade associations play an important role in the fair trade councils and, in some instances, dominate the affairs of a particular council. The United States clarifies that in this dispute it is concerned with the actions of trade associations only as they relate to a code or council. In the US view, Japan should bear responsibility for a council whose formation it promoted and approved, as well as the rules and codes which that council promulgated.

6.202 The United States argues that, even though individual aspects of Japan's promotion countermeasures approximate facets of measures elsewhere, the United States is unaware of any nation with a regime that is equal to Japan's. In particular, no nation has an enforcement mechanism of government/industry cooperation akin to Japan's system of "fair trade councils" and "fair competition codes." This system allows powerful businesses and trade associations to formulate a set of competition rules and, with the assistance of the government, impose those standards not only on members of their groups but on non-members as well.[667] The United States argues that industry "fair competition codes" played a critical role in the JFTC's assessment of what constituted "normal business practices" in applying the promotion countermeasures. If there is a fair competition code, then the code will be used as the standard. If none exists, the JFTC will make a determination after investigating the business practices of that industry or issue guidance to the industry to establish a fair competition code. This close government/industry relationship has been used to stifle foreign competition such as when the Promotion Council worked with the JFTC to undermine Kodak's VR campaign before it even began.[668]

[667]Severe Restrictions Placed on Businesses for Premium Offers: Shatokuren Hears JFTC Explanations at Jyosui Kaikan on the 12th, Nihon Shashin Kogyo Tsushin, 20 June 1967, US Ex. 67-8.

[668]In the US view, Japan failed to provide any evidence contradicting the US recitation of events regarding the VR campaign. Japan contends that statements contained in Mr. Ishikawa Sumio's affidavit of the United States are not substantially objective evidence and therefore are not trustworthy.

6.203 According to the United States, Japan's photographic materials sector has four relevant councils:

(1) the Manufacturers Fair Trade Council,
(2) the Wholesalers Fair Trade Council,
(3) the Photographic Industry Fair Trade Promotion Council, and
(4) the Retailers Fair Trade Council.

The United States emphasizes that with respect to the two councils most relevant to the US case, i.e., the Promotion Council and the Retailers Fair Trade Council, trade associations dominate the activities and policies of each council.

6.204 **Japan** argues that a fair competition code does not by itself constitute a "measure" of the Government of Japan for the following reasons. A fair competition code is an agreement, or a contract, among non-government industry members. Its enforcement will have to be affected, ultimately, by the judiciary, and the JFTC has no role to play in the enforcement process. It is only when parties to the code fail to observe the Premiums Law, Notifications, or other JFTC regulations, that the Commission takes any action. Industry members may freely choose whether or not to participate in a code. The JFTC does not demand membership. According to Japan, the rationale for such a mechanism is well understood overseas as well: For example, the "guidelines on codes of practice" prepared by the United Kingdom's Office of Fair Trade state that "[t]he code or articles will also set out the penalties for non-compliance up to and including dismissal from the association."[669] Similarly, the Annual Report 1987-1988 of Australia's Trade Practices Commission states that "[c]odes should include commercially significant and realistic sanctions for their enforcement."[670]

(i) Manufacturers' Council

6.205 The **United States** argues that prior to the establishment of the Retailers Council, Japan established two fair trade councils in cooperation with the manufacturers and wholesaler associations. Pursuant to Article 10 of the Premiums Law, the JFTC approved on 15 October 1965 the "Fair Competition Code Regarding Restrictions Premiums Offers by the Cameras and Related Products Manufacturers' Industry" ("Manufacturers' Code") "to enable this Code to be enforced smoothly and effectively". Article 4 of the Manufacturers' Code established the Camera Manufacturers Fair Trade Council ("Manufacturers' Council"). Article 4 further defines the duties of the Manufacturers' Council, which include the responsibility to "investigate those who may be in violation of the code" and to "take necessary measures against those who have violated the Code".

6.206 **Japan** notes that Kodak Japan Limited (Nagase Sangyo, until 1988) has been participating in the Manufacturer's Council as a camera manufacturer since 1988.

(ii) Wholesalers' Council

6.207 According to the **United States**, the JFTC similarly approved the "Fair Competition Code Regarding Restrictions of Premium Offers by the Cameras and Related Products Wholesalers Industry" ("Wholesalers' Code") on 29 October 1966. Article 4 of the Wholesalers' Code established "the Cameras and Related Products Wholesale Industry Fair Trade Council ("Wholesalers' Council"). Article 4-3 defines the duties of the Wholesalers' Council. Articles 5 and 6 authorize the Wholesalers' Council to investigate violations and to take measures against violators, including the imposition of fines.

[669]Japan Ex. D-72 and Ex. D-73.
[670]Trade Practices Commission, Annual Report 1987-1988, p. 114, Japan Ex. D-74 and Ex. D-44.

(iii) Promotion Council

6.208 The United States further submits that the Photographic Industry Fair Trade Promotion Council ("Promotion Council") is a vertically-integrated industry association representing every stage of the distribution of photographic materials and equipment, with the photosensitive materials distributors' association (Shashoren) and the Retailers Association (Zenren) being the primary beneficiaries of the organization. The United States points out that the JFTC created the Promotion Council by administrative guidance.[671]

6.209 According to the United States, the fact that the JFTC oversees the fair trade council is illustrated by Article 17 of the Promotion Council's articles of association which provides:

> "Establishing or abolishing the provisions of these Articles of Association and the responsibilities of this Council shall require prior approval from the Japan Fair Trade Commission".[672]

6.210 In the view of the United States, the delegation of authority from the JFTC to the Promotion Council is made explicit in Article 4 which confers upon the Promotion Council a number of enforcement powers. Article 4 provides:

> "In order to achieve the objectives which were described in Article 3 above, the Council will create a committee which will be responsible for the following: … secure fair transaction order between all elements of the distribution system, manufacturers, wholesalers, and retailers. Take the necessary actions against those who violate the Self-Regulating Measures. Liaise with the competent governmental authorities. All other responsibilities necessary to achieve the Council's objectives".

Accordingly, the same association-council dynamic exists between the Promotion Council and the JFTC as it is true with respect to the Retailers Council and the JFTC, which is described below. The Promotion Council has received a similar delegation of authority from the Japanese Government.

6.211 **Japan** responds that industry self-regulation is private-sector conduct, and not a government "measure". Japan explains that the Promotion Council is a private-sector organization, which was established by the camera industry to implement voluntary standards on dispatched employees, and that has no governmental authority.

6.212 The **United States** responds that the Promotion Council and its first set of rules, governing dispatched employees, were established under guidance from the JFTC.[673] According to the United States, Japan admitted that "the Promotion Council was established after consultation with the JFTC" and conceded that "[t]he Promotion Council refers to the JFTC's 'approval' or 'guidance' for its action in its rules."[674] Regardless of whether the Promotion Council is a purely private trade association or a quasi-governmental association, Article 8-2 of the Antimonopoly Law requires that "[e]very trade association … file a report [with the JFTC] within thirty days as from the date of its formation". JFTC

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[671]The official directive of the Promotion Council states: "This council was established under the guidance of the Japan Fair Trade Commission in December of 1982 for the purpose of securing a fair trade system in the photographic industry, deepening the exchange of ideas and understanding among businesses, and contributing to the development of the industry". National Photographic Industry Fair Trade Promotion Council, No. 1, 29 August 1992, US Ex. 92-7.

[672]Fair Trade Promotion Council Establishment: An Attempt to Improve the Structure of the Industry, Zenren Tsuho, January 1983, pp. 46-47, US Ex. 83-3.

[673]US Ex. 92-7. ("the council was established under the guidance of the JFTC in December of 1982"); US Ex. 83-3 ("the JFTC expressed an understanding [about] establishing the Council").

[674]At the time of the formation of the Promotion Council, the Council's chairman stated that the council had "the stamp of approval of the Fair Trade Commission." Shashin Kogyo Junpo, 20 October 1982, US Ex. 46.

Notification 2 of 1953, as amended, requires such associations to file basic information such as the copy of the articles of association, business plan, membership, and self-regulating measures.[675]

6.213 **Japan** further points out that the JFTC has no statutory authority to approve agreements underlying the Promotion Council. Its action with regard to their agreements on dispatched employees or "develop-print" price representations[676] was a non-binding expression of the view that the agreements would not immediately violate the Antimonopoly Law. In that respect, the status of the Promotion Council is no different from that of their "ordinary" industry associations. Accordingly, Japan concludes that the Promotion Council's individual activities cannot constitute "measures" for purposes of non-violation complaints.[677]

6.214 The **United States** responds that the exemption created by section 5 of Article 10 of the Premiums Law applies not only to the establishment of a fair competition code, but also to "such acts of entrepreneurs or a trade association as have been done in accordance therewith." The United States also was unaware of any reason to view the Promotion Council differently from the other councils relevant to this dispute.

(iv) Retailers' Council

6.215 According to the United States, the example of the Retailers Fair Trade Council ("Retailers Council") displays the relationship between a trade association and a fair trade council and is illustrative of the powers effectively delegated to a trade association by the Japanese Government:

6.216 The United States submits that, since its inception, the Retailers Fair Competition Code ("Retailers Code")[678] has essentially been administered by the photographic retailers trade association, or Zenren, acting as the Retailers Council. According to the United States, it was Zenren that asked the JFTC to approve the establishment of the Retailers Code and since then Zenren officials have dominated the Fair Trade Council's board of directors.[679] Moreover, Zenren's official journal, Zenren Tsuho, is used to disseminate information relating to activities of the council.[680] Zenren and the Retailers Council hold annual meetings at the same time and in the same location, and they even occupy the same offices.[681]

6.217 **Japan** points out that the Retailers Council, which is responsible for the observance of the Industry Code, is established separately from "Zenren," a national federation of prefecture-wide photographic products retailers organizations. The Retailers Council has an independent assembly and an independent board, as well as its own secretariat and budget. In foreign countries, industrial organizations often serve as an implementation organ for voluntary restraints.

6.218 The **United States** submits that the Retailers Code specifies sweeping enforcement powers for the Retailers Council, including enforcement authority under the Premiums Law and other "fair

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[675]The United States mentions that it has requested the Japanese Government to provide copies of the report filed by the Promotion Council. Although the report would not normally contain business confidential information, the Japanese Government refused to provide any documentation relating to the Promotion Council.

[676]Japan states that Kosei Torihiki Joho, the publication the United States cites as an official publication, is in fact not an official publication.

[677]The United States confirmed that the Council actions which they believe are problems are their reaction to the VR campaign, and the 1996 Circular. Japan notes that the 1996 Circular, however, is only an inquiry and does not instruct members to suspend the service of dispatched employees.

[678]US Ex. 87-4.

[679]See, e.g., Zenren Tsuho, June 1987, p. 6-11, US Ex. 87-5.

[680]See the Retailers Fair Trade Council's 1994 and 1995 fiscal year business plans.

[681]Zenren Tsuho, August 1987, pp. 16-20, US Ex. 87-7.

trade" laws.[682] Article 15 of the Code outlines the Retailers Council's powers to investigate suspected violations[683] and Article 16 specifies penalties[684] in the case of a business operator's non-compliance with the Code.

6.219 **Japan** contends that the Retailers' Code, constitutes self-regulation among business entities approved by the JFTC in accordance with the Premiums Law. In Japan's view, the Retailers Council is a voluntary organ established by the Code to implement the self-regulation. Nor does Article 14, paragraph 7 of the Retailers Code serve as a basis to confer on the Retailers Council authority to enforce the Premiums Law. It only gives the Council the task of making the Premiums Law or the Antimonopoly Law more widely understood and observed.

(v) Federation of Fair Trade Councils

6.220 The **United States** further points out that the JFTC has delegated certain authority to an umbrella organization of fair trade councils, i.e., the Federation of Fair Trade Councils (the "Federation"), to manage the operation of Codes. The Federation was established by the Japanese Government in 1979 to promote, coordinate, and cooperate in the implementation of fair competition codes, conduct surveys on the degree of compliance with them, and perform other duties pertaining to the prevention of violations of the Premiums Law.[685] The JFTC convenes the Federation annually to determine policy relating to fair competition codes and fair trade councils, and reports on the Federation activities in its legally mandated Annual Report to the Japanese parliament.[686] According to the United States, the Retailers Council executive director regularly participates in policy meetings with senior officials of the JFTC. Furthermore, the JFTC regularly issues awards through the Federation to reward the activities of the fair trade councils.

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[682]Article 14 of the Retailers Code provides: "The Retailers Fair Trade Council shall perform the following:

(1) Activities pertaining to causing the Code to be thoroughly understood.
(2) Activities pertaining to offering consultation and directions in connection with the Code.
(3) Activities pertaining to making adjustments pertaining to how the Code is being observed.
(4) Activities pertaining to investigating the facts when there is suspicion of violation of the Code.
(5) Activities pertaining to taking the necessary steps against those who have violated the Code.
(6) Activities pertaining to processing complaints received from the general consumer.
(7) Activities pertaining to making the Act Against Unjustifiable Premiums and Misrepresentations and other laws and ordinances pertaining to fair trade widely understood and preventing violations thereto.
(8) Activities pertaining to liaison with competent authorities.
(9) Activities pertaining to providing information to the members.
(10) Activities pertaining to other activities connected with implementing the Code".

[683]Article 15 of the Retailers Code provides:

"the Fair Trade Council may summon the parties involved to hear their explanations, send out the necessary inquiries, obtain the opinions of witnesses, and conduct the necessary investigations for other circumstances".

[684]Article 16 of the Retailers Code states:

"[w]hen a business operator is found to be in violation … the Fair Trade Council may serve a written warning … When the business operator served with the warning as per the above is found not to obey the same, the Fair Trade Council may levy on the business operator a penalty of up to 500,000 yen, or dismiss it from the membership of the Fair Trade Council, or when necessary, request that the Japan Fair Trade Commission take the necessary measures".

[685]The Fair Competition Code System and Status of Establishing Fair Competition Codes, Kosei Torihiki, No. 390, April 1983, pp. 37-38, published by Japan Fair Trade Institute, JFTC, Trade Practice Department, US Ex. 83-8.

[686]1995 JFTC Annual Report Antimonopoly White Paper, July, 1996, pp. 247-251.

(b) Attributability to the government

(i) Fair Competition Codes

6.221 The United States claims that the Japanese Government should bear responsibility for the effects of fair competition codes and the activities of fair trade councils, including trade associations acting under aegis of a code or council because the codes and councils are the creation of Japanese law, specifically Article 10 of the Premiums Law. Subsection (1) of that provision provides:

> "Businesses or a *trade association* may, upon obtaining authorization from the Fair Trade Commission in accordance with the Rules of the Fair Trade Commission, with respect to matters relating to premiums or representations, conclude or establish an agreement or a code, aiming at preventing unjust inducement of customers and maintaining fair competition. The same shall apply in the event alterations thereto are attempted".[687]

In the view of the United States, Article 10(1) makes clear that the establishment of the code is subject to approval by the JFTC. Similarly, Article 10(3) states that the operation of the codes and councils is subject to JFTC supervision.

6.222 The United States emphasizes that the power of the Retailers Council and Zenren - like all other councils and trade associations - is even greater because Article 10 of the Premiums Law exempts their activities from antitrust enforcement. Article 10(5) of the Premiums Law states that:

> "The provisions of Section 48 [recommendation, recommendation decision] and Section 49 [initiation of hearing procedures], Section 67(1) [urgent injunction] and Section 73 [accusation] of the [Antimonopoly Law] shall not apply to the fair competition code that has been authorized under Subsection (1), and to such acts of entrepreneurs or a trade association as have been done in accordance therewith".

6.223 **Japan** replies that council actions under an approved code are not exempt from the operation of the substantive provisions, e.g., prohibitions of unfair trade practices, of the Antimonopoly Law. For the JFTC, anything a council does is actionable, just as activities of other associations. The only legal consequence of the JFTC approval is that it must first revoke the approval before it enforces the Antimonopoly Law against an approved code or implementation thereof.

6.224 Japan explains that according to Article 10 of the Premiums Law entrepreneurs or a trade association may conclude or establish a code ("fair competition code"), aiming at the prevention of unjust inducement of customers and maintaining fair competition. The Law also provides that such code be concerned with matters related to premiums or representations, and that it must be approved by the JFTC.[688] Accordingly, with regard to other matters, such as the dispatch of employees, entrepreneurs cannot conclude a "code". Japan submits that the JFTC may approve a "code" only when it is found to meet strict conditions.[689] Before deciding whether or not to approve a "code", the JFTC holds public hearings to receive opinions from general consumers, people of learning and knowledge as well as representatives from enterprises concerned. The Premiums Law further provides

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[687]US Ex. 62-6 (emphasis added).

[688]Article 10 (1) of the Premiums Law.

[689]According to Article 10 (2) Premiums Law a "code" may be approved only if:

(i) it is appropriate for preventing unjust inducement of customers and to maintain fair competition;
(ii) it is not likely to impede unreasonably the interests of consumers in general or the related entrepreneurs;
(iii) it is not unjustly discriminatory; and,
(iv) it does not restrict unreasonably the participation in or withdrawal from the fair competition code.

the JFTC with oversight authority, allowing the JFTC to subsequently revoke its approval. When the JFTC approves a "code", it is published in the official gazette. Japan argues that the approval by the JFTC has the effect of a confirmation that the content of the "code", as well as acts done in compliance with the code, does not violate the Antimonopoly Law.[690]

(ii) Fair Trade Councils

6.225 Japan explains that, for the purpose of implementing and observing the code effectively, the parties (entrepreneurs) to the "code" usually organize themselves into a private body called a fair trade council, composed of the members of the code, which are legally distinct from the existing trade association. Although approved codes may contain provisions on the establishment and operation of councils, in Japan's view, the councils remain private organizations because the approval of the establishment of an organization composed of private parties does not render the organization a governmental entity. Many codes provide that the council may or must take the following actions:

(a) The council is to report to the JFTC the decisions made at the annual meetings of the council.
(b) The council is to report to the JFTC the fact of having taken such actions as
  (i) requiring breach-of-contract damages for the disobedience of the code, or
  (ii) expulsion of a member who did not obey the code.
(c) The council may request the JFTC to take necessary measures against those members who did not obey the fair competition code.

The actions in (a) and (b) above are intended to ensure that the JFTC is informed of main developments regarding the operation of the code. With regard to actions in (c) above, the JFTC is not obliged to take any action in response to such approaches from the councils.

6.226 Japan states, however, that it is not obligatory for a code to have provisions regarding the above-mentioned actions. They are included in the code based on the voluntary decision of the members of the code. Japan further notes that councils are not required to, and actually do not, seek the JFTC's approval on such matters as its annual business plan or budget, appointment of personnel, or its individual actions. Japan further emphasizes that fair trade councils are not governmental or even semi-governmental organizations, and their executive committee members or its staff are not government officials.

6.227 The **United States** alleges that, in effect, the Japanese Government has delegated enforcement authority under the Premiums Law to fair trade councils and the industry trade associations that comprise them. According to the United States, by its very terms, the Premiums Law delegates enforcement authority to trade associations acting as fair trade councils, empowering them to implement JFTC-approved fair competition codes. According to the United States, in this light, the director of the JFTC's division on premiums has explained that

> "[t]he approval of the Code means that the role we play to take enforcement actions on violations will be left to the Fair Trade Council. If this expectation is not met, [the approval] will have no meaning".[691]

According to the United States, e.g., Members of the Retailers Council have echoed his sentiments, stating that "[t]he retailers fair trade council is just like a subcontractor for the JFTC".[692]

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[690]Article 10 (5) Premiums Law.

[691]Zenren Tsuho, July 1987, p. 7, US Ex. 87-5. Japan contends that "teki-hatsu" should be translated as "discovery" rather than as "enforcement action". See translation issue 20.

[692]Shukan Shashin Sokuho, 7 August 1987, p. 3, US Ex. 87-9.

6.228 The United States further points out that the JFTC, through its approval of the code, confers not only broad authority on private parties to act as surrogate enforcers, but also exempts them from prosecution for their activities. As the JFTC has explained, "even if the contents of the codes or the activities based on the codes violate the Antimonopoly Law, no control measures will be taken based on the Antimonopoly Law".[693]

6.229 **Japan** contends that the enforcing authority of the JFTC may not be delegated to a private body. The kinds of actions which the United States cites as examples of delegation of power are the ones which a council may undertake on its own.[694]

6.230 As to the nature of the relationship between the JFTC and the fair trade councils, Japan notes that the JFTC enforces only the Premiums Law and not the codes. Since fair competition codes are agreements among private entrepreneurs, the specific performance of the codes to the members is ultimately effected by the court. Japan explains that the JFTC is empowered by Article 10 of the Premiums Law to approve a fair competition code drafted by entrepreneurs or a trade association. The amendment of the code also requires the JFTC's approval. The Premiums Law has no provision referring to the council as such. Although codes approved by the JFTC usually contain provisions on councils, the JFTC's legal relationship with the councils is the same as that with ordinary private organizations or enterprises. The JFTC would be ready to take appropriate steps, should the councils be found to be obstructing fair competition.

6.231 Japan emphasizes that fair trade councils are not delegated any powers from the JFTC. With regard to the relations between the JFTC and the prefectural governments, Articles 9:2 to 9:5 of the Premiums Law provide that certain powers are delegated to the latter. However, no such provision exists in Article 10 of the Premiums Law, which deals with fair competition codes. From that, it is clear for Japan that the JFTC cannot delegate any power to non-governmental bodies without explicit authorization by the law.

6.232 Japan points out that the self-regulation codes are not enforceable to members without being approved and published by the JFTC. They are naturally not enforceable to non-members, either. Japan points out that such self-regulatory codes are effective so long as they do not contravene the Antimonopoly Law.[695] However, JFTC-approved codes are applicable to members and can be enforced by courts. According to Japan, many codes have a provision that enables the council to take certain actions against those who do not obey the codes, such as requiring a breach-of-contract damages or expulsion from the code. In this sense, one may be able to say that the code is "enforceable" by the fair trade council. However, Japan emphasizes that the JFTC has no power to approve individual actions taken by the organization composed of the members of the code (the fair trade council). Moreover, many codes provide that the works of the council include:

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[693]Jirei Dokusen Kinshi Ho, 15 December 1995, p. 442, US Ex. 95-20.

[694]Japan states that, e.g., anybody may establish "self regulation for fire prevention", and take enforcement actions, such as a survey, imposition of a penalty, or a request for an action with the appropriate authorities.

[695]The JFTC will regulate self-regulatory agreements when they fall upon one of the following:

(i) the self-regulatory agreements constitute "unreasonable restraint of trade" by entrepreneurs, such as cartel, (Article 3 of the Antimonopoly Law)

(ii) the self-regulatory agreements constitute either

(a) substantial restraint of competition by a trade association, or

(b) unjust restriction of the function or activities of the members of the code.

(Article 8 of the Antimonopoly Law).

(i) making the code better known,
(ii) looking into the possible disobedience of the codes and taking certain actions against it, and
(iii) preventing the violation of the Premiums Law.[696]

In Japan's view, since all of these are actions taken in conformity with an agreement among private parties (i.e., the code) with a view to complying with the rules in the code and the Premiums Law, they cannot be regarded as the use of powers delegated to the council by the JFTC.

6.233 In Japan's view, the fact that councils are authorized to impose "penal fines" on members who violated the codes, is not a case of delegated power. Private persons are basically free to agree (a) that they abide by a certain rule and (b) that those who have broken the rule pay breach-of-contract damages. It takes no delegation of governmental power to make and comply with such an agreement. In many instances, the code provides that when the council has required breach-of-contract damages for the disobedience of the code, the council is to report the fact to the JFTC. Such a provision is intended to make sure that the JFTC is informed of main developments regarding the operation of the code. It is nothing but an "ex post facto" notification, and does not indicate the JFTC's "involvement in" or "responsibility for" the activities of the councils.

(iii) Conclusions

6.234 The **United States** contends that the Japanese Government established its private-sector-enforced code system, at least in part, to counteract the perceived superior marketing abilities and promotion budgets of foreign firms. The United States quotes a leading Japanese antitrust scholar who explained that "[F]air competition codes can also be effective in controlling firms if they disturb the market.[697] Given these circumstances, the United States takes the position that the activities of these councils and associations are attributable to the Japanese Government and fall within the purview of the WTO and this Panel.

6.235 The United States emphasizes that Japan's present position, i.e., that the effects of the codes and councils cannot be attributed to the government, contradicts the position it took in the 1987 *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* case.[698] In its submission to that panel, Japan stated that "labelling of alcoholic beverages in Japan is *regulated* by a range of *legal controls* as follows: … (iii) fair competition codes in accordance with the said Act [against Unjustifiable Premiums and Misleading Representations]."[699] Japan further explained:

> "Article 10 of the [Premiums Law] establishes the fair competition code system. While the code is a rule voluntarily set by the industry concerned with a view to contributing the correct selection by consumers and assuring fair competition, it requires approval

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[696]The items usually listed in the code as the works of the council are as follows:
(i) making the codes better known;
(ii) consultation and giving advice on matters related to the code;
(iii) surveys on the situation regarding the compliance of the code;
(iv) surveys regarding possible disobedience of the code;
(v) taking actions against members who did not obey the code;
(vi) dealing with complaints from consumers;
(vii) making the Premiums Law and other laws related to fair trading better known, and preventing the violation of such laws; and
(viii) getting in contact with the government agencies concerned.

[697]Matsushita Mitsuo, Antimonopoly Law and International Transactions, 25 May 1970, pp. 83-84, US Ex. 70-2.

[698]Panel Report on *Japan - Customs Duties,Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages ("Japan - Liquor Taxes and Labelling Practices"),* adopted on 10 November 1987, BISD 34S/83.

[699]Submission of Japan to the panel in *Japan - Liquor Taxes and Labelling Practices,* Annex 9, p. 15 (emphasis added).

> by the Fair Trade Commission. This fair competition code provides for sanctions (imposition of a penal sum) against disobedience of the stipulated obligations, in order to ensure its proper enforcement."[700]

6.236 In this regard, the panel on *Japan - Liquor Taxes and Labelling Practices* stated in the section on "factual aspects":

> "Japan enacted various legal regulations in order to prevent the use of trade names in such a manner as to misrepresent the true origin of a product, including the Law for the Prevention of Unfair Competition, the Act Against Unjustifiable Premiums and Misleading Representations, a range of "fair competition codes" voluntarily laid down by each industry concerned pursuant to Article 10 of the latter Act and approved by the Fair Trade Commission, and the Law Concerning Liquor Business Association and Measures for Securing Revenue of Liquor Tax".[701]

6.237 According to the United States, Japan took this position to demonstrate that it had met its obligations under Article IX:6 of GATT, which requires Members to cooperate with one another to protect the trade names of foreign products. In the US view, Japan should not be able to take credit for its system of codes and councils to suit its position in an earlier proceeding only to later claim that the codes and councils have nothing to do with the government.

6.238 **Japan** responds that a "fair competition code" is an agreement among private parties for autonomous control. The passage in the quoted panel report specifically states that "fair competition codes [are] voluntarily laid down by each industry concerned". At the same time, a code approved by the JFTC is also an enforceable agreement. In Japan's view, the expression of "legal regulations" in the above-mentioned report was used in this sense.

6.239 Japan further contends that a fair competition code does not by itself constitute a "measure" of the Japanese Government for the following reasons:

> (i) A fair competition code is an agreement, or a contract, among non-government industry members. Its enforcement will have to be effected, ultimately, by the judiciary, and the JFTC has no role to play in the enforcement process. It is only when parties to the code fail to observe the Premiums Law, Notifications, or other JFTC regulations, that the Commission takes any action.
>
> (ii) Industry members may freely choose whether or not to participate in a code. The JFTC does not demand membership.

6.240 Japan further submits that also individual activities carried out by a fair trade council or other industry association are not "measures". Japan notes that a fair trade council is not granted a particular status in the law, nor is it subject to special control or guidance of the Government:

> (i) The concept or the status of a fair trade council is not defined or regulated by the law. It is an establishment defined and provided for in a code. It is treated as an "industry's association" in no way differently from other such organizations.

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[700]Ibid. p. 26.

[701]Panel Report on *Japan - Liquor Taxes and Labelling Practices*, adopted on 10 November 1987, BISD 34S/83, 86-87 para. 2.7.

(ii) There is no *de jure* or *de facto* presumption of lawfulness conferred on individual activities of a fair trade council. Conversely, unless the council commits an unlawful activity, the JFTC is not authorized to require reporting from the body.

(iii) Participation in a fair trade council is not mandatory.

6.241 Japan further emphasizes that there is no fair competition code which is applicable to photographic film and paper.

6.242 In summary, Japan concludes that activities of fair trade councils or other industry association of this type cannot constitute a governmental "measure" within the purview of Article XXIII:1(b).

D. UPSETTING THE COMPETITIVE POSITION OF IMPORTED PRODUCTS

1. THE LEGAL TEST

6.243 The **United States** claims that Japan, by its promulgation and application of the distribution countermeasures, the Large Stores Law, and promotion countermeasures, worked to "systematically offset" the intended effects of its tariff concessions. According to the United States, Japan identified in a systematic fashion the advantages it believed that foreign firms and products enjoyed, then designed policies and implemented measures to offset those advantages. As a consequence, the application of these three groups of countermeasures upset the competitive relationship between imports and domestic products in the Japanese market contrary to Article XXIII:1(b).

6.244 The United States notes that only a few disputes have resulted in a finding of nullification or impairment within the meaning of Article XXIII:1(b), but each panel addressing the issue has emphasized the importance of protecting a party's reasonable expectations that tariff concessions will lead to improved market access and will not be frustrated. For example, the panel in *EEC - Oilseeds* considered that

> "…the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset".[702]

The 1992 Follow-up Report of the Members of the Original *EEC - Oilseeds* Panel held that "… the assurance of better market access … would be meaningless" if concessions could be "systematically counteracted".[703]

6.245 The United States further explains that the key question considered by the panel on *EEC - Canned Fruit*, as in all cases involving Article XXIII:1(b), was whether the government measure in question upset the competitive relationship between the domestic and imported product.[704] Likewise, the panel in *EEC - Oilseeds* noted:

> "In the past, Article XXIII:1(b) cases, the CONTRACTING PARTIES have adopted the same approach: their findings of nullification or impairment were based on a finding that the products for which a tariff concession had been granted were subjected to an adverse change in competitive conditions".[705]

6.246 Article 26.1(a) of the DSU states that the complaining party must provide a "detailed justification in support of any complaint". **Japan** emphasizes that, while Article 3.8 of the DSU states that in violation cases, "there is normally a presumption that a breach of the rules has an adverse impact on other Members", there is no presumption of adverse impact in non-violation cases. Therefore, in Japan's view, a complaining party must meet its burden of proof by showing that a measure is currently upsetting the competitive position of the imported product concerned.[706]

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[702]Panel Report on *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins ("EEC - Oilseeds")*, BISD 37S/86, 128-129, para. 148. (Emphasis added).

[703]*Follow-up on the Panel Report "EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins*", 16 March 1992, BISD 39S/91, 116, para. 81, (unadopted).

[704]Panel Report on *European Economic Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktails and Dried Grapes ("EEC - Canned Fruit*"), GATT Doc. L/5778, 20 February 1985, (unadopted), p. 29, para. 80.

[705]*EEC - Oilseeds*, BISD 37S/86, 129-130, para. 150.

[706]Ibid.

6.247 Japan argues that all previous non-violation findings have addressed only two specific types of measures: product-specific subsidies and tariffs. In those situations, it was unquestionable that the provision of a subsidy on the domestic product, or a tariff concession on some products, established less favourable competitive conditions for imports of the product concerned. Thus, in all prior panel decisions which found non-violation nullification or impairment, the complaining party showed a clear connection between the alleged measures and the competitive position of imported products.

6.248 Japan points out that the US non-violation claims in this case, however, challenge Japanese policies, e.g., encouraging modernization of distribution practices, regulation of large scale retailing, and regulation of unfair trade practices, which make no distinctions between imports and domestic products. In Japan's view, there is therefore no explicit connection between these alleged measures and the competitive position of imports.

6.249 The **United States** explains that in both the *EEC - Oilseeds* and *EEC - Canned Fruit* cases, the measures applied were subsidies that gave an advantage to domestic products and effectively offset the benefits of the tariff reductions. In the present case, however, Japan has achieved the same objective by application of different measures. Japan systematically sought to offset the effects of its tariff concessions by precluding access to key distribution channels through systemization, and then buttressing the market structure, established through systemization, by application of the Large Stores Law and promotion countermeasures. As tariffs were reduced, Japan placed additional hurdles in the path of imports (e.g., closing distribution channels) to make it substantially more difficult to distribute and sell imported products in Japan. The United States alleges that in taking these actions, Japan has effectively crippled efforts by foreign firms to utilize the opportunity provided by tariff reductions to improve their position in the Japanese market.

6.250 **Japan** responds that none of the alleged measures in dispute is currently upsetting the competitive position of imported black and white or colour film or paper relative to the time of any of the tariff concessions cited by the United States. Japan explains that this conclusion can be demonstrated with respect to each of the three sets of policies in dispute in three different ways:

(1) the alleged measures in dispute do not distinguish between domestic and imported products, and impose no inherent disadvantage on imports;
(2) there is no causal connection between the alleged measures and any unfavourable competitive conditions; and
(3) the alleged measures as they exist today are unchanged or more favourable to imports as compared to the time of any relevant tariff concession.

6.251 In the view of the **United States**, Japan has fabricated three rules as defense against the US claim that the liberalization countermeasures are responsible for the adverse competitive conditions confronting imported film and paper which, in the US view, cannot be substantiated with the text or negotiating history of Article XXIII, or with prior panel decisions:

(1) the Panel may look only at the face of the measures to determine if a tariff concession is being nullified or impaired;
(2) the measures on their face must "formally distinguish" between imported and domestic film and paper or otherwise "inherently disadvantage" imports to nullify or impair the relevant tariff concessions; and
(3) the measures must be more unfavourable to imports today than at any point in the past to nullify or impair a concession.

(a) Measures, trade effects and market structure

6.252 **Japan** argues that in determining whether a benefit is being nullified or impaired, panels should focus exclusively on the measures themselves. Changes in marketplace conditions and trade flows alone, i.e., apart from changes in the measures themselves, in Japan's view, are irrelevant to whether competitive conditions are being upset. Japan submits that the panel report on *EEC - Oilseeds* makes this point unequivocally:

> "The approach of the CONTRACTING PARTIES reflects the fact that governments can often not predict with precision what the impact of their interventions on import volumes will be. If a finding of nullification or impairment depended not only on whether an adverse change in competitive conditions took place but also on whether that change resulted in a decline in imports, the exposure of the contracting parties to claims under Article XXIII:1(b) would depend on factors they do not control; the rules on nullification and impairment could consequently no longer guide government policies … . The Panel further noted that changes in trade volumes result not only from government policies but also other factors, and that, in most circumstances, it is not possible to determine whether a decline in imports following a change in policies is attributable to that change or to other factors".[707]

6.253 In view of the findings of the panel on *EEC - Oilseeds*,[708] **Japan** argues that the relevant consideration in the context of non-violation complaints is whether the alleged measures, not the market situation, have established, and continue to establish, conditions of competition that are less favourable for imported products. Given that Article 26.1(a) of the DSU refers to "any complaint relating to a measure", and that Article 26:1(b) of the DSU states, "where a measure has been found to nullify or impair benefits", Japan concludes that Article 26 of the DSU supports its position.

6.254 The **United States** responds that Japan tries to impose unjustifiable limitations on the facts and circumstances that the Panel can examine in deciding whether there is nullification or impairment of a benefit under GATT. The United States points out that panels typically have found that the complaining party need not present evidence of declining trade flows (e.g., decreases in imports or market share) to prevail on its claim.[709] In this context, the United States refers to the panel report on *EEC - Canned Fruit*[710] which noted that "benefits accruing from bound tariffs under Article II also encompass future trading opportunities" so that "complaints by contracting parties regarding nullification and impairment should be admissible even if there was not yet statistical evidence of trade damage". The United States further argues that the responding party cannot defeat a claim by presenting evidence of the complaining party's improving trade flows (e.g., increases in imports or market share). The *EEC - Oilseeds* panel rejected the EC's "defense" that the subsidies on oilseeds did not displace or impede imports and therefore did not actually nullify or impair the tariff concessions on oilseeds.[711] This is so because panels have generally understood GATT to protect competitive opportunities, not only trade flows, as explained by the panel on *EEC - Oilseeds*:

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[707]*EEC - Oilseeds*, BISD 37S/86, 130-131, para. 151.

[708]"The Panel further noted that changes in trade volumes result not only from government policies but also other factors, and that, in most circumstances, it is not possible to determine whether a decline in imports following a change in policies is attributable to that change or to other factors". *EEC - Oilseeds*, BISD 37S/86, 130-131, para. 151.

[709]The United States also notes that Japan acknowledged that: "[W]hether or not the governmental (dis)incentives, actions or interventions achieved the desired objective in itself is irrelevant in the analysis of a non-violation claim, because what the claim should be concerned with is the impact on the conditions of competition by a government measure, and not the actual results of a governmental action".

[710]*EEC - Canned Fruit*, GATT Doc. L/5778, p. 28, para. 77.

[711]*EEC - Oilseeds*, BISD 37S/86, 129-131, paras. 150-151.

> "In the past Article XXIII:1(b) cases, the CONTRACTING PARTIES have adopted the same approach: their findings of nullification or impairment were based on a finding that the products for which a tariff concession had been granted were subjected to an adverse change in competitive conditions. In none of these cases did they consider the trade impact of the change in competitive conditions to be determining. In one case they specifically rejected the relevance of statistics on trade flows for a finding on nullification and impairment. [Citation omitted]. It is of course true that, in the tariff negotiations in the framework of GATT, contracting parties seek tariff concessions in the hope of expanding their exports, but the commitments they exchange in such negotiations are commitments on conditions of competition for trade, not on volumes of trade".[712]

6.255 The United States points out that panels have applied the same logic in Article III cases, generally in response to the responding party's attempt to use trade flows as a means of defending its measures, not in response to the complaining party's presentation of its claims. In this context, the United States emphasizes that the panel on *United States - Section 337* rejected the US "defense" that the panel's determination "could only be made on the basis of an examination of the actual results of past Section 337 cases".[713]

6.256 The United States further argues that prior panel reports support the proposition that complaining parties may submit, and panels should consider, information on market structure and market conditions.[714] The panel on *Australia - Ammonium Sulphate* would not have known that the termination of the subsidy for Chilean fertilizer would have upset the conditions of competition between Chilean and Australian fertilizers if it had not looked beyond the face of the terminated subsidy program to understand how the two products actually competed in the marketplace.[715]

6.257 Thus the United States stresses that panels should examine the design, architecture, and structure of the measures at issue[716] and focus on the market structure and conditions at the time Japan implemented the various measures to understand the effect of the measures on competitive opportunities for imports *versus* domestic photographic film and paper. Furthermore, panels should examine the market structure and conditions today for confirmation that the measures have had and continue to have an adverse effect on the competitive opportunities for imported film and paper.

6.258 Accordingly, the United States requests the Panel to reject Japan's rule that it (i) must limit its inquiry to the face of the measures in determining whether a tariff concession is being nullified or impaired; and (ii) cannot consider evidence of "marketplace conditions" or "trade flows". The United States explains that some measures may be blatantly protectionist or discriminatory that a panel only

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[712]Ibid.

[713]Panel Report on *United States - Section 337 of the Tariff Act of 1930 ("United States - Section 337"*), adopted on 7 November 1989, BISD 36S/345, 386-387, paras. 5.12-5.13.

[714]The United States notes that there is one case which focused on the panel's treatment of the trade flow data presented by the complaining party as part of its affirmative case - versus trade flow data presented by the responding party in its defense. In *United States - Automobile Taxes*, the EC presented trade flow data to prove that the United States had drawn a distinction between automobiles on the basis of selling price so as to afford protection to domestic production. That panel considered the data and determined they were not conclusive, thereby supporting the US position in this case that this Panel may consider all relevant facts and factors, including evidence related to trade flows. See *United States - Taxes on Automobiles*, GATT Doc. DS 31/R, p. 101, para. 5.13.

[715]*Report of the Working Party on the Australian Subsidy on Ammonium Sulphate ("Australia - Ammonium Sulphate"),* BISD II/188, 192-193, para. 12. See also *Japan - Taxes on Alcoholic Beverages ("Japan - Alcoholic Beverages"),* WT/DS8/R, pp. 113, 116-119, paras. 6.23, 6.29-6.32 (considering evidence outside the four corners of the tax measures at issue to determine if differently taxed products are like products or directly competitive or substitutable products).

[716]See Appellate Body Report on *Japan - Taxes on Alcoholic Beverages ("Japan - Alcoholic Beverages"),* WT/DS8, 10 and 11/AB/R, p. 29.

needs to look within the four corners of the measure to understand its protective effect.[717] But, for many measures, the United States submits, a panel cannot determine whether the measure is affecting the competitive opportunities for imported products if it does not have some understanding of the market structure and conditions in which the imports are being sold.[718]

6.259 **Japan** argues that the existing marketplace conditions or trade flows result from various factors, such as market forces and private practices, and are beyond the control of the government. Determining the nullification or impairment of the benefit by inference from the marketplace conditions or trade flows, which allegedly demonstrates actual trade damage, could lead to the consequence that a government would be held responsible for what it does not control. In Japan's view, therefore, the panel must focus on the measures themselves, and not on the marketplace conditions or trade flows.

6.260 According to Japan, in evaluating the upsetting of competitive conditions allegedly caused by measures, panels thus must look exclusively to the provisions of the measures themselves, and whether they are inherently less favourable to imports of the bound product than to domestic products. The panel should not be misled by incidental consequences, i.e., in this case, the allegedly "closed" distribution networks in the Japanese film and paper markets today.

6.261 Japan submits that the principle that measures should be judged by their provisions, and not by their actual consequences, is well established in Article III jurisprudence where the competitive conditions established by measures are similarly at issue. The panel report on *United States - Section 337 of the Tariff Act of 1930* found that panels should base their Article III analysis "on the distinctions made by the laws, regulations, or requirements themselves and on their potential impact, rather than on the actual consequences for specific imported products".[719]

6.262 Japan also mentions the unadopted panel report on *United States - Taxes on Automobiles*,[720] which dealt with the issue of whether measures altered the competitive relationship between imported and domestic products. In that case, the United States imposed a luxury tax on all automobiles priced over $30,000. The EC argued that this tax, while facially neutral, discriminated against European cars in violation of Article III:2, given that a large percentage of the cars imported from the EC were priced over $30,000 while many US cars were priced under $30,000. The panel rejected this argument on the ground that the distinction drawn between automobiles priced under and above $30,000 was not inherently disadvantageous to European imports and concluded that the US measure did not discriminate automobiles from the EC in violation of Article III:2.[721]

6.263 The **United States** rejects the notion that a measure cannot nullify or impair benefits unless it: (i) draws "formal distinctions" between imported and domestic products; or (ii) is otherwise "inherently less favourable" to imports. The United States submits that in proposing and applying this rule, Japan refers to a number of terms such as "formal distinctions", "distinguishes between", "explicit disadvantage", "inherently less favourable", "inherently disadvantageous", and "inherently

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[717]In *EEC - Oilseeds*, for example, the panel appears to have limited its consideration of whether the subsidies at issue upset the competitive relationship between imported and domestic products by looking exclusively at the face of the measure. *EEC - Oilseeds*, BISD 37S/86, 128, para. 147.

[718]See, e.g., *Australia - Ammonium Sulphate*, BISD II/188, 192-193, para. 12. The United States explains that, for example, a measure applied in the oligopolistic photographic materials sector in Japan could have an entirely different effect if applied for example, in the highly competitive textiles sector in Hong Kong. Only by reviewing the measure in the context of the market in which it is applied can the effect of some measures on competitive opportunities be understood.

[719]Panel Report on *United States - Section 337*, BISD 36S/345, 387, para. 5.13.

[720]Panel Report on *United States - Taxes on Automobiles*, GATT Doc. DS31/R, 11 October 1994 (unadopted).

[721]"[A] selling price above $30,000 did not appear from the evidence to be inherent to the EC or other foreign automobiles. In particular, no evidence had been advanced that EC or other foreign automobile manufacturers did not in general have the design, production, and marketing capabilities to sell automobiles below the $30,000 threshold, or that they did not in general produce such models for other markets". Ibid., p. 102, para. 5.14.

unfavourable", without defining the meaning of these terms, except through a reference to the panel report in *United States - Automobile Taxes*. The United States suggests that Japan mischaracterizes the *Automobile Taxes* report as standing for the proposition that a measure cannot violate Article III:2 if it is "not inherently disadvantageous to imports". In the view of the United States, that panel found that the taxes at issue did not discriminate against foreign automobiles because neither the aim, effect, nor any other evidence showed that the measure afforded protection to domestic production.[722]

6.264 In the US understanding, Japan appears to be arguing that only measures which obviously discriminate against imported products can nullify or impair tariff concessions within the meaning of Article XXIII:1(b). While Japan substantiates its interpretation with an analogy to Article III, the United States contends that Japan's interpretation has not even been applied in the Article III context. The United States points out that panels have found that laws, regulations, and requirements that do not discriminate against products on the basis of origin nevertheless can violate Article III.[723] Panels also have affirmed that a measure which does not draw any formal distinctions between imported and domestic products on the basis of origin or other product characteristics can violate Article III.[724] More importantly, the United States emphasizes that if this rule were applied under Article XXIII:1(b), that Article would become redundant, thereby effectively eliminating a Member's right of redress for non-violation nullification and impairment. Such an outcome would not only be inconsistent with the general rules of treaty interpretation,[725] but would also be inconsistent with the plain language of Article XXIII:1(b), which provides a right of redress if a benefit under the GATT is being nullified or impaired as a result of any measure "whether or not it conflicts with the provisions" of the GATT.

6.265 In response to the United States claim that Japan's position is not valid because it would render Article XXIII:1(b) a legal nullity, **Japan** argues that the United States bases this argument on the view that all inherently discriminatory measures may be addressed under Article III. In Japan's view, however, not all cases of inherent discrimination can be considered to be in violation of Article III. For example, production subsidies which are potentially discriminatory are specifically excluded by Article III:8(b) from the scope of Article III and Article XXIII:1(b) could also deal with non-mandatory government measures if it imposes a substantive equivalent of legally binding obligations, whereas Article III:4 only covers laws, regulations, and requirements and has a narrower scope.

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[722]Ibid., pp. 100-102, paras. 5.12-5.14.

[723]See, e.g., Panel Report on *Japan - Alcoholic Beverages*, WT/DS8, 10 and 11/R (finding that Japanese tax measures that differentiated between spirits by product characteristics violated Article III:2); Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages ("United States - Alcoholic Beverages")*, adopted on 19 June 1992, BISD 39S/206, 277, para. 5.26 (finding that a Mississippi tax that differentiated between wines by grape type violated Article III:2).

[724]See, e.g., Panel Report on *United States - Section 337*, BISD 36S/345, 386, para. 5.11 (noting that it "has to be recognized that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products"); Panel Report on *Canada - Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 18 February 1992, BISD 39S/27, 83, para. 5.27 (finding that "minimum prices applied equally to imported and domestic beer did not necessarily accord equal conditions of competition to imported and domestic beer"); Panel Report on *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (*"Thailand - Importation of Cigarettes*"), adopted 7 November 1990, BISD 37S/200, 224, para. 78 (noting that "It might be argued that… a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers"); *United States - Alcoholic Beverages*, BISD 39S/206, 275, para. 5.19 (finding that "the granting of tax credits on a non-discriminatory basis to small breweries inside and outside the United States' would be inconsistent with Article III:2 as long as imported beer from large breweries were subject to higher taxes"). See also Article XVII of GATS (providing that "formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of any other Member").

[725]The Appellate Body has noted on two occasions that "[o]ne of the corollaries of the 'general rule of interpretation' in set out in Article 31 of the VCLT is that interpreter must give meaning and effect to all terms of the treaty. An interpretation is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. Appellate Body Report, *Japan - Alcoholic Beverages*, pp. 11-12, (citing Appellate Body report, *United States - Standard for Conventional and Reformulated Gasoline*).

6.266 Japan further argues that the complaining party must show that the benefit "is being" nullified or impaired by the measure. Japan emphasizes that many of the alleged "measures" complained against ended years ago. However, a measure which is no longer in effect cannot currently be establishing less favourable conditions of competition for imports of the bound product, and therefore cannot result in nullification or impairment. On the other hand, Japan concedes that there are some "measures" identified by the United States that are still in effect. However, in Japan's view, those alleged measures cannot upset the competitive position of imported film and paper because a measure that does not "apply" to the given product as such, is incapable of upsetting competitive conditions for imports of that product.

6.267 The **United States** notes that it concurs with Japan on the proposition that a finding of nonviolation nullification and impairment may be based only on measures that are currently in force. The United States does not believe, however, that Japan has presented credible evidence that its intervention in photographic material distribution is merely "a fact of the past".

(b) Causal connection

6.268 **Japan** argues that even if the panel looks beyond the provisions of the measure in question and examines actual consequences, at the very least the complaining party must be required to prove a clear causal connection between the alleged measures and competitive conditions unfavourable to imports. Japan explains that this requirement is reflected in the phrase "as the result of" as stipulated in Article XXIII:1. In particular, in Japan's view, the complaining party must not only establish (1) that conditions are in fact unfavourable to imports, but also (2) that those conditions are due to the alleged measures in question. Otherwise, Japan contends, if no causal connection between the measures and unfavourable competitive conditions is established, any non-violation finding would rest simply on changes in marketplace conditions alone, a result squarely at odds with the relevant provisions of the WTO Agreement and with past precedent.

6.269 The **United States** responds that it does not take issue with the proposition that there must be a causal connection between the measures and the competitive conditions complained of. However, to the United States, it appears that Japan is advocating a requirement that the complaining party must establish causation in a "but for" sense; i.e., that the United States must establish that the unfavourable competitive conditions in Japan for imported photographic film and paper were solely the result of the measures taken by Japan and that "but for" these measures, these conditions would not exist. To the extent that this is the causation standard advocated by Japan, the United States strongly disagrees.

6.270 According to the United States, Japan cites the phrase "as the result of" in Article XXIII:1, in support of a "but for" causation standard. The United States contends that textual interpretation of this phrase does not support such a strict standard of causation. In the US view, if the drafters had intended such a standard, they would have inserted a word like "directly" or "solely" immediately before the phrase "as the result of".[726] A "but for" causation standard is also inconsistent with the object and purpose of Article XXIII:1(b). The drafters clearly intended that Article XXIII:1(b) be capable of providing relief in appropriate circumstances. However, under a "but for" causation standard, the United States submits, a complaining party essentially would face the impossible task of proving the negative, e.g., in this case, that the documented unfavourable market conditions for imported photographic film and paper would not have existed "but for" the actions of the Japanese Government. The United States asserts that such an approach would render Article XXIII:1(b) a deadletter, a result at odds with the intent of the drafters. In this regard, the United States recalls that the Appellate Body has cautioned against reading into provisions of WTO agreements requirements that are not reflected

[726]The United States notes that in Article 8.2(a)(iv) and (v) of the SCM Agreement, the drafters used the phrase "directly as the result of" to refer to the types of costs that could be covered by non-actionable government assistance for research activities. Thus, the United States argues that when the drafters intended a strict causation standard, they knew how to express their intentions.

in the text of those provisions. For example, in the *United States - Underwear*[727] and the *United States - Wool Shirts*[728] cases, the Appellate Body stressed the importance of respecting the balance of rights and obligations as reflected in the actual language used by the drafters.

6.271 The United States warns that the establishment of a "but for" causation standard would amount to rewriting Article XXIII:1(b). Accordingly, the United States claims to have established what it is required to establish under Article XXIII:1(b), i.e., that (i) Japan sought to alter the conditions of competition for the distribution and sale of photographic film in Japan; and (ii) those conditions have been altered.

6.272 The United States further contends that rather than apply a but-for causation standard, the Panel should determine whether Japan took measures that affirmatively contributed to the formation, strengthening, and maintenance of conditions of the oligopolistic distribution structure in Japan. Japan did so through a series of actions promoting exclusive dealings between Japanese manufacturers and wholesalers, cementing such relationships where they already existed, pushing those exclusive relationships as far downstream as possible, and defending them against competition from foreign firms and alternative distribution channels. Specifically, Japan pursued these ends through measures that:

1. shifted the balance of economic power between manufacturers and wholesalers (through shortened payment terms);

2. created an incentive for volume purchasing and channel exclusivity (through volume discounts, rebates);

3. chilled foreign firms' ability to offer more competitive terms to wholesalers (through standardized transaction terms, international contract notification, JFTC Notification 17 and the comparable underlying provisions of the Antimonopoly Law);

4. enhanced domestic manufacturers' integration with, and control over, wholesalers (through electronic information link, joint distribution facilities);

5. limited the availability of alternative distribution channels to foreign firms (through subsidies to laboratories, Large Stores Law);

6. curtailed competition to manufacturer domination of the distribution structure by suppressing large stores (through the Large Stores Law); and

7. stifled foreign manufacturers' ability to utilize their strengths in promoting their products (through the promotion countermeasures).

With the support of these measures: Fuji achieved exclusive control of its four primary wholesalers; Konica solidified its relationships with its previously independent primary wholesalers, first through establishing joint distribution facilities with them and then by acquiring them outright; secondary wholesalers became aligned with the domestic manufacturers' vertical distribution chains; and Fuji

[727]In the *Underwear* case, the Appellate Body declined to read into Article 6.10 of the Agreement on Textiles and Clothing a license to backdate the effective date of a temporary restraint measure. The Appellate Body previously has relied on a comparison of the texts of different WTO agreements in order to elucidate the meaning of a particular provision. Appellate Body Report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 17, n. 25.

[728]In the *Wool Shirts* case, the Appellate Body declined to read into the Agreement on Textiles and Clothing a requirement that the importing Member bear the burden of proving that temporary safeguard action was not inconsistent with Article 6 of the Agreement on Textiles and Clothing. Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts from India*, adopted on 23 May 1997, WT/DS33/AB/R.

gained domination over a vast network of photo processing laboratories, substantially limiting their availability as an alternative distribution channel for foreign film and as a market for foreign photographic paper. These measures also significantly impaired the ability of foreign manufacturers to overcome the obstacles of the oligopolistic distribution system by offering competitive incentives to wholesalers or consumers or by-passing wholesalers to go directly to large stores. Each of these actions and results is significant in itself. But together, they combine to substantially alter the conditions of competition in ways that are adverse to imports.

6.273 **Japan** responds that the United States appears to argue that causation can be established by showing the existence of government measures on one hand, and the existence of unfavourable market conditions on the other hand, without proving the linkage between them. Although Japan does not argue that it is necessary for a complaining party to show that the unfavourable competitive conditions were "solely" the result of the alleged measure, Japan considers it indispensable to prove a clear linkage between the alleged measures themselves and the alleged unfavourable competitive conditions with "detailed justification". In Japan's view, the existing marketplace conditions result from various factors such as market forces and private practices. Determining the nullification or impairment of the benefit by inference from the marketplace conditions could lead to the consequence that a government would be held responsible for what is does not control.

(c) Relevance of the time of the tariff concession

6.274 Japan emphasizes that in order to demonstrate current nullification or impairment, it is necessary to compare the measure in question as it exists today with the measure (or absence thereof) as it existed at the time of the relevant tariff concession. If a measure at present is not materially changed, or is now more favourable to the imports, as compared to the time of the relevant tariff concession, there can be no upsetting of the competitive position.[729] For Japan, it is irrelevant whether marketplace conditions have worsened in that interim period.

6.275 In the view of the **United States**, there is no legal basis for Japan's position that a measure which continues to exist in its original or a modified form cannot nullify or impair tariff concession. The United States explains that the fact that a measure may have been upsetting the competitive relationship between imported and domestic products for some period of time does not mean that the measure suddenly ceases to have that effect. Similarly, the fact that a measure may be "liberalized" does not mean that it no longer upsets the competitive relationship between imported and domestic products. For example, if a Member began providing a subsidy in 1979, the subsidy could still be nullifying or impairing tariff concessions on the subsidized products ten years later. Similarly, if a Member began providing a subsidy in 1979 and then cut in half the amount of the subsidy to the recipient ten years later, the subsidy could still be nullifying or impairing tariff concessions on the subsidized products.

6.276 **Japan** responds that unlike Article III of GATT 1994, the tariff concessions under Article II of the GATT 1994 do not establish equal competitive conditions between domestic and imported products, since a tariff is by its nature a barrier to imported products. For the purpose of a non-violation remedy, therefore, the benefit of the tariff concessions accruing under Article II consists of the legitimate expectation that competitive conditions for imported products had improved compared to the competitive conditions that existed before the tariff concessions. In Japan's view, this analysis is in line with the finding of the *EEC - Oilseeds* panel, which stated that, "[i]n the past Article XXIII:1(b) cases, the contracting parties have adopted the same approach: their findings of nullification or impairment were

[729]The *EEC - Oilseeds* panel found that: "In the past Article XXIII:1(b) cases, the CONTRACTING PARTIES have adopted the same approach: their findings of nullification or impairment were based on a finding that the products for which a tariff concession had been granted were subjected to an adverse change in competitive conditions". *EEC - Oilseeds*, BISD 37S/86, 129-130, para. 150.

based on a finding that the products for which a tariff concession had been granted were subjected to *an adverse change in competitive conditions"*.[730]

2. OVERVIEW OF THE IMPACT OF SPECIFIC MEASURES ON THE COMPETITIVE POSITION OF IMPORTS

6.277 According to the **United States**, on 6 June 1967, as the Kennedy Round was concluding, the Japanese Cabinet announced that it would apply "countermeasures" to "create the foundation to enable our enterprises to compete with foreign enterprises on equal terms. …".[731] For the United States, the purpose of the countermeasures was not to ensure that foreign enterprises had equal opportunities to compete with Japanese enterprises in Japan. In the US view, Japan sought to "restrain foreign enterprises coming into Japan after liberalization from disturbing order in domestic industries concerned by resorting to the strength of their superior power and from advancing into the non-liberalized sectors by evading control".[732] The United States concludes that the very premise of the Japanese Government's countermeasures was to upset the competitive relationship between domestic and foreign enterprises by neutralizing the perceived advantages of foreign enterprises of their superior capital resources, organizational scale, and marketing expertise.[733]

6.278 The United States claims that the Japanese Government designed measures to neutralize the advantages of foreign enterprises arising from the tariff concessions, working closely with the Japanese industry to give effect to the closing of the Japanese market:

(i) MITI and other Japanese Government agencies implemented distribution countermeasures to limit foreign penetration of the Japanese market through Japanese wholesalers and retailers;
(ii) MITI implemented the Large Store Law, in part, to control the growth of large stores which would promote the sale of imported products; and
(iii) the JFTC implemented promotional countermeasures to make it more difficult for foreign enterprises to attract Japanese consumers to imported products.

6.279 During the Tokyo Round, US negotiators once again attached a high priority to obtaining from Japan tariff concessions on both black and white, and colour photographic film and paper.[734] The United States argues that, having closed the primary distribution network, limited the operation of large-scale retail stores and imposed a panoply of restraints on promotions following the Kennedy Round, nonetheless, following the Tokyo Round, Japan imposed further burdens on large stores and marketing activities.

6.280 The United States further submits that in the Uruguay Round, Japan entered into a zero binding on colour photographic film and paper.[735] During the Uruguay Round negotiations, Japan's trading partners knew that the Japanese market was difficult to penetrate, but the way in which the distribution countermeasures, Large Stores Law, and promotion countermeasures worked in concert to systematically

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[730]*EEC - Oilseeds*, pp. 129-130, para. 150 (emphasis added).

[731]1967 Cabinet Decision, p. 3-4. US Ex. 67-6.

[732]Ibid., p. 4.

[733]The United States notes that the Distribution Committee in its Sixth Interim Report explained that Japanese enterprises were inferior to their American counterparts on the basis of capital resources, organizational scale (as measured by the number of employees, number of stores, sales volume, and net profit), and sales technique. Sixth Interim Report, p. 29, US Ex. 68-8.

[734]Given that colour film and paper had replaced black and white film and paper as the majority consumer product in 1971 and the predominant consumer product in 1975, US negotiators sought and received even deeper cuts in the tariff rates for colour film and paper products (4 percent on each) than for black and white film and paper products (7.2 percent and 6.6 percent, respectively).

[735]The United States sought full market access in Japan and achieved tariff bindings to ensure that such market access would continue, notwithstanding that Japan had maintained an applied rate of zero since 1990.

offset tariff concessions on photographic film and paper was not known. This web of liberalization countermeasures has continued to operate to nullify or impair US benefits, due to: (i) foreclosure from the primary wholesale channels of distribution as a result of the distribution countermeasures; (ii) sharp diminution of alternative channels, i.e., large stores, and secondary wholesalers; and (iii) inability to price and promote products effectively and competitively as a result of restrictions under the Premiums Law and Antimonopoly Law.

6.281 According to the United States, Japan achieved this result through several measures:

6.282 First, the United States submits that Japan promoted and implemented standardized transaction terms between manufacturers and wholesalers, and between primary wholesalers and secondary wholesalers and retailers. These transaction terms fostered exclusive dealing between Japanese manufacturers, wholesalers, and retailers of photographic film and paper. Where such exclusive relationships already existed, the terms promoted by the Japanese Government further cemented the relationships. In addition, the standardization of transaction terms among manufacturers and among wholesalers limited the ability of foreign manufacturers to attract wholesalers with more competitive transaction terms. Each contract between a foreign manufacturer and Japanese distributor was subject to automatic scrutiny by the JFTC, and more favourable terms could be considered an unfair trade practice in violation of the Law.

6.283 Second, Japan is alleged to have used administrative guidance and concessionary financing to establish or solidify physical infrastructure and computer ties between Japanese manufacturers and wholesalers. These ties further cemented the closed vertical relationships in the Japanese distribution system, to the exclusion of foreign products.

6.284 Third, the United States argues that Japan used administrative guidance and concessionary financing to limit foreign firms' access to a new distribution channel that began to emerge in the late 1960s and early 1970s, i.e., colour photoprocessing laboratories. Through its subsidized loans, Japan helped ensure that 84 percent of colour laboratories act as captive distributors for Japanese film manufacturers and a captive market for Japanese photographic paper manufacturers.

6.285 Fourth, according to the United States, Japan implemented, amended, and aggressively applied measures to restrict the growth of what Japan's own reports identified as the greatest threat to the oligopolistic distribution structure of domestic manufacturers, i.e., large stores. Not only were large stores a challenge to the oligopolistic distribution structure, they also presented a potentially significant alternative distribution channel for foreign film to by-pass the exclusive wholesale system. In the US view, Japan's strict application of both formal and informal adjustment procedures under the law have very effectively suppressed the growth of large stores in Japan for three decades.

6.286 Fifth, the United States contends that Japan substantially curtailed the ability of foreign firms to ply their capital strength and marketing prowess to attract Japanese distributors and consumers to their products. Japan not only developed strict limits on promotions, it authorized the Japanese private sector to develop and enforce its own, stricter standards, and it allowed these stricter standards to govern the market as a whole.

6.287 According to the United States, the result of these measures is a market structure in which none of the primary wholesalers carries foreign film or paper, whereas Japanese film manufacturers sell all of their product through these wholesalers.[736] The disadvantages to being excluded from the principal distribution channel are manifold given that foreign firms have no prospect of matching or

[736]Among the two foreign manufacturers, Kodak is able to sell only 15 percent of its film through secondary wholesalers and 25 percent through colour laboratories; the remainder it must sell direct to retail. Agfa relies on direct to retail sales for virtually all of its film.

re-creating the infrastructure, geographic reach, relationships with customers, and efficiencies of scope that the primary wholesalers have.[737]

6.288 The United States emphasizes that the distribution countermeasures, Large Stores Law, and promotion countermeasures have played an instrumental role in the establishment and maintenance of the closed, domestic-manufacturer-dominated distribution system for photographic film and paper in Japan. By means of a series of measures, the Japanese Government has contributed to the formation, strengthening, and maintenance of exclusive ties between manufacturers and wholesalers, and between primary wholesalers and secondary wholesalers and retailers. Japan undertook additional measures that have protected this system from competition from foreign suppliers and from the growth of alternative channels, such as large stores and laboratories, for the distribution of imported photographic film and paper. The United States submits that it explains in detail how each of the measures assists in accomplishing these results, including:

(i) shifting the balance of economic power between manufacturers and wholesalers (through shortened payment terms);
(ii) creating an incentive for volume purchasing and "channel exclusivity" (through volume discounts, rebates);
(iii) chilling the ability of foreign firms to offer more competitive terms to wholesalers (through standardized transaction terms, international contract notification, Premiums Law Notification 17 and the comparable underlying provisions of the Antimonopoly Law);
(iv) enhancing domestic manufacturers' integration with, and control over, wholesalers (through electronic information links, joint distribution facilities);
(v) limiting the availability to foreign firms of alternative distribution channels (through subsidies to laboratories, Large Stores Law);
(vi) limiting competition to manufacturer domination of the distribution structure by suppressing large stores (through the Large Stores Law); and
(vii) stifling the ability of foreign manufacturers to utilize their strengths in promoting their products (through the promotion countermeasures).

6.289 The United States claims that it documents not only how these measures helped create the vertically integrated distribution system beginning 30 years ago, but also how they have been instrumental in maintaining it up to the present. In addition, the United States argues that it demonstrates that, as a result of the measures applied by Japan, the conditions of competition for the distribution and sale of photographic film in Japan have been altered to the disadvantage of imported products.

6.290 According to **Japan**, to show that the "measure" in question is upsetting the competitive position of imported products, the following three criteria should be demonstrated:

(1) whether or not the measures themselves, not the marketplace conditions, are upsetting the competitive conditions of the imports;
(2) whether or not the complaining party has demonstrated a clear causal connection between the alleged measures and competitive conditions unfavourable to imports; and

[737]The United States request the Panel to examine how these measures have operated in the market, and how Japanese Government and the private sector have interacted to give the measures effect. The United States emphasizes that government/industry relations and the use of administrative guidance in Japan are unique. According to the United States, the process of "concerted adjustment" involves extensive back-and-forth interaction between industry and government, including surveying of market conditions, coordination to build consensus, government validation of the consensus through announcement of guidance, and constant government monitoring to ensure that the guidance is implemented. While to an outsider the formal policy announcement may not appear particularly binding or forceful, within Japan, however, the pervasive government involvement, monitoring, peer pressure, and potential for additional formal or informal action carries significant force.

(3) whether or not the competitive conditions of the imports are less favoured under the measure in question as it exists today than they were under the measure as it existed at the time of the relevant tariff concessions.

6.291 As for the first point, Japan emphasizes that the alleged measures do not make any distinction between products, either explicitly or implicitly, based on their country of origin, or draw any line at all between products based on any product characteristics. In Japan's view, these features are important indications that the alleged measures do not upset the competitive conditions of imports.

6.292 Regarding the need to demonstrate a casual connection, Japan notes that the existing marketplace conditions or trade flows result from various factors such as market forces and private practices and are beyond the control of the government. Japan explains that determining the nullification or impairment of the benefit by inference from the marketplace conditions or trade flows, which allegedly demonstrates actual trade damage, could lead to the consequence that a government would be held responsible for what it does not control. Therefore, Japan maintains that the legal examination should focus on the measures themselves, and not on the marketplace conditions or trade flows.

6.293 With regard to the third point, Japan emphasizes that unlike Article III of GATT, the tariff concessions under Article II of GATT do not establish equal competitive conditions between domestic and imported products, since a tariff is by its nature a barrier to imported products. For the purpose of a non-violation remedy, therefore, the benefit of the tariff concessions accruing under Article II consists of the legitimate expectation that competitive conditions for imported products had improved compared to the competitive conditions that existed before tariff concessions. In Japan's view, this analysis is consistent with the finding of the panel on *EEC - Oilseeds*, which stated that, "[i]n the past Article XXIII:1(b) cases, the contracting parties have adopted the same approach: their findings of nullification or impairment were based on a finding that the products for which a tariff concession had been granted were subjected to an adverse change in competitive conditions".[738]

3. DISTRIBUTION "COUNTERMEASURES"

6.294 According to the **United States**, at the time Japan began liberalizing tariffs and quantitative restrictions on photographic film and paper, a foreign manufacturer attempting to break into the Japanese distribution system could not invest in a Japanese distributor, could not give prizes, gifts, cash, or other premiums to a Japanese distributor beyond a token amount, and could not offer more competitive transaction terms to a distributor without reporting them to the JFTC and risking Antimonopoly Law action. Even simply price cutting could bring automatic scrutiny under the international contract notification provisions, and raise the risk of a "dumping" or unfair trade practices case under the Antimonopoly Law. Meanwhile, the tightened payment terms, rebates, and volume discounts continued to work - along with other aspects of the "systemization" policy such as information links and physical integration of distribution - to establish and solidify exclusive vertical relationships in the Japanese distribution system for photographic film and paper. These barriers prevented foreign manufacturers from forming or maintaining relationships with Japanese wholesalers that would accord meaningful access to the Japanese market. The continuation of these barriers for nearly three decades has allowed the Japanese manufacturers to maintain domination over the wholesale distribution system, to the near exclusion of foreign suppliers. The factual aspects of these measures are also described in Section B of Part II and, in more detail, in Section A of Part V.

[738] *EEC - Oilseeds*, BISD 37S/86, 129-130, para. 150.

(a) Evolution of systemization, rationalization and standardization of distribution policies

6.295 *1967 Cabinet Decision*: The United States submits that in June 1967, the Japanese Cabinet approved the use of distribution countermeasures[739] to limit foreign enterprises from penetrating the Japanese market through Japanese distributors.[740] To implement this part of the Cabinet's decision, MITI, the JFTC, the Small and Medium Enterprise Agency (SMEA), and the Japan Development Bank (JDB) developed a series of countermeasures that: (1) limited the ability of foreign enterprises to use economic incentives to induce Japanese distributors to carry their products; (2) promoted "systemization" of wholesalers into manufacturer-controlled distribution channels, including through the use of standardized transaction terms which excluded foreign enterprises from the main channels of distribution; and (3) financed the development of these exclusive distribution channels. The US claims that these distribution countermeasures upset the conditions of competition between imported and domestic products following the conclusion of the Kennedy Round.

6.296 *1967 JFTC Notification 17*: In May 1967, the JFTC issued Notification 17 which set a 100,000 yen maximum limit on the premium that a manufacturer could give to a wholesaler or retailer (or a primary wholesaler to a secondary wholesaler or retailer) in one year for all products traded between the two.[741] The United States claims that even though the 100,000 yen restriction applied to both domestic and foreign enterprises, it upset the competitive relationship between the two. Foreign enterprises entering the Japanese market or trying to expand their market share were not able to invest in their own distribution networks, and had to compete with Japanese manufacturers for existing wholesalers and distributors to carry their products. Notification 17 limited the ability of foreign enterprises to "outbid" Japanese enterprises in the competition for Japanese distributors by setting an arbitrarily low ceiling on the amount of premiums that a manufacturer could give to a wholesaler or retailer in any one year. JFTC Notification 17 was applicable only to offers of goods. Low price offers, rebates and offers of goods to assist the other parties' promotional activities were outside the scope of the regulation.

6.297 *1968 Sixth Interim Report*: The United States notes that in August 1968, the MITI Distribution Committee's Sixth Interim Report recommended the "rationalization of transaction terms" as another means of preventing foreign enterprises from penetrating the Japanese market through the distribution system.[742] Specifically, it recommended (i) standardizing transaction terms, (ii) rationalizing physical distribution techniques,[743] and (iii) making improvements in the distribution environment.[744] The goal was to improve the efficiency and, more importantly, to give control of the distribution channels in Japan to domestic manufacturers.[745] In 1969, MITI's Transaction Terms Standardization Committee was formed to develop sector-specific transaction terms for eleven products, including film.

6.298 *1969 Seventh Interim Report*: The United States submits that MITI Distribution Committee's Seventh Interim Report noted that "the concerted efforts of government and the private sector must be directed at systemization from the point of view of a capital liberalization countermeasure."[746] It recommended (i) establishing a "Distribution Systemization Promotion Council" comprised of scholars, manufacturers, wholesalers, retailers, and computer specialists, to establish consensus on the basic direction for systematizing distribution activities; (ii) researching and promoting distribution

[739]Japan strongly disagrees with the US phrase "distribution countermeasures." See translation issue 1.

[740]1967 Cabinet Decision, p. 6. US Ex. 67-6.

[741]JFTC Notification 17, 20 May 1967, p. 1, US Ex. 67-4.

[742]Industrial Structure Deliberation Council - Distribution Modernization Outlook and Issues, 27 July 1968 (Sixth Interim Report), p. 39, US Ex. 68-8.

[743]Sixth Interim Report, p. 33, US Ex. 68-8.

[744]Ibid. p. 33.

[745]Ibid., p. 36.

[746]Distribution Systemization - Industrial Structure Council Distribution Committee, 22 July 1969 (Seventh Interim Report 1969), p. 46, US Ex. 69-4.

systemization; and (iii) providing financial incentives through loans or special tax treatment to support systemization.[747]

6.299 *1970 Guidelines on Transaction Terms*: In 1970, MITI issued "Guidelines for Standardizing Terms of Trade for Photographic Film," establishing industry standards for, e.g., sales contracts; discounts; rebates; frequency of, and minimum order per, delivery; return of goods; terms of payment, and dispatched employees.[748] The United States alleges that the application of the 1970 Guidelines upset the competitive relationship between imported and domestic photographic materials in several ways as discussed in detail below.[749]

6.300 *1971 International Contract Notification*: The United States argues that the 1971 "Rules on Filing Notification of International Agreements on Contracts"[750] require each contract between a foreign manufacturer and a Japanese wholesaler to be reported to the JFTC. This notification requirement enables the JFTC to see if the foreign manufacturer is offering more competitive transaction terms departing from the industry standard, and if so, to consider action under the Antimonopoly Law.

6.301 *1971 Basic Plan for Distribution Systemization*: The United States submits that MITI's Distribution Systemization Promotion Council[751] issued a "Basic Plan for Distribution Systemization" in July 1971. That plan announced that modernization of the Japanese distribution sector was urgent from the standpoint of capital liberalization countermeasures,[752] explained that the entire distribution process should be regarded as a single system, and instructed individual industries to use rational transaction conditions to prevent disruption by foreign capitalized firms.[753]

6.302 *1975 Manual for Systemization of Camera and Film Distribution*: The United States points out that MITI's Distribution Systemization Development Centre, established in 1972, pursuant to the 1971 Basic Plan, issued the "Manual for the Systemization of Camera and Film Distribution" in 1975.[754] It stressed the need to protect against foreign manufacturers gaining market shares for imported products by consolidating producer-distributor linkages that would improve Japanese manufacturers' capacity to resist the foreign capital-affiliated corporations.[755] Specifically, the Manual (i) advised businesses to maintain "appropriate prices" and proper discount and rebate margins, to rationalize payment terms, and to improve order and delivery systems; (ii) recommended that the camera and film industries improve their information systems to facilitate communication among firms and to improve access to important business information; and (iii) called for establishing an industry association and a government-affiliated committee which recommended systemization projects for government funding.

6.303 According to the United States, during the Uruguay Round negotiations, Japan's trading partners producing photographic materials knew that the Japanese market was difficult to penetrate, but the way in which the distribution countermeasures, Large Stores Law, and promotion countermeasures

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[747]Ibid., p. 54, US Ex. 69-4. The Distribution Committee Ninth Interim Report described the Seventh Interim Report as "a powerful political blueprint for reforming the distribution sector". Industrial Structure Deliberation Council - Distribution for the 1970s (Ninth Interim Report), 22 July 1971, US Ex. 71-9.

[748]For a more detailed description of the 1970 Guidelines, see Part II.B.2.(c), Part V.A.5.(b), and US Ex. 70-4.

[749]See, inter alia, sub-sections (b-d) of this Part VI.D.3.

[750]JFTC, Rule Regarding International Agreement on International Contract Notification, Rule No. 1, 12 April 1971, US Ex. 71-6.

[751]The Council was established as a result of the recommendations of the Seventh Interim Report in September 1970.

[752]The Basic Plan, p. 2, US Ex. 71-10.

[753]Ibid, p. 10.

[754]MITI, Manual for Systemization of Camera and Film Distribution, March 1975, p. 2-15, 43 ("1975 Manual"), US Ex. 75-5.

[755]The Manual described the changes in the industry since the early 1960's which paralleled the changes that the Japanese Government had promoted through various policy documents between 1967 and 1975, e.g., distributors began to pay their balances monthly and, in most instances, no longer carried competing products.

worked in concert to systematically offset tariff concessions was not known. In the US view, this web of liberalization countermeasures has continued to operate to nullify or impair US benefits accruing not only from the Uruguay Round, but the Tokyo and Kennedy rounds as well.

(b) Objectives underlying the introduction of transaction terms

6.304 According to the **United States**, Japan held off foreign investment in the distribution sector in order to ensure that foreign manufacturers could not establish their own distribution networks in Japan until Japanese manufacturers had restructured their own distribution networks and made them more efficient. For the US, Japan specifically sought to neutralize a competitive advantage of imports and to prevent foreign distributors from acquiring Japanese distributors, and move upstream into manufacturing and downstream into retailing.[756] In the US view, Japan's restructuring of the distribution sector was more than just an attempt to make the system more efficient for the benefit of domestic manufacturers. Japan worked to put distributors out of the reach of foreign manufacturers through a "systemization" policy that fostered vertical distribution "keiretsu". Japan sought to ensure that the distributors stayed out of reach of foreign manufacturers through its policies regarding the standardization of transaction terms, and measures to limit the availability of alternative distribution channels such as the laboratories and large stores.

6.305 **Japan** argues that MITI has consistently sought to encourage the modernization of the Japanese distribution system over the past three decades for a variety of legitimate policy reasons which were mostly unrelated to capital liberalization or import competition. To the extent that MITI's distribution policies were partially a response to capital liberalization, they were motivated by a desire to modernize and bolster the competitiveness of a relatively backward sector in the economy, not to hinder imports' access to this backward sector. Promoting the competitiveness of domestic industries is a common practice of countries around the world. Japan emphasizes that it sought to promote efficiency and competitiveness of domestic industries, not to block imports. In Japan's view, distribution modernization, which initially served to promote efficiency and to cope with inflationary pressures would also help the Japanese distribution sector compete with foreign capital. The purpose was to secure effective competition in the domestic market through improving the efficiency of the domestic distribution sector.

6.306 In response to Japan's argument that it intended only to promote efficiency and not protect domestic manufacturers, the **United States** argues that if promoting efficiency were the true goal, then Japan should have welcomed foreign investment in distribution rather than postpone it to the last of the sectors liberalized. According to the United States, the foreign distributors were four to seven times more efficient than domestic distributors. Those efficient foreign distributors could have contributed substantially to the upgrading of Japan's still highly inefficient distribution system. Nonetheless, Japan chose to postpone 100 percent foreign investment in new distribution enterprises until 1976, and in existing distribution enterprises until 1979, and maintained a prior approval requirement for such investment until 1985 and a prior notification requirement until the 1990s. The Seventh Interim Report explicitly acknowledged that foreign interests would accelerate modernization, but concluded that "develop[ing] a system sufficiently capable of resisting the rational systems introduced by foreign capital" should be "emphasized" in MITI policy.[757] The United States also notes that Japanese academic analysis support the US conclusion that the main objective in pursuing the systemization policy was not efficiency but to exclude foreign products though the reinforcement of distribution keiretsu.[758]

6.307 **Japan** responds that multilateral liberalization of trade or investment generally occurs over time, with transitions to avoid excessive shock to the domestic economy. Given that Japan pursued

[756]Sixth Interim Report, US Ex. 68-8, p. 22.

[757]Seventh Interim Report, US Ex. 69-4.

[758]Sasaki Yasuyuki, Distribution Policies in Japan and the West, 16 June 1995, US Ex. 95-12; Takeshi Shirahige, Current Distribution Issues in Modern Japan, Tokyo, 26 February 1974, p. 108, US Ex. 74-1.

modernization in a way that its distribution sector could compete on a level playing field once full liberalization took place, its distribution modernization policy cannot be considered evidence of protectionist intent.[759] Japan emphasizes that MITI saw the backwardness of the distribution sector as an "Achilles' heel" that would render domestic manufacturers unable to compete with foreign products.[760] Specifically, the concern was that domestic manufacturers would be limited to existing distribution channels while foreign producers, freed from capital restrictions, would be able to choose between using existing Japanese distribution channels or constructing their own modern (and exclusive) distribution channels.

6.308 In the view of the **United States**, the Japanese Government and private sector clearly understood the potential for standardized transaction terms, in combination with scrutiny under the Antimonopoly Law, to restrict foreign firms. For the United States, Japanese Government documents, as well as academic studies of the systemization policy, leave no doubt of Japan's intent to create and support vertically-tied, domestic-manufacturer-dominated distribution channels.[761] This is made clear by repeated statements in the key surveys, studies, and guidance from the time that Japan pursued its transaction terms policies in order to insulate the photographic materials distribution system from foreign competition by promoting vertical keiretsu:

a. According to the United States, in 1967, the Foreign Investment Council issued a report stating that foreign firms "will often become the object of the regulation of the Antimonopoly Law" because their strong capital position would allow them to compete aggressively in Japan. The report called for developing clear "standards" of fair and unfair business practices, to help regulate foreign capital.[762]

b. In 1968, the Distribution Committee's Sixth Interim Report recognized that foreign investment could promote efficiency in several different ways.[763] The report concluded, however, that there were very serious disadvantages to liberalizing investment in the distribution sector, including that "[t]here is a risk that the manufacturing sector will be dominated by controlling the sales routes, bringing about the international subcontracting of Japanese industry".[764]

c. In 1969, a leading Japanese competition policy scholar and member of the Foreign Investment Council published an article along the same lines.[765]

d. In 1969, the Seventh Interim Report stated that under systemization, "more systems will probably be formed in which keiretsu routes are covered under the guidance of the manufacturer"[766] and "… comprehensively and systematically integrate the various aspects of production, processing, and [distribution] services".[767]

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[759]Japan's capital restrictions were imposed through legitimate reservations under the OECD Capital Code, and the liberalization schedule was fully consistent with Japanese obligations under the Code.

[760]Japan notes that existing distribution channels were not perceived as "crown jewels" but as an "achilles heel."

[761]E.g., August 1969 discussion by the JFTC of distribution "keiretsu-ka". This document uses the term "systemization" interchangeably with the word or concept "keiretsunization". US Ex. 69-8, p. 3.

[762]US Ex. 67-5B.

[763]US Ex. 68-8, p. 7.

[764]US Ex. 68-8, p. 8.

[765]"When foreign capital affiliates unfairly give preferences to companies with [which they have] special relationships or to their own primary wholesalers … in terms of price or [transaction] terms, they will thereby become subject to regulation" under the Antimonopoly Law. Iyori Hiroshi, Basic Approach Capital Liberalization and Antimonopoly Law: Basic Approach, Types of Regulation, Sample Cases, Zaikai Keizai Koho, No. 1332-1333, 24 November 1969, p.6-7, US Ex. 69-7.

[766]US Ex. 69-4, p. 7.

[767]US Ex. 68-8, p. 4.

e. MITI's 1970 Guidelines stated that standardized transaction terms will help resist inroads by foreign capital: "… in order to prevent disruption of the established order of trade by foreign businesses with powerful capital strength, the standards for rational transaction terms must be clarified".[768]

f. The 1971 Basic Plan for the Systemization of Distribution made the same point.[769] It makes clear that vertical links are the goal: "[t]he critical point here is to regard the entire process of distribution from production to consumption as a single system".[770] and "there is a need to view individual industry sectors as 'closed systems,' and to achieve a systematic coordination of production, distribution and consumption within such a framework".[771] The Basic Plan emphasized the standardization of transaction terms and the establishment of inter-company electronic information links as important elements for accomplishing systemization. It also stated that MITI's Transaction Terms Standardization Committee had drafted standardized transaction terms for individual sectors such as film, and that MITI "will seek to obtain the cooperation of relevant industry groups to draft standard agreements that incorporate the substance of these guidelines".[772]

g. In 1971, a photo industry journal explained to its readers that "The Ministry of International Trade and Industry's guidelines for normalizing transaction conditions is what may be called an 'immunization' … . For instance, standard rebates were adopted so that the use of non-standard rebates by foreign capital may be checked by the application of the Antimonopoly Law".[773]

h. The 1975 Manual emphasized that the major issues facing the Japanese film industry include "the liberalization of capital and trade" and "the US landing in Japan". It stated an "urgent need to improve the structure of manufacturers to a capacity that will resist foreign capital affiliated firms" and recommended several actions toward "systemization," including "standardization of transaction terms".[774]

i. A 1976 industry journal article notes that 100 percent capital liberalization was "the most feared development by [Japanese] photosensitive materials makers," and that in preparation for this event, Japanese manufacturers had "requested the government to implement measures centering around legislating antimonopoly measures that could effectively restrict mammoth multi-national corporations from dominating the Japanese industry".

6.309 **Japan** emphasizes that MITI's policies about volume discounts and rebates were not driven by protectionist intent. MITI's objective was increased distribution efficiency. Since large volume transactions lowered distribution costs, the use of volume discounts, if used in a transparent way, may promote the benefits of lower costs. MITI never encouraged progressive rebates, and urged that all rebates be kept to a minimum. For example, Japan contends that the 1967 Cabinet Decision, did not reveal concern to block foreign manufacturers. While the 1969 Survey acknowledges Kodak's role as a competitive factor in this industry, but in no way urges keeping distribution channels "out of the hands of foreign manufacturers". Rather, the 1969 Survey mentions the problems that will arise if new players entering the market introduce irrational transaction terms.

6.310 Japan concludes that another objective of trade term rationalization was to help ensure fair competition in the market. By setting a basic framework to prevent companies from abusing their

[768]1970 Guidelines on the Standardization of Transaction Terms for the Photo Film Industry, US Ex. 70-4.

[769]"In connection with capital liberalization in the distribution sector, rational transaction terms should be clarified in order to prevent disruption of the [established] order of trade by foreign capital-affiliated firms. US Ex. 71-10, p. 10.

[770]Ibid.

[771]Ibid., p. 6.

[772]Ibid.

[773]US Ex. 71-11.

[774]1975 Manual for the Systemization of Distribution by Industry (Camera - Film), US Ex. 75-5, p. 121-22.

dominant position, but leaving the specific terms to be negotiated case-by-case, MITI sought to secure a level playing field on which foreign and domestic companies would compete fairly by the same rules.

(c) Competitive position of imported products

6.311 In the view of the **United States**, through this variety of reports and specialized expert institutions, MITI directed industry to establish vertical distribution channels controlled by Japanese manufacturers and instructed industry on how to accomplish this goal. The Japanese Government's guidance was critical in binding together *domestic* film and paper manufacturers with wholesalers, and wholesalers with retailers, in large exclusive business structures under each Japanese manufacturer. Japan promoted, enlarged and strengthened these exclusive channels, i.e., carried out the process of systemization, to impede foreign firms from competing in the Japanese market and to protect Japanese manufacturers from foreign competition. The production-distribution structures that it promoted through extensive use of government measures, including administrative guidance and government resources, blocked or substantially impeded access by foreign products to key channels of distribution. The United States claims that by facilitating the sale of domestic products while simultaneously establishing roadblocks to the sale of imported products through the systemization of distribution, Japan severely disrupted the conditions of competition in the Japanese market that otherwise would have prevailed and that would have enabled imports from the United States (and other countries) to take advantage of the tariff concessions granted by Japan in the Kennedy Round.

(i) 1970 Guidelines and transaction terms

6.312 The United States claims that the standardization of transaction terms chilled the ability of foreign manufacturers to offer competitive terms to Japanese wholesalers:

6.313 *First*, the United States argues that the 1970 Guidelines, by setting uniform transaction terms, limited the ability of foreign enterprises to outbid their Japanese competitors. Foreign enterprises could not circumvent the Guidelines because the Japanese government was monitoring the industry's compliance with the Guidelines. MITI declared its expectation that industry would voluntarily comply with the Guidelines and instructed the Photographic Materials Industry Association to make a progress report to MITI within 5 months.[775] In addition, the transaction terms between manufacturers and wholesalers were to be clearly stated in their sales contracts[776] which meant that the JFTC could monitor compliance with the Guidelines when it reviewed contracts involving foreign enterprises pursuant to its "Rules on Filing Notification of International Agreements on Contracts".[777] Once transaction terms are standardized, the JFTC more easily can find that transaction terms departing from the standard are unfair trade practices under the Antimonopoly Law.

6.314 *Second*, the United States submits that the Guidelines established shortened payment terms that enhanced the financial strength of Japanese manufacturers at the expense of wholesalers, and positioned domestic manufacturers to better withstand foreign penetration. Prior to their adoption of standardized transaction terms, competition forced Japanese manufacturers to allow wholesalers and retailers to carry large outstanding balances and to pay over extended periods of time. The new standardized transaction terms shifted the financial burden from the manufacturers to wholesalers and gave domestic manufacturers greater control of the wholesalers.

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[775]Fuji Translation, Rewriting History, Willkie Farr & Gallagher for Fuji Photo Film Co., Ltd., 31 July 1995, US Ex. 70-3.

[776]In presenting the standardized terms to the photographic materials industry, MITI explained that, "to prevent foreign corporations with huge investment capacity from disrupting the trade order, reasonable trade terms must be clearly stated". MITI Guidelines, reprinted in Rewriting History, Tab 11, p. 9, US Ex. 70-3.

[777]JFTC, Rule Regarding International Agreement on International Contract Notification, Rule No. 1, 12 April 1971, US Ex. 71-6.

6.315 *Third*, the United States claims that the Guidelines established standardized terms that were by their very nature more beneficial to Japanese manufacturers than foreign manufacturers. MITI intended Japanese manufacturers to use volume rebates to develop exclusive supply contracts with Japanese wholesalers, whereas foreign manufacturers, with their restricted market share, could not have done this. Volume rebates promote exclusivity by encouraging distributors to purchase from a single source to achieve and maximize the rebate. With volume rebates, distributors only want to enter into exclusive supply relationships with manufacturers that have a sufficient share of the market.[778]

6.316 **Japan** responds that the starting point for analysis should be the wording of the 1970 Guidelines themselves. Specifically, the Guidelines did not either mandate *uniform* transaction terms or provide *specific* transaction terms to be followed by manufacturers, wholesalers, secondary dealers, and retailers. The Guidelines only made general suggestions related to payment terms, volume discounts, and rebates including that:

(i) interest should be charged for an unusually long payment period (neither the reasonable payment period, the amount of interest to be charged, nor other terms were specified);[779]
(ii) volume discounts should have clear transparent terms (whether and under what circumstances such discounts should be granted and the amount of the discounts were not specified); and
(iii) rebates should be minimized (with no details at all about the specific terms of rebates).

6.317 Japan notes that the Guidelines did not even use the word "standardize" in connection with the suggested transaction terms, and did not encourage standardization or uniformity. They urged the adoption of economically rational transaction terms, and then left it to individual manufacturers, wholesalers and retailers to establish their own specific terms. In fact, the transaction terms of individual manufacturers may and do vary, e.g., Fuji had and continues to have different transaction terms with each of its four independent primary wholesalers. Japan concludes that there is no evidence that the payment terms, volume discounts, and rebates of the various companies in the industry have ever been standardized or uniform.

6.318 Japan states that MITI believed that rationalizing transaction terms would help to ensure fair competition in the market. If opaque, secret, and customer-specific transaction terms were common in the Japanese distribution sector, it would be more difficult to identify unfair trade practices (e.g., dumping, excessively progressive rebates) committed by foreign companies abusing their dominant position. There was no suggestion, however, that foreign enterprises would be held to a different legal standard than domestic enterprises. MITI was merely interested in securing a level playing field in which foreign and domestic enterprises would compete fairly by the same rules.

6.319 Japan submits that there was neither ongoing monitoring nor ongoing enforcement of compliance with the Guidelines. If the Guidelines were the centrepiece for protecting the Japanese photographic film market, the question arises how the relatively passive government efforts served to impose or even encourage their adoption.[780] Thus, the alleged adverse effects should be evaluated in light of both the specific recommendations of the Guidelines and the absence of efforts by the Japanese Government to impose, encourage, or even monitor compliance.

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[778]In 1969, when the Guidelines were issued, domestic producers had 93 percent of the Japanese film market and 87 percent of the paper market - leaving imports with only 7 percent and 13 percent shares, respectively.

[779]The US alleges that "there is no logical difference" between favouring shortened payment terms and advocating charging interest for long payment terms. The Guidelines, however, recommended the interest should be charged only on the promissory notes with "unusually long sight" which is exceptional and "only few in number". It did not favour shorter payment terms.

[780]Japan recalls that only one of three industry associations even bothered to respond to a request for a report of actions taken, and no efforts were directed to specific companies.

6.320 Japan asserts that the United States has not shown that anything in the distribution policies explicitly discriminates against imports. Those policies pursued distribution modernization in a completely neutral manner. In Japan's view, the United States does not identify a single example of a government policy that facially treats imports or other certain products differently.[781] Whereas the United States complains about the underlying effect of the policies to find some adverse impact on imports, Japan contends that

(i) there is nothing inherent about imported products that makes them any more or less able to compete equally in a market characterized by rationalized terms of trade and single-brand distribution;
(ii) there is no factual basis to find any causal connection between the distribution policies and single-brand distribution; and
(iii) there have been either no changes at all, or no changes less favourable for imports, to those policies since the time of relevant tariff concessions.

(ii) 1970 Guidelines and progressive rebates

6.321 With respect to rebates, Japan states that the 1970 Guidelines recommend clearly that they should be kept to a minimum. MITI stated that rebates were often discretionary and without clear criteria, and therefore customers could not be sure whether or not they would receive them. MITI opposed this tendency of rebates to interfere with the business planning of rebate recipients, and sought to discourage this practice.

6.322 In response to Japan's argument that it did not promote the use of rebates between manufacturers, wholesalers and retailers, the **United States** contends that MITI repeatedly endorsed the need for progressive rebates in the photographic materials sector. Whereas the 1970 Guidelines state that rebates "should be kept to a minimum", they do not condemn rebates, particularly because they note the wide use of rebates and conclude that such use "will be allowed".[782] The United States also stresses that at the numerous times, MITI published or republished surveys or other documents clearly emphasizing that MITI favoured progressive rebates.

6.323 **Japan** notes that the US argument seems to be that since MITI did not completely prohibit all rebates, it was somehow encouraging rebates, a rather strange interpretation of the suggestions to "minimize" rebates.

6.324 The **United States** notes that MITI's Business Bureau completed draft guidelines based on the 1969 survey in September 1969 and published them in a photo industry journal.[783] The draft MITI guidelines stated, "[w]ith regard to rebates, progressive rebates should be aggressively promoted in order to facilitate large volume transactions".[784] Subsequently in its cover note to the 1970 guidelines, MITI directed the industry associations to formulate and implement more specific transaction terms,

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[781]For Japan, the only possible exception is the international contract notification requirement. Japan notes that it has raised procedural objections with respect to this measure.

[782]"Rebates are generally awarded at the discretion of the sellers. Therefore, *rebates are widely used as a means of controlling the distribution process*. However, their excessive use may constitute an unfair trade practice under the Antimonopoly Law. Even when it does not constitute a violation of law, the distribution process can in effect be controlled. Also, it may make it difficult for recipients [of the rebates] to formulate a clear management plan, and the final price may not fully reflect the merits derived from rebates. In addition, the rebate system has become very complicated in recent years, and the administrative burden of rebates has increased. In principle, discounts should be used as a means to reward consumers for the benefits of large quantity transactions. *The use of rebates will be allowed* as a supplementary means to achieve other price policies. However, the use of rebates should be kept to a minimum". 1970 Guidelines, Japan Ex. B-24.

[783]MITI, Standardization of Transaction Terms: Draft Submitted for Photographic Film, Camera Times, 9 September 1969, p. 2, First Panel Meeting, Supplemental Panel Questions and US Answers, Attachment 2.

[784]Ibid.

and to report back to MITI by November 1970. The photospeciality wholesalers association responded by publishing a "Transaction Outline" which stated, "with regard to quantity-related [volume] rebates, these will be adopted".[785] In 1971, MITI republished the 1969 survey which noted that the "problem" was that "progressive rebates with clear standards that function as volume discounts are not being used very often".[786] The United States further noted that the guidance was being issued based on the recognition that, at the time, rebates were in widespread use in the photosensitive materials sector. In the US view, if MITI had meant for those practices to be eliminated, it would have said so directly.[787]

6.325 The United States argues that Japan promoted the use of rebates as part of a series of government actions to standardize transaction terms and that MITI's efforts in this regard should be examined in terms of the way the Japanese industry understood MITI's recommendation. The United States argues that in addition to guidance that specifically called for progressive rebates, the Japanese film industry interpreted MITI's policy on volume discounts as equating rebates with volume discounts because it saw very little differences between the two. The United States cites the wholesalers' Transaction Outline which explained that rebates were the same as discounts, and notes that the outline stated that "quantity-related [volume] rebates will be adopted".[788] The United States further argues that when the Chamber of Commerce issued its standard contract which it prepared pursuant to a MITI commission, although the Chamber did not include a provision on rebates, it included a specific provision on discounts with the explanation that: "Volume discounts are not uncommon with photographic film. However, since the discounts are paid at set intervals, these discounts seem almost the same as rebates".[789] The United States recalls that the wholesalers' outline and the Chamber's standard contracts were prepared under the close scrutiny of MITI. The United States argues that, accordingly, there can be no question that MITI considered both documents consistent with its policy under the 1970 Guidelines, and that MITI promoted both rebates and volume discounts, to promote incentives for large-volume transactions, which foster "channel exclusivity".

6.326 **Japan** contends that it did not encourage progressive rebates:

> (i) The March 1969 Survey was prepared by an outside research group and only notes the importance of clear criteria for discounts and rebates as part of trade term rationalization.
>
> (ii) In 1969, while a reference to progressive rebates in a draft of the guidelines stressed their ability to function economically like volume discounts, this reference was deleted from the final version of the September 1969 Guidelines.[790]

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[785]Japan Ex. B-31

[786]MITI Business Bureau, Actual Condition of Transaction Terms in the Wholesale Industry, 31 August 1971, p. 62, US Ex. 20 and First Panel Meeting, Supplemental Panel Questions and US Answers, Attachment 4. (The United States notes that this document is an edited and republished version of the 1969 Survey.) The United States argues that Japan failed to quote the entire sentence from the republished version of the 1969 survey, thereby inverting the meaning of the document. The full translation states: "The problem is that categories of rebates that accord significant discretion to sellers such as fixed rebates and goal achievement rebates are the main rebates, and progressive rebates with clear standards that function as volume discounts are not being used very often".

[787]The United States notes that at the same time MITI issued these guidelines for the photographic film sector, it also issued transaction terms guidelines for 12 other sectors. Rebates were widely used in *all* of those 12 other sectors. In 9 out of the 12 sectors, the guidelines use the *exact same* formulation regarding rebates as in the film guidelines, indicating that the formulation clearly was generic. In three of the 12 sectors, MITI called for modifications in the rebate programs, indicating that when MITI wanted changes in rebates, it knew how to say so directly. Japan Ex. B-1.

[788]For a discussion of statements specifically calling for progressive rebates, see para. 6.322 and footnote 782, Japan Ex. B-31.

[789]Japan Chamber of Commerce, Recommendation on Standardized Contracts for Transactions, commissioned by the Ministry of International Trade and Industry, January 1975, p. 22, US Ex. 32.

[790]Japan notes that the "draft" guidelines were never published by MITI.

(iii) The March 1970 JFTC Report made no recommendation about any rebates, and thus said nothing about progressive rebates.

(iv) The June 1970 Final Guidelines regard discounts as a more rational approach for large volume transactions, and then state that "the use of rebates should be kept to a minimum". Thus there is no mention at all of progressive rebates.

(v) The November 1970 Policy Outline by an industry association noted that "quantity-related rebates" could be adopted. Japan emphasizes that the Policy Outline did not represent government thinking, ignored the 1970 Guidelines suggestion to keep rebates to a minimum, and did not even bind association members.

(vi) The August 1971 Survey specifically identified rebates and discounts without clear standards as an irrational practice, and noted that "progressive rebates with clear standards that function as volume discounts are not being used very often".[791] The survey explained a position of an outside research group that (a) rebates should have some rational economic basis; (b) rebates should be based on clear criteria; (c) progressive rebates are more economically rational than fixed rate rebates, since they could function to achieve large volume transactions like volume discounts, but, if used, such rebates should have clear criteria.

(vii) Furthermore, the March 1975 Manual did not even mention progressive rebates.

6.327 Japan points out that of these seven documents, three do not mention progressive rebates at all, and three documents mention progressive rebates, but none of them encourage progressive rebates and none represents a government statement. Finally, the one document that actually encouraged progressive rebates was a draft document reported in an industry journal that, when finalized, deleted any reference to progressive rebates, and instead specifically *discouraged* the use of rebates.

(iii) 1970 Guidelines and single-brand distribution

6.328 Japan emphasizes that MITI policies did not force Japanese wholesalers to become single-brand distributors for domestic manufacturers because the nature of the policies at issue was different: First, the 1970 Guidelines did not encourage rebates; they discouraged rebates and urged that there be some efficiency basis to rebates or volume discounts. Second, the 1970 Guidelines also did not encourage shorter payment terms; they only indicated that after a reasonable period customers should pay interest for continued credit term.[792] Japan emphasizes that these payment terms are common in many industries throughout the world. Moreover, payment terms are not the reason that the distributors chose to become single-brand or remain single-brand, but are only one element of the cost to the buyer. In the view of Japan, the US assumes, that the manufacturer did not adjust the invoiced price to reflect shortened payment terms, or that the additional costs to the wholesalers were not passed on to their customers.[793]

6.329 The **United States** alleges that Japan promoted shortened payment terms, volume discounts, and progressive rebates, among other transaction terms. Shortening payment terms in effect tightened credit between manufacturers and wholesalers, and between primary wholesalers and secondary wholesalers and retailers. This tightening of credit weakened the wholesalers and made them more

[791]Torihiki Jouken No Jittai, The Institute of Distribution Research's 1969 survey of trade conditions in the film and other industries, Japan Ex. B-1, pp. 6-7, para. 309.

[792]Furthermore, Japan argues that this recommendation was aimed at dealings between wholesalers and retailers, not manufacturers and wholesalers.

[793]In Japan's view, since the United States alleges that the next step in the progression was pushing the shortened payment terms downstream, the United States itself appears to assume that the additional costs of the shorter payment terms were in fact ultimately absorbed not by the primary wholesalers but by their customers.

susceptible to control by Japanese manufacturers in two respects. It increased the wholesalers' need for financial support from the manufacturers and their "keiretsu" banks, and it made it more important for the wholesalers to earn volume discounts and progressive rebates from the domestic manufacturers, which meant focusing their sales efforts on the products of the dominant suppliers, Fuji and Konica.[794] With either a volume discount or rebate, the purchaser has an incentive to concentrate its purchases on the suppliers from which it can expect to receive the greatest rebate or discount from volume purchases, usually the dominant supplier. These types of transaction terms have the potential to enhance manufacturer dominance over distribution.[795] The particular transaction terms promoted by Japan helped cement exclusive vertical relationships in the distribution system, and the standardization of those terms across manufacturers and across wholesalers limited the ability of foreign manufacturers to offer more favourable terms to Japanese manufacturers.

6.330 As to the US argument that the wholesalers were weakened by the shorter payment terms and became more dependent on the manufacturers and, in particular, on volume discounts and rebates, **Japan** responds that the 1970 Guidelines did not encourage the use of volume discounts without reservation, and it never encouraged rebates. In fact, the Guidelines encouraged transparency if volume discounts were given, and discouraged the use of rebates. The more transparent the volume discount, the easier it would be for a competitor to provide the buyer an offsetting incentive (e.g., lower price) to purchase its product rather than the product of the manufacturer offering the volume discount. Thus, if anything, the encouragement of transparency improved the position of competitors with a customer.

6.331 Japan notes that as to payment terms, the Guidelines' recommendations were also completely unexceptional. The Guidelines did not call for shorter payment terms. They merely stated that after a certain period, suppliers should charge their customers interest for late payment. Late payment charges are not novel or unusual; rather, they are a completely normal term of credit arrangements. It is simply not credible to contend that the institution of late payment charges is a draconian assertion of control by suppliers over their customers.

6.332 In the alternative, even assuming that the 1970 Guidelines facilitated the development of single-brand relationships between domestic film manufacturers and their primary wholesalers by encouraging volume discounts and rebates and tighter payment terms, Japan argues that such encouragement was not inherently unfavourable to imported film or paper. There is nothing intrinsic to the nature of imports that renders them incapable of competing in the context of such distribution practices.[796] Even if the guidelines even went so far as to encourage single-brand distribution,[797] there is nothing intrinsic to the nature of imports that renders them incapable of competing in such a market structure.[798]

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[794]The US submits that volume discounts and rebates favour the dominant supplier. By striving to hit the targets for discounts or rebates from its dominant suppliers, the wholesaler or retailer is likely to receive a much larger value in rebates or discounts than if it hits the targets from its minor suppliers. At the time MITI began promoting standardized transaction terms, Fuji and Konica were (as they are today) the dominant suppliers in Japan. Therefore, volume discounts and rebates favoured them over the foreign manufacturers who had been kept from the market by trade and investment restrictions. By the time Japan began to liberalize those restrictions, the transaction terms and other measures pressed by the Government of Japan had cemented the exclusive relationships between Japanese manufacturers and wholesalers, and to a significant extent the retailers as well.

[795]E.g., MITI's 1970 Guidelines, US Ex. 70-4, p. 6.

[796]Japan explains that the panel in *US - Automobiles* found that a luxury tax on cars priced higher than $30,000 was not inherently less favourable for imports, despite the fact that most imported cars were indeed in the higher priced category. *US - Automobiles*, DS31/R, para. 5.14. By that standard, there is no argument that the provisions of the 1970 Guidelines were inherently less favourable for imports.

[797]According to Japan, the contrary was true, i.e., vertical integration was perceived as a problem to watch, not a policy to promote.

[798]Japan submits that industry experts and even Kodak officials severely criticized Kodak for its failure to invest sooner in its own single-brand distribution network. This criticism reflects a view that single-brand distribution could not be a competitive disadvantage for imports.

(iv) Other distribution measures

6.333 According to Japan, most of the distribution measures identified by the US are merely reports by advisory councils or public corporations, e.g., the various Distribution Committee interim reports, the 1971 Systemization Report, and the 1975 Manual. In Japan's view, none of these reports nor the 1967 Cabinet Decision discussed policies that were inherently disadvantageous to imports.

6.334 Japan argues that the 1967 Cabinet Decision -- which implemented the first stage of capital liberalization -- was quite direct in expressing a concern about the ability of domestic industry to compete with foreign rivals. The Japanese Government sought to promote the efficiency and competitiveness of domestic industries, not block imports. In Japan's view, the conclusions drawn by the United States have no support in the text of the Cabinet Decision. Japan stresses that there is no discussion of promoting domestic manufactureres from foreign competition at all, let alone a discussion of using distribution policies to protect manufacturing companies.

6.335 Japan argues that the international contract notification requirement does not allow the JFTC to take action against foreign manufacturers that are offering more competitive terms than their domestic counterparts. This provision is merely a reporting requirement applicable to trade transactions in general, import as well as export transactions, for the purpose of policing Antimonopoly Law violations. Japan emphasizes that the JFTC does not enforce MITI Guidelines and questions the relevance of the international contract notification requirement to film given that, during the 1970s, sales of Kodak film in Japan were made exclusively by a domestic Japanese company, Nagase, which was not subject to that requirement in respect of contracts with other wholesalers, secondary dealers, or retailers.[799]

6.336 Japan concludes that the competitive conditions allegedly established by MITI's distribution policies - assuming they constitute "measures" for purposes of non-violation complaints - are not less favourable for imported film and paper than for domestic products. Japan emphasizes that competitive conditions must be examined exclusively on the basis of the provisions of the alleged measures themselves, and not to any incidental consequences, such as single-brand distribution. Japan maintains that there is no causal connection between the alleged measures and single-brand distribution or between single-brand distribution and the alleged impeded market access. Moreover, none of these distribution measures draws any formal distinctions between imported and domestic products. For these alleged measures to establish less favourable competitive conditions for imports, their provisions must somehow be inherently disadvantageous to imports. However, according to Japan, distribution modernization policies themselves were not inherently disadvantageous to imports.

(v) Black and white film and paper

6.337 Moreover, Japan points out that the US allegations are completely irrelevant to black and white film and paper. For Japan, the US "distribution bottleneck" theory is premised on the large number of retail film outlets, but those are *colour* film outlets. However, black and white film is a niche product that is sold through a much smaller number of retail outlets, generally photospecialty retailers. Thus Japan concludes that the US theory is not even applicable to black and white film.

6.338 With regard to *paper*, Japan asserts that the US claims focus on Japan's alleged encouragement of the domestic film and paper manufacturers' vertical integration into *colour* photofinishing, thereby allegedly creating a "captive market" for colour paper. However, what matters in the present context

[799]Kodak had made a fundamental decision to rely exclusively on Nagase, and did not reevaluate this marketing strategy until years later, long after the period in question. Although Kodak reestablished a subsidiary in 1977, that subsidiary only provided support to the distributors. It was not until 1983 that Kodak reassessed that business strategy and decided to become more active. Japan Ex. B-45.

is that it has nothing to do with black and white paper. With respect to the 1967 tariff concessions, which were made only on black and white film and paper, these facts provide an additional reason why there is no upsetting of competitive conditions on account of "distribution countermeasures".

6.339 On Japan's argument related to the competitive dynamics of a market for black and white film, the **United States** responds that the subject and title of this dispute is consumer photographic film and paper. That is because Japan's liberalization countermeasures were and are directed at consumer photographic film and paper, whether black and white, or colour. Until 1970-1972, black and white was the predominant consumer film (and paper) used in Japan, thereafter it was colour.[800] Accordingly, Japan's focus on the relationship between the Kennedy Round concessions (on black and white products) and current colour film and photo-finishing outlets is not relevant. Given that black and white film (and paper) was the dominant product at the time the Japanese Government began pursuing liberalization countermeasures, and that the Government recognized that colour would surpass black and white at some time in the near future, the Government directed the liberalization countermeasures at obstructing the distribution and sale of consumer photographic film and paper, whether black and white, or colour.

(d) Causal connection between distribution measures and competitive position of imports

6.340 **Japan** emphasizes that even if the Panel looks beyond the provisions of the alleged measures and attempts to evaluate their practical consequences, the US claims fail because of the lack of any actual causal connection (i) between the alleged measures and current single-brand distribution, or (ii) between current single-brand distribution and the alleged current impeded market access.

6.341 According to Japan, even if the 1970 Guidelines are a "measure" for purposes of Article XXIII:1(b), they are not a "measure" that has anything at all to do with the alleged nullification or impairment of the benefits of tariff concessions. In Japan's view, the US claims that the alleged nullification or impairment comes from single-brand distribution, while being unable to show any nexus between the 1970 Guidelines and single-brand distribution. Private companies had adopted single-brand distribution prior to the alleged measures. Japan alleges that the United States tries to shift the focus from the measures themselves to the market structure that allegedly disadvantages imported products. However, GATT precedent has consistently focused on the measures themselves, and not market outcomes. Japan adds that even if the panel were inclined to depart from this past GATT practice, there is no factual basis to conclude either that MITI policies created the market structure, or that the market structure in fact disadvantages imported consumer photographic products.

6.342 For Japan, it is also important to examine whether there is current nullification or impairment. Putting aside the relationship between MITI's policies and the private sector during the 1960s and '70s, what matters is whether there is any causal connection between the alleged measures and *current* business decisions by wholesalers and outlets regarding what kind of film and paper to purchase. In Japan's view, since the alleged "measures" are no longer in effect, there is no such connection.

6.343 Even if the US interpretation of MITI's distribution policies argument were accurate, in Japan's view, there is no upsetting of the competitive position for imported products. According to Japan, the United States alleged that MITI has sought over the past 30 years to establish and then maintain an exclusionary market structure for film and paper in which foreign brands are blocked from the primary distribution channels. For Japan, in light of the nature of the suggestions being made, and the private sector response to those suggestions, it is not credible to argue that there is some connection. While the United States has submitted voluminous background information on the evolution of government policy thinking, however, the ongoing policy debate during the process of policymaking is much less

[800]Until 1970-72, black-and-white film and paper were the predominant products used in Japan. Thereafter, the dominant products were colour film and paper. Today, colour film and paper account for 97 percent of Japan's total market for consumer photographic materials, with black and white accounting for only 3 percent.

relevant than what eventually happened. Japan emphasizes that private sector actions happened either too early or too late to have any meaningful connection to the government and advisory committee suggestions being made in the early 1970s.

6.344 For the **United States**, there is ample evidence to suggest that the nearly simultaneous decisions of Fuji and Konica to tighten payments and introduce new rebates and discounts in 1966 were in response to Japanese Government policy. By 1965-66 the Japanese Government already had begun the process of working closely with industry to study and devise ways to respond to capital and trade liberalization. The Industrial Structure Council's Distribution Committee had studied the need for rationalized transaction terms in its Fifth Interim Report in 1965. Also in 1965, MITI worked with the Japanese photographic film and paper manufacturers in the Natural Colour Photography Promotion Council (NCPPC) to devise means to prepare for trade and capital liberalization. Among other things, the NCPPC considered and reported on specific "import suppression counter measures".[801] The United States concludes that the Japanese Government's guidelines and administrative guidance to industry had a clear purpose at the time they were given, and they accomplished their objectives very effectively.

6.345 **Japan** responds that the United States elevates preliminary deliberations of the Industrial Structure Council's Distribution Committee and the Natural Colour Photography Promotion Council (NCPPC) and the Industrial Structure Council's Fifth Interim Report to the level of Japanese Government policy. In Japan's view, these were activities of non-governmental bodies: (i) that were in the early stages of studying distribution issues, and were not yet even making specific recommendations; (ii) that took place two years prior to the 1967 Cabinet Decision endorsing the broad concept of modernizing the distribution sector; and (iii) that took place *five years* prior to the first specific government statement on the issue of rationalizing transaction terms for the photographic products industry. Therefore, in Japan's view, the United States has not submitted evidence to link the actions taken by Fujifilm and Konica regarding transaction terms to governmental action.

(i) Introduction of transaction terms

6.346 As to the timing problems with this alleged link between the introduction of distribution measures and the upsetting of competitive conditions for photographic materials, Japan argues that private companies had taken actions themselves regarding payment terms and rebates well before any actions by the Japanese Government regarding "standardized"[802] transaction terms. For Japan, it is clear that these documents cannot have caused Fuji's and other manufacturers' decision to implement e.g., volume rebates. For example, Konica began tightening payment terms in 1962 and Fuji started in 1966. Trade journals discussed these business developments and the quite natural desire of the domestic manufacturers to improve their accounts receivables through shorter payment terms. Thus, the manufacturers' tightening of transaction terms for their primary wholesalers as well as Fuji's volume discount policy predate both the 1967 Cabinet Decision and the 1970 Guidelines. Fuji made no change in its policy in response to the 1967 Cabinet Decision. Regardless of MITI's 1970 Guidelines, Japanese manufacturers in this sector had already begun to adjust their rebate policies and shorten payment terms before 1967, three years or more before MITI first announced its suggestions.

6.347 The **United States** notes that Japan does not deny that its manufacturers implemented shortened payment terms, rebates, and volume discounts. While Japan raises a question of timing, the United States contends that there is no timing mismatch in its position. Specifically, the United States argues

[801]Studying a Policy for Coping: Natural Colour Photograph Promotion Council, Approaching Liberalization of Trade in Colour Film, Camera Times, 2 March 1965, US Ex. 65-3.

[802]Japan notes that it distinguishes "standardization," with its implication of uniformity, from "rationalization," which does not have this nuance. Japan points out that the United States consistently translates "tekisei(-ka)" as "standardization" rather than the more accurate alternative "rationalization". In Japan's view, if the Japanese original had meant "standardization", it would have used the term "ityoujun-ka".

that there were two purposes for Japan's transaction terms policies, i.e.: (1) standardizing transaction terms in order to create a benchmark against which to judge the "fairness" of competition from foreign firms using non-standard terms, and (2) implementing specific terms that promoted channel exclusivity.

6.348 According to the United States, in terms of the *first* goal, the timing of Japan's measures was perfect. The Japanese Government actively pressed for standardized transaction terms in the 1968-75 time frame precisely when lowering tariffs and moving toward the first significant liberalization of capital investment. Japan wanted its manufacturers, primary wholesalers, and secondary wholesalers to standardize transaction terms in order to resist this increasing competition by means of scrutiny under the Antimonopoly Law. The United States emphasizes that the 1969 survey of transaction terms submitted by Japan[803] shows that, at this time, transaction terms were not standardized between manufacturers, primary wholesalers, secondary wholesalers and retailers. MITI's repeated and active efforts to standardize the terms (including through publicizing the particular terms applied by individual wholesalers) served to standardize those terms at this time when standardization was most needed to resist the imminent threat of foreign competition. It was also at this time that Japan implemented Notification 17 to prevent foreign manufacturers from offering attractive premiums to wholesalers, and Rule No. 1 under the international contract notification provisions of the Antimonopoly Law, which ensured the opportunity to scrutinize each contract between foreign manufacturers and Japanese wholesalers for "unfair" departures from standardized terms.

6.349 The United States emphasizes that Japan's timing was right on the mark regarding the *second* goal as well. Although Japanese manufacturers had implemented rebates, volume discounts, and shortened payment terms before the 1970 Guidelines, the 1969 survey and the 1970 Guidelines themselves noted that rebates and volume discounts were less widely used between primary wholesalers and secondary wholesalers and retailers. These documents also indicated that long payment terms were common at these levels of the distribution system. In the US view, Japan wanted to advance its keiretsu distribution system beyond the first tier of manufacturer-to-primary-wholesaler to encompass these lower levels as well. Moreover, greater efforts were necessary to accomplish keiretsu-nization at these levels, since it was not necessarily in the interest of the wholesalers or retailers. The low levels of foreign access to the secondary wholesalers demonstrates that Japan's policies were largely successful at this level as well.

(ii) Introduction of single-brand distribution

6.350 For **Japan** it is clear that neither volume discounts nor rebates were responsible for the decision by primary wholesalers to become single-brand in the Japanese market. Private companies had adopted single-brand distribution prior to any government action. Single-brand distribution had emerged by the mid 1960s, and was essentially complete by 1968.[804] Konica's primary wholesalers were single-brand since at least 1955. Three of Fuji's four major primary wholesalers were already single-brand wholesalers well before 1970. Accordingly, single-brand distribution of film was already the industry norm by 1968, years prior to the 1970 Guidelines, which were the only government statement concerning transaction terms,[805] and other alleged measures. Thus, well before the 1970 Guidelines, the industry had already shifted to single-brand distribution and not surprisingly, the 1970 Guidelines said nothing about single-brand distribution. Japan concludes that the history of business decisions in this industry reveal the timing problems of the US theory of causation because it is impossible for a government action to cause something that happened before that government action was taken.

[803]Japan Ex B-1.

[804]The only remaining multibrand wholesaler was Asanuma, which became single-brand in 1975 after being rebuffed by Kodak when Asanuma tried to reestablish direct dealing with Kodak.

[805]The other reports and surveys were not formal government actions or statements. Moreover, even these items came after single-brand distribution had emerged as the predominant industry practice.

6.351 Japan points out that Kodak's agent Nagase had acquired Kuwada, and turned the formerly multibrand primary wholesaler into a single-brand wholesaler, and became a direct competitor of the other independent primary wholesalers in 1967. Thereafter, independent primary wholesalers would have to compete in selling Kodak with their supplier (an obvious impossibility given that the supplier could always ensure its ability to underprice the independent wholesaler) or to act as a secondary wholesaler. Those that had the ability to remain a primary wholesaler for another manufacturer chose this course of action. This decision was not because of rebates or volume discounts, it was because Kodak had chosen exclusive distribution at the primary wholesale level and in so doing effectively excluded independent primary wholesalers from a role in distributing Kodak products. In Japan's view, ultimately, the success or failure of volume discounts and rebates in attracting business from a wholesaler is a matter of business judgement. However, neither necessarily leads to exclusivity. Wholesalers must choose between the advantages of lower purchase costs from volume discounts and a greater variety of brands which is a pure business decision.

6.352 Japan states that Asanuma remained a wholesaler of Kodak film until 1975. Thus Asanuma did not terminate its relationship because of payment terms, volume discounts, rebates, "keiretsu" relationships or purported policies of the Japanese Government to encourage single-brand distribution. In Japan's view, Asanuma terminated its relationship with Kodak because Kodak was unwilling to deal with it directly as a primary wholesaler. Similarly, the other primary wholesalers remain single-brand Fuji distributors because they have made a business decision to do so.[806]

6.353 The **United States** contests Japan's argument that its measures could not have caused the alleged effects because Japanese manufacturers began implementing shortened payment terms and volume discounts and rebates in 1966, before the series of Japanese Government measures from 1968 through 1975 that called for such transaction terms. In the US view, there are no timing problems in the US argument.

6.354 The United States notes that there were two purposes for the Government of Japan's transaction terms policies: (1) standardizing transaction terms in order to create a benchmark against which to judge the "fairness" of competition from foreign firms using non-standard terms; and (2) implementing specific terms that promoted channel exclusivity. In terms of the first goal, Japan actively pressed for standardized transaction terms in the 1968-75 time frame precisely as Japan was lowering its tariffs and moving toward the first significant liberalization of capital investment. Japan wanted its manufacturers, primary wholesalers, and secondary wholesalers to standardize transaction terms in order to resist this increasing competition by means of scrutiny under the Antimonopoly Law. The 1969 survey of transaction terms[807] shows that at this time, transaction terms were not standardized between manufacturers and wholesalers or between primary wholesalers and secondary wholesalers retailers. MITI's repeated and active efforts to standardize the terms (including through publicizing the particular terms applied by individual wholesalers) served to standardize those terms at this time when standardization was most needed to resist the imminent threat of foreign competition. It was also at this time that Japan implemented Notification 17 to prevent foreign manufacturers from offering attractive premiums to wholesalers, and Rule No. 1 under the international contract notification provisions of the Antimonopoly Law, which ensured the opportunity to scrutinize each contract between foreign manufacturers and Japanese wholesalers for "unfair" departures from standardized terms.

6.355 The United States also emphasizes that Japan's timing was right on the mark regarding the second goal as well. Although Japanese manufacturers had implemented rebates, volume discounts, and shortened payment terms before the 1970 Guidelines, the 1969 survey and the 1970 Guidelines themselves noted that rebates and volume discounts were less widely used between primary wholesalers

[806]Affidavit of Takenosuke Katsuoka, Japan Ex. A-11; Affidavit of Kaoru Konno, Japan Ex. A-15, Affidavit of Yukiyoshi Noro, Japan Ex. A-14, Affidavit of Tomihiko Asada, Japan Ex. A-12.

[807]Japan Ex. B-1

and secondary wholesalers and retailers. These documents also indicated that long payment terms were common at these levels of the distribution system. Japan wanted to advance its keiretsu distribution system beyond the first tier of manufacturer-to-primary-wholesaler to encompass these lower levels as well. Moreover, as the United States provided evidence for, greater efforts were necessary to accomplish keiretsu-nization at these levels, since it was not necessarily in the interest of the wholesalers or retailers. The low levels of foreign access to the secondary wholesalers demonstrates that Japan's policies were largely successful at this level as well.

(iii) Governmental endorsement of private actions

6.356 The United States argues that, to the extent that manufacturers already had implemented some of the desired transaction terms, the Japanese Government's endorsement of those terms made clear that they were approved government policy, and should be perpetuated or strengthened.

6.357 **Japan** contends that the companies' economic self-interest was a sufficient reason to maintain rationalized transaction terms. Moreover, Japan points out that the alleged objective behind the adoption of these transaction terms, i.e., single-brand distribution, is the common form of distribution in the film industry in every market in the world. It results from business decisions as to how to most effectively compete. Manufacturers selling in Japan would not need the government's endorsement to adopt and maintain practices and market structures that had proven successful in all other markets in the world. Therefore, payment terms, discounts, and rebates were not responsible for the evolution to single-brand distribution in Japan any more than they were in the United States or the European Union. Nor are the use of payment terms, discounts, and rebates as a tool of competition constrained in Japan. They have been and remain competitive tools constrained only by the application of the relevant competition statutes equally applied to both foreign and domestic competitors.

(iv) Downstream standardization

6.358 According to the **United States**, Japan wanted these transaction terms implemented and standardized further downstream in the distribution system. The surveys and the guidelines from the late 1960s and early 1970s note that transaction terms between primary wholesalers and secondary wholesalers and retailers were not yet, but should be, standardized.[808] Pushing its systemization policies further downstream would help ensure the stability of the system as a whole, and its resistance to foreign capital enterprises. When wholesalers actually began to implement the terms suggested by MITI, the retailers raised objections.

6.359 **Japan** responds that this argument ignores the economic incentives for the transaction terms to pass downstream and the actual economic consequences of downstream transaction term rationalization. As to the US theory that tightening terms at the manufacturer-wholesaler level created financial pressure on the wholesaler, Japan responds that efforts to shorten transaction terms at the wholesaler-retailer level would actually *help* wholesalers by relieving the financial pressure from shorter payment terms at the manufacturer-wholesaler level. Thus, there could be no actual financial effects on the wholesaler, which would then not lead to the exclusive manufacturer-wholesaler relationship alleged by the United States.[809] If manufacturers and wholesalers had, of their own accord, adopted shorter payment terms, rebates, and volume discounts, inevitably these changes would eventually have their own effect on the downstream terms from the wholesaler to the customer, regardless of what the government recommends as distribution modernization. Japan concludes that the alleged government's endorsement of the wholesaler-to-retailer transaction terms, which were the likely consequence of the changes already

[808]1970 Guidelines, US Ex. 70-4.

[809]According to Japan, the United States cites trends in wholesaler profitability. Yet this data in fact shows that as the manufacturers tightened payment terms in the mid 1960s, profitability actually increased. The decline in profitability did not happen until several years later. The timing of these trends hardly supports the US allegations.

taking place in the manufacturer-to-wholesaler terms, had nothing to do with the underlying economic forces pushing transaction terms downstream.

(v) Uniformity and standardization

6.360 In the view of the **United States**, the standardization of transaction terms served two purposes: (i) to encourage vertical alignment of distribution, and (ii) to establish a baseline for standard industry practices, the departure from which would be scrutinized under the Antimonopoly law. The fact that the domestic manufacturers had implemented rebates, discounts, and shortened payment terms in 1966 or 1967 does not mean that the terms were uniform across manufacturers and wholesalers. The Japanese Government needed industry to standardize the terms, and to keep them standard, in order to resist inroads from foreign capital.

6.361 With regard to the US emphasis on the importance of the government in ensuring *uniformity* of transaction terms, **Japan** argues that this argument has no support in the government actions or the private sector actions during this period, given that rationalized transaction terms did not limit the ability of foreign or domestic manufacturers to offer more competitive terms.

(i) In particular, Japan emphasizes that the 1970 Guidelines did not specify the payment terms, the interest rates on extended payment terms, the terms of volume discounts, or the terms of rebates. None of the other documents identified by the United States specifies target "standards" for any of these elements.[810] The Guidelines provided only broad suggestions, not specific details of suggested transaction terms. Moreover, the Guidelines did not even use the word "standardize" in connection with its suggestions regarding transaction terms.[811]

(ii) As to the US argument that the "standard contract" drafted by an industry group[812] pushed for uniformity, Japan responds that the draft "standard contract"[813] clearly left to individual negotiation every major element of the business transaction and would not prevent a competitor from offering better terms to win business. Thus standardizing of any specific transaction terms was not intended.

(iii) In Japan's view, the idea that rationalizing transaction terms somehow limited the ability of foreign manufacturers to offer competitive terms also contradicts recent US statements. The 1990 Guidelines state that "Business operators trying to enter a new business sector are clueless as to the amount of rebates it would offer in order to maintain a position superior to its rivals".[814] Here the 1990 Guidelines, which are supported by the United States, assume that the rationalization of transaction terms will help new entrants, including foreign manufacturers, to offer competitive terms.

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[810]Japan notes that to the extent the 1969 Survey contained examples of actual transaction terms, such information is quite common in such factual surveys. There is no indication the survey evaluated any specific terms either favourably or unfavourably, and thus they could not be "targets".

[811]Japan states that the United States consistently translates "tekisei(-ka)" as "standardization" rather than the more accurate "rationalization". If the Japanese original had meant "standardization," it would have used the term "hyoujun-ka". e.g., see US Ex. 71-11 (Zenren Tsuho, August 1971); US Ex. 70-4 (Zenren Tsuho, July 1970); US Ex. 69-5 (Zenren Tsuho, November 1969).

[812]The contract was reprinted in an industry trade journal at the time. Nihon Shashin Kogyo Tsushin (1 July 1972). Japan Ex. F-2. This "standard contract" was made as a model form of contract and did not have any binding effect whatsoever. MITI merely encouraged the Japan Chamber of Commerce and Industry to draft it. Its purpose was to encourage the private sector to use written forms and make contracts more transparent.

[813]Japan underscores that the Standard Contract: (i) left blank the number of days in the payment period; (ii) left blank the interest rate to be charged on late payment; (iii) left blank the discount rate for cash discounts; (iv) indicates that volume discounts should be in accordance with "separately specified standards," and (v) makes no mention of rebates at all.

[814]Shoukankou Kaizen No Kihonteki Houkou Ni Tsuite (Basic Distribution to be Taken for the Improvement of Commercial Practices), 20 June 1990 [hereinafter "1990 Guidelines"], US Ex. 90-5, p. 2.

6.362 Japan concludes that even assuming the US allegations about the timing, the meaning of the 1970 Guidelines, and their effect on encouraging exclusivity, were correct, these US arguments still would fail because they assume that there were legal constraints on the ability to offer competing transaction terms to customers. However, there were no constraints on a competitor, whether foreign or domestic, to offer more attractive transaction terms.

(e) Financing for rationalization, systemization and standardization

(i) JDB funding for joint distribution facilities

6.363 The **United States** claims that Japan also promoted the vertical integration of manufacturers and wholesalers through administrative guidance and financial incentives for manufacturers, wholesalers and retailers to establish joint distribution facilities. The establishment of common facilities between these different levels of the distribution system bound the participating companies closer together and made it more difficult for foreign suppliers to establish or maintain relationships with the participating distributors. The Distribution Committee's Seventh Interim Report recommended financing by the Japan Development Bank ("JDB") to promote systemization.[815] In 1976, the JDB provided a subsidized loan of 550 million yen to Konica to establish a joint distribution centre for Konica and its four primary wholesalers.[816] JDB funding of the distribution centre gave Konica the means to establish strong, physical and electronic ties with its primary wholesalers and consequently stripped the wholesalers of their independence and made it all but impossible for other manufacturers to overcome the wholesalers' exclusive relationships with Konica.[817] The US alleges that the JDB's selective financing of Japanese manufacturers in their attempts to systematize distribution channels for photographic film and paper upset the conditions of competition between imported and domestic products since the loans helped to further tie domestic manufacturers to primary wholesalers that otherwise would have been available to distribute imported products.

6.364 **Japan** contends that Konica had already acquired its primary wholesalers before the JDB loan and that the loan was thus too late to encourage vertical integration. No government intervention is necessary to tell subsidiaries to cooperate with the parent company. For Japan, the cooperation between Konica and its primary wholesalers and their joint development of a distribution facility cannot be the result of some government plan to strengthen the relationship between these primary wholesalers and Konica.

6.365 The **United States** responds that Japan does not deny that the loan was made for the purpose of establishing the joint distribution between Konica and its wholesalers, or that the centre was in fact established using the loan. As to Japan's argument that Konica already had acquired its primary wholesalers at the time, the United States contends that Konica merged with its last two independent primary wholesalers (i.e., Haruna Shokai and Daiwa Shokai) on 13 July 1977, more than a year after the JDB loan.[818] The United States maintains that the establishment of the joint distribution centre further interwove the manufacturer and its wholesalers, making it more difficult for a foreign supplier to establish a relationship with, or purchase, a Konica wholesaler.

6.366 According to **Japan**, given that single-brand distribution is not inherently unfavourable to imports, it follows that MITI's encouragement of systemization, the JDB loan to Konica for a joint distribution

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[815]US Ex. 69-4.

[816]The Direction of Regulating Multi Level Marketing, Catalog Sales and Door to Door Sales (Eleventh Interim Report, Dec. 1974, US Ex. 74-6.

[817]The President of Konica at the time referred to the distribution centre as "a kind of business merger on the distribution front". Standing Before a Trial Photographic Distribution Industry, Camera Times, 8 May 1976, US Ex. 76-4.

[818]An industry journal article from 20 July 1977 reported the merger: Era for Reorganizing Distribution: "Retailers Are Like Octopi," Shashin Kogyo Junpo, 20 July 1977, p. 8, US Ex-37.

centre - which at most, even according to US allegations, merely lent some encouragement to single-brand distribution - were not inherently unfavourable. Japan explains that the JDB did not and does not evaluate applications from foreign enterprises that carry foreign products any differently than it evaluates applications from domestic enterprises.[819] Thus, if Nagase (i.e., Kodak's importer) and Kuwada (i.e., Nagase's single-brand primary wholesaler subsidiary) applied for a loan to build a joint distribution centre, the JDB would have evaluated the application based on the same criteria used to evaluate Konica's application.

6.367 As to Japan's argument that the JDB in the 1970s would have, and today would, provide the same type of loan to foreign manufacturers, the **United States** rebuts that the fact remains that the only manufacturer who received such a loan was Japanese.[820]

(ii) SMEA loans to photoprocessing laboratories

6.368 According to the United States, as colour photography became popular in the 1960s and 1970s, photoprocessing laboratories became a potential alternative distribution channel, and a potential threat to the oligopolistic distribution system maintained by Fuji and Konica. In 1968, the director of the Small and Medium Enterprise Agency (SMEA) called for applying SMEA programs to improve the structure of medium and small businesses in light of the "advancing capital liberalization," and as "protective countermeasures against the selling of oneself to foreign capital".[821] The 1969 MITI-commissioned survey of transaction terms in the photographic sector[822] notes as potential threats "if the oligopoly of the two domestic manufacturers is broken up by a foreign company," and "if a new [distribution] route emerges to compete against the route of photographic material dealers, which is the core existing route in the distribution market". The survey further warned that "foreign companies have already provided financial assistance to the processing industry" and advocated taking steps "to minimize the anticipated disorder in the distribution market". Among the recommended measures were, "subsidize the processing industry".[823] In response, the United States claims, MITI's SMEA gave substantial subsidies to the photoprocessing industry aimed at modernizing the equipment in the facilities in anticipation of capital liberalization. In July 1967, SMEA approved "colour film development and printing laboratories" as one of four sectors deemed eligible that year for subsidized loans.[824] The Chairman of the Laboratories Association, who also was the president of Fuji Colour Service,[825] stated that "the main purposes of the laboratory industry becoming designated industry are … as capital liberalization countermeasures, to modernize facilities and thereby solidify the foundations of businesses".[826] When the laboratories were designated as eligible for another SMEA subsidy program in 1973, the chairman of the Laboratory Association again stressed the need to respond to trade liberalization.[827] Japanese film manufacturers used SMEA financing to convert black and white to

[819]Japan notes that since 1984, the JDB has been promoting imports by providing loans for the construction of distribution facilities and service facilities for imported products. JDB Annual Report 1995, p. 26-27, Japan Ex B-36.

[820]According to the United States, Japan also argues that it was in Konica's interest to establish the joint distribution centre, as if that fact alters the Government's responsibility for intervening in the market to facilitate that result.

[821]Small and Medium Enterprises Director, Otsutake Kenzo, Main Points of Fiscal 1968 MITI Policy; New Policy Dealing With Capital Liberalization; Approach to Policy on Small and Medium Enterprises, Tsusan Journal, December 1967, vol. 2 no. 2, 10-15, US Ex-12.

[822]Institute of Distribution Research, Fact-Finding Survey Report Pertaining to Transaction Terms: Actual Conditions of Transaction Practices in the Wholesale Industry, March 1969, p. 1-21, 287-319. US Ex-15.

[823]Ibid.

[824]The 1967 and 1968 SMEA Annual Reports confirm that the SMEA played a leading role in providing company-specific financing, consulting, guidance, and monitoring in support of Industrial Structure Council Distribution Committee's liberalization countermeasures. White paper on Small and Medium Enterprises by the SMEA 1967, US Ex. 67-1.

[825]The United States notes that all chairmen of the All Japan Laboratories Association (Laboratories Association) have been Fuji employees.

[826]Murakami Eiji, With This Opportunity as Designated Industry, Let's Strive for Further Development of the Lab Industry, CFA News, Special Issue, 1967, p. 4, US Ex-9.

[827]Murakami Eiji, A Year of Trial, JCFA News, 1 January 1973, No. 34, p. 2, US Ex-27.

colour photo processing laboratories in the late 1960s and early 1970s. During this time, SMEA provided approximately 160 million yen to support this effort. After conversion, these laboratories tended to remain closely affiliated with the Japanese manufacturers. These subsidies helped tie the laboratories into exclusive relationships with the domestic Japanese photographic film and paper manufacturers.

6.369 The United States submits that the close links between domestic manufacturers formed under this SMEA program helped domestic manufacturers close off another distribution channel for film, since photoprocessing laboratories are the primary market for photographic paper and an important distribution channel for photographic film. Because the laboratories make frequent stops at retail stores to pick up exposed film for processing and printing and drop off finished prints, the laboratories are in a good position to deliver new undeveloped film as well. Moreover, the brand of developing and processing equipment the laboratory uses often corresponds to the brand of photographic paper it uses and the brand of film distributes. Consumer perception, if not technology, often suggests that the best prints come from using the same brand of film, paper, and processing equipment. Accordingly, a laboratory with one company's photoprocessing equipment is likely to purchase photoprocessing paper and chemicals from that same company, as well as its film, to ensure compatibility and to meet consumer expectations for consistency between the brand of film and paper used. A laboratory that uses Fuji equipment often will use Fuji paper and chemicals, and if it distributes film, it likely will be Fuji.

6.370 **Japan** responds that there is no logical nexus between government financing and the trend toward vertical integration. The trend toward affiliation actually began long before any of the alleged government efforts to integrate the photofinishing laboratories came into effect. Both Fuji and Konica were beginning to develop affiliations with its laboratories by the early 1960s which shows that the timing of SMEA financing had nothing to do with this trend.

6.371 In the view of the **United States**, given that lowered tariffs on photoprocessing equipment and a strengthened yen would decrease the cost of imported photoprocessing equipment and materials, and therefore improve the laboratories' bottom line, liberalization would be a threat to the laboratories only if they were tied in relationships with Fuji or Konica and did not feel free to purchase cheaper imported equipment and materials. In this situation, concessionary government financing could help reduce the comparative cost of purchasing domestic equipment and materials, and therefore help form or continue the bonds between laboratories and domestic film and paper manufacturers. Therefore, in the US view, Japan severely disrupted the conditions of competition in the Japanese market that otherwise would have prevailed and that would have enabled imports from the United States (and other countries) to take advantage of the tariff concessions granted by Japan in the Kennedy Round.

6.372 Given that, in **Japan's** view, single-brand distribution is not inherently unfavourable to imports, it follows that MITI's encouragement of systemization and SMEA financing for modernization of photofinishing laboratories - which at most, even according to US allegations, merely lent some encouragement to single-brand distribution - were not inherently unfavourable. Japan emphasizes that the SMEA financing to photo laboratories was available to any laboratory with any affiliation to any manufacturer. The financing was designed to help the small laboratories, not the major manufacturers, to buy or lease new equipment to handle the new developing technologies for colour film. Obviously smaller laboratories would experience more difficulty financing such a large capital expenditure. Laboratories receiving the financing were free to choose the type and brand of all the equipment they acquired with the help of the loans. Once the laboratories obtained the new equipment, they were then available as customers to anyone who could supply the colour paper they would need to use the new technology. Japan argues that this independent source of financing actually reduced any dependence the laboratories would have on the manufacturers. In Japan's view, the United States has not explained why the SMEA financing would favour Japanese manufacturers rather than any other supplier with a competitive product.

6.373 In response to Japan's argument that the SMEA programs did not specify that the laboratories receiving the subsidies purchase only equipment by Japanese manufacturers, the **United States** maintains that the manner in which SMEA operated these programs disadvantaged foreign manufacturers. In the US view, MITI in general has operated its SMEA programs to support its industrial policy goals, including preparing Japanese industry to confront trade and investment liberalization.[828] The administration of the SMEA financing programs helps ensure that loans are dispensed in conformity with MITI industrial policy. Loans are approved on a case-by-case basis, at the discretion of a MITI certified "management consultant". To obtain certification as a management consultant, an individual must pass an examination on MITI and SMEA industrial policies, including distribution policy.[829] In the US view, these policies have contributed to Fuji's strong and extensive ties with Japanese photoprocessing laboratories, and that these ties have reinforced Fuji's dominant position in the market.[830]

6.374 **Japan** underscores that SMEA loans continue to be made available to laboratories affiliated with both foreign and domestic manufacturers. From the fiscal year 1993 to fiscal year 1995, 48.2 percent of the loans were distributed to Fuji laboratories, 9 percent to Kodak laboratories and 7.1 percent to Konica laboratories.

6.375 The **United States** contends that the receipt of a handful of subsidized loans under the SMEA programs by Kodak-affiliated laboratories in the period from 1993 through 1995 does not disprove that the program has operated for years to strengthen Japanese industry's control over its laboratory network.

(f) Electronic information links

6.376 The United States submits that MITI saw the development of information links as an integral part of its distribution systemization efforts and strongly advocated improving computer linkages to cement the closed vertical distribution system and ensure its perpetuation, e.g., in the 1969 Seventh Interim Report or the 1975 Manual. MITI created, beginning in the mid-1970s, a series of government-industry entities to facilitate the creation of computer networks between Japanese manufacturers and Japanese distributor. The Japanese Government also worked closely together with private companies to develop computer ties and address the variety of obstacles they faced in achieving this goal, including through low-interest financing.

6.377 **Japan** responds that there is no basis for assuming that MITI's systemization policies, e.g., the creation of information ties, had any exclusionary impact. MITI's policies recognized and addressed all distribution channels for film, including distribution channels used by imports.[831] For Japan, there

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[828]"The need to increase international competitive strength with the liberalization of trade at the start of the 1960s made it even more necessary to do this [i.e., improve the facilities of SMEs]. The SME modernization policies that got fully underway in the 1960s were a policy response to this necessity". Takashi Yokokura, Chapter 20: Small and Medium Enterprises, Industry Policy of Japan Edited by Ryutaro Komiya, Masahiro Okuni, and Kotaro Suzumura, 1988, p. 521. Chapter 11: The Development of New Policy Measures, MITI History, Vol. 15, 31 May 1991, p. 431-2, US Ex. 70. Among the specified industrial policy objectives were response to "capital and trade liberalization". Ibid.

[829]As explained in a recent guide to becoming a MITI-certified "management consultant": "Individuals taking the examination should review the latest and immediately previous editions of the [SMEA] White Paper. This is an extremely useful source for understanding … the direction in which the government it attempting to guide small and medium enterprises". Nagano Hiroji, An Easy Guide to Becoming a Consultant for Small Business, 26 January 1997, p. 35-36, US Ex. 104.

[830]"The source of power for building Fuji Film's high market share, which pays no heed to [Agfa retailer Nihon] Jumbo's aggressive pricing policies, is the keiretsu-nization of wholesalers and laboratories. This structure is the foundation for a strong corporate system that produces big profits from film and printing paper". "Firm Control of Film Distribution - The Fair Trade Commission does not take action as discounters pose no threat," Special Feature - Part 2, Nikkei Business, 28 March 1993, pp. 16-19, US Ex-79.

[831]Japan notes that Nagase's subsidiary Kuwada, a single-brand primary wholesaler for Kodak, was a member of the wholesalers' trade association ("Shashoren") at the time MITI's Distribution Manual was prepared. Thus imports were not left out of the process.

is thus no reason why imports would have encountered difficulties because they did not share the same standardized forms and practices.

6.378 The **United States** contends that Japan was well aware that creating information links between manufacturers and their distributors risks reinforcing oligopolistic distribution structures and limiting competition.[832] The JFTC's list of highly oligopolistic industries includes the Japanese photographic film and paper industry. In these circumstances, the United States argues that the formation of Fuji-controlled information links should have raised concerns by the Japanese Government rather than its explicit support.

6.379 As to the US argument that Japanese manufacturers established on-line computer links with their primary wholesalers as a result of the guidance by the 1975 Manual, **Japan** responds that Fuji did not establish its first on-line connection with a primary wholesaler until 1989. Thus Japan contends that the alleged systemization guidance that the United States claims was so effective in creating an exclusionary market structure was in reality ignored for at least fourteen years.

6.380 According to the **United States**, the Japanese Government's support and promotion of information links spanned nearly 25 years:

a. In 1968, the importance of information flows was first identified in the Sixth Interim Report which stated that "appropriate conditions of location, the formation of distribution information networks should be promoted …".[833]

b. In 1969, in the Seventh Interim Report, MITI's Distribution Committee set forth a specific information "systemization" program which was premised on the belief that information flows were "a fundamental key to pursuing systemization of distribution activities".[834]

c. In 1971, the Distribution Committee's Ninth Interim Report[835] reiterated the importance of strengthening information ties as part of distribution systemization and called for the establishment of "guideposts" for development of information ties needed to strengthen horizontal and vertical linkages of a "type that clusters client retailers around a powerful wholesaler that serves as its nucleus; a type where the fulcrum is an organized system of integrated wholesale centres and the wholesale business districts".[836]

d. With the 1971 Basic Plan for Distribution Systemization, Japan called for the strengthening of information ties as a key element of distribution systemization. The plan specifically called for the creation at the national economic level of distribution information networks, the implementation of joint information activities, and the creation of special organizations to promote the provision of distribution information. The plan stated "such systemization of distribution must be realized through various stages: vertically from the intra-firm level, horizontally on the inter-firm

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[832]A JFTC study of information networking in the distribution sector noted: "Information networking especially under the sole direction of oligopolistic manufacturers may be considered as a problem which could expand the gap in competitiveness … In particular, in the case that oligopolistic manufacturers use information networks as an integral part of their management of distribution channels, it is feared that the dependence of other information network participants on the network leader for transactions will increase, and that their freedom to conduct business activities will become restricted". Fair Trade Commission Office, Fact-Finding Survey Report Regarding Information Networking in the Distribution Sector, September 1989, p. 57-65. US Ex. 65.

[833]1968 Sixth Interim Report, US Ex. 68-8 and US Ex. 14.

[834]1969 Seventh Interim Report, p. 4. US Ex. 69-4.

[835]Industrial Structure Council Distribution Committee, Distribution for the 1970's (Ninth Interim Report), 22 July 1971. US Ex. 71-9.

[836]Ibid., p. 80-81, US Ex. 71-9.

level to the national economic level. Furthermore, in seeking to implement this, sufficient attention must be paid to the introduction of computers as an effective means of achieving [such systemization]".[837]

e. In December 1971, MITI established the "Distribution System Development Centre" ("the Centre")[838] in order to facilitate systemization, including the strengthening of information linkages, in close cooperation between the government and the private sector. The Centre orchestrated the development of standardized state-of-the-art hardware and software and coordinated the standardization of information formats to facilitate computer integration.

f. In 1975, the Centre produced the MITI-commissioned "1975 Manual", which underscored the urgency of developing information links to promote systemization.[839] The Centre also studied distribution in specific sectors, including the film and photographic paper sector, and made further proposals for enhancing systemization.

g. In 1975, the Centre published a study on Fuji's strategy to respond to capital liberalization and the entry of Kodak into the market. The study commented that Fuji had been highly successful at internal computerization and concluded that Fuji's next step was to build a "Total Distribution Management System" to include distributors. The study noted the key role that computer links would play.[840]

h. In 1976, the Centre produced a second study of Fuji's computer system, recommending that Fuji develop information links with the primary photospecialty wholesalers and retailers to strengthen its control over the wholesale distribution channel.[841]

6.381 The United States further submits that MITI continued to actively promote information systemization throughout the 1980s:

a. In 1985, MITI promulgated its "Vision for an Information-Armed Wholesale Industry" ("Vision"), which called for support from the Japanese Government for information networking in the distribution industry, including study groups on developing information systems for the wholesale industry, creation of low interest financing, and intensive financing of computerization of small and medium-sized wholesale industry.[842]

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[837]The Basic Plan for Distribution Systemization, 28 July 1971, US Ex. 71-10, p. 4.

[838]Establishment of 'Distribution System Development Centre' and the Promotion of Distribution Systemization Measures, Tsusansho Koho, 20 December 1971, pp. 5-6, 13-18 US Ex. 71-13. Japan notes that the official English name of this institution is the "Distribution System Research Institute".

[839]"… Thus, in addition to rationalization of transactions and distribution, the camera and film industry must improve its information systems, bringing them to an advanced level". 1975 Manual, US Ex 75-5.

[840]"The building of an information system oriented physical distribution system will serve as the front-line in improving the stability of channels that are centred on the company's primary wholesalers and pursuing the creation of a competitive distribution system". Asada Koji, Special Series - PD Strategy: Distribution System and Distribution Channel (No. 9), Physical Distribution Management, April 1975, pp. 55-61, US Ex. 75-1.

[841]"… (2) The online system has allowed the company to ascertain the status of its internal inventory. In the future an attempt should be made to come closer to a system that enables [the user] to ascertain and control inventory at the distribution stage. (3) Because it is important in managing film inventory, ascertaining the status of inventory at the wholesale and retail stages will also lead to the stabilization of channels centred on exclusive tokuyakuten, and there are great benefits both in information and in physical distribution ..". Yoshioka Yoichi, The Online Inventory Control System at Fuji Photographic Film Co., Ltd., Ryutsu to Shisutemu, July 1976, pp. 61-68, US Ex. 35.

[842]MITI Industrial Policy Bureau, Division of the Information-Armed Wholesale Industry, 14 June 1985, US Ex. 52.

b. In 1986, to implement the "Vision," the Centre issued a report[843] to serve as the "guiding light" for the basic position of the information-armed wholesale industry and oversaw a series of government-industry committees to address the problems identified in the report.

c. In 1987, the "Photography Industry Information Systemization Symposium," i.e., the System Council was established under MITI auspices to standardize the information systemization infrastructure.[844] The System Council focused mainly on the problem of incompatibility of data formats but also conducted yearly studies on the advancement of information systemization in the photography industry.

d. In 1988, the System Council[845] finally solved the problem of incompatibility of computer systems in the photography industry by standardizing the data formats, product codes, and transaction forms across companies that were to participate in a particular information network.

e. In January 1989, the Council issued standard film developing and processing product codes.[846]

f. In February 1989, the Council issued uniform vouchers for use by members of the photography industry.[847]

g. In March 1989, the Council issued "Comprehensive Photo Industry Informization Manual", which served as the industry's reference manual for standardization of information systems.[848]

6.382 According to the United States, as noted by Japan, Fuji finally established on-line connections with its primary wholesalers in 1989.[849]

6.383 **Japan** admits that the 1971 Systemization Report discussed suggestions for standardization of paperwork and distribution, and better information exchanges through the distribution chain and the 1975 Manual expanded on these suggestions in a more detailed manner. However, whatever the advisory councils and public corporations were recommending, Japanese manufacturers in this industry were not paying much attention. Specifically, Japan maintains that the largest Japanese manufacturer in this sector did not finish installing joint computer systems with its wholesalers until 1993, almost 20 years after the recommendations were made.

(g) Current competitive position of imports

6.384 The **United States** emphasizes that Japan's actions to deprive foreign manufacturers access to the wholesale distribution channels have adversely altered the conditions of competition for imported photographic materials. Foreclosure from the wholesale system substantially impairs the ability of imported products to compete by limiting their access to retail outlets, increasing their distribution costs relative to those of domestic manufacturers, and neutralizing vigorous attempts to market

[843]Distribution Organization Centre, "Research Report on Information Networking in the Wholesale Industry: Toward An Information Oriented Wholesale Industry," March 1996.

[844]Photo Industry Information System Manual (The Fourth Edition), Photo Industry Distribution System Council, April 1996, US Ex. 96.

[845]The System Council was renamed the "Conference for Photography Trade Information Systems" in October 1988.

[846]Saito Seiichi, "Uniform Voucher Policy Facing New Challenges," Ryutsu to Shisutemu, March 1992, pp. 86-97, US Ex. 75.

[847]Ibid.

[848]Photo Industry Distribution Information System Council, Photo Industry Distribution Information System Manual (The First Edition), March 1989, US Ex. 62.

[849]Affidavit of Mr. Tanaka, General Manager, Fuji Photo Film Co., Ltd., Japan Ex. A-10, p. 3-4.

aggressively. Furthermore, market surveys demonstrate that imports have access to only a limited segment of the market, as compared with domestic products.

(i) Primary and secondary wholesale channels

6.385 The United States submits that virtually all domestically manufactured film in Japan flows to *retail* outlets through wholesale channels, while imported film is almost entirely excluded from those channels. Foreign manufacturers sell virtually no film through primary wholesalers. Kodak sells only 15 percent of its film to secondary wholesalers, and Agfa sells no film through secondary wholesalers.[850]

6.386 In the US view, *primary* wholesale channels provide the Japanese photographic film and paper manufacturers with assets pivotal to protecting their dominance of the Japanese market, e.g., access to the customer relationships which the primary photospecialty wholesalers have developed over much of the last century which are a vital element of successfully doing business in Japan. Moreover, through this exclusive access, Japanese film manufacturers have gained unparalleled marketing power and such services as inventory control, after-sales services, sales promotion, and front-line sales personnel. Foreign suppliers must perform such marketing and distribution functions themselves and so are burdened with a higher relative cost structure. Foreign film manufacturers cannot replicate these relationships or provide comparable services in an economically viable manner.

6.387 The United States submits that *secondary* wholesalers support the operations of the primary wholesalers but they cannot substitute for them.[851] Secondary wholesalers are small and regional in their operations and do not have either the scale or the geographic reach of the primary wholesalers. Moreover, Fuji and its primary photospecialty wholesaler control or dominate a number of the larger secondary wholesalers, and are in a position to influence all secondary dealers because of Fuji's status as supplier of the dominant brand.[852] While some secondary wholesalers carry multiple brands of film, most do not, and foreign film is almost as scarce in these channels as it is in primary channels.[853]

6.388 The United States maintains that any foreign manufacturer is disadvantaged in this situation because it would face many of the same obstacles in trying to convert a secondary wholesaler into a primary wholesaler as it would in trying to build a new distribution network from the ground up. These include, e.g., the need to establish relationships with many small retail outlets; the need to establish a personnel base with the necessary technical skills and market knowledge; and the need to develop wholesale supplier relationships with various manufacturers of photographic supplies (cameras, accessories, etc.). Even those secondary wholesalers that will supply multiple brands buy a large share of the film and other products they distribute from the primary photospecialty wholesalers. Were a secondary wholesaler to try to expand its business, it would find itself in direct competition with these primary wholesalers (who also are its suppliers of Fuji film) and attempting to displace primary wholesalers with whom most retailers have longstanding and stable relationships.[854] Moreover, those manufacturers that currently distribute through the primary wholesalers would be unlikely to jeopardize

[850]Photo Market 1996, US Ex. 96-1.

[851]In response to Japan's argument that secondary wholesalers provide the key to accessing small retail outlets, the US argues that Japan has provided no supporting evidence and that only about one-third of Fuji's film sales go through secondary wholesalers to the retailers, while the majority goes directly from the primary wholesalers to the retailers. US Ex. 96-1, p. 132.

[852]Affidavit of Sumi Hiromichi, 27 November 1996, US Ex-96-10.

[853]Foreign film accounts for only 7 percent of the film sold through secondary channels. Photo Market, 10 June 1996, pp. 132-133 and 254, US Ex. 99.

[854]The stability of these ties is apparent from the constant share of Fuji film sales through primary and secondary wholesalers since 1980. While Kodak's film sales through the various distribution channels changed in accordance with its changing market strategies, Fuji's sales through primary wholesalers have remained at exactly 59 percent since 1981 and its sales through secondary wholesalers have remained at exactly 33 percent since 1980, according to *Photo Market*, the standard Japanese statistical publication for the photography sector.

their relationships with these primary wholesalers by selling their products to an upstart primary wholesaler. Finally, the existing primary photospecialty wholesalers achieve efficiencies (i.e., "economies of scope") by delivering cameras and a wide variety of other photospecialty products beyond film and paper. A foreign film and paper manufacturer building a new distribution system from the ground up would not have the benefit of such efficiencies. Thus, the United States alleges that for a foreign manufacturer it would be impossible to establish the customer base to achieve the economies of scope necessary to make its operations economically viable.

(ii) Current market structure in the distribution system

6.389 For **Japan**, the core of the US allegations regarding distribution policies is the claim that single-brand distribution in Japan impedes market access for foreign brands of film and paper and that it is impossible for a foreign manufacturer to sell directly to all the 280,000 outlets that sell film in Japan. To gain access to those outlets, according to Japan, the United States claims that it is necessary to sell through national wholesalers, such as the primary wholesalers of the domestic manufacturers. Japan disagrees with this characterization because Kodak, the leading foreign manufacturer, does not sell directly to Japanese retail outlets. Similarly to Fuji and Konica, it sells through a national wholesaler. Kodak's national wholesaler, Kodak Japan, just happens at present to be a wholly owned subsidiary. In the past, it was a Japanese company, Nagase, and then a joint venture with Nagase.

6.390 The **United States** responds that Kodak does business in Japan through its wholly-owned subsidiary, Kodak Japan, Ltd., which performs technical support, product development and marketing tasks. Lacking access to wholesale channels, Kodak Japan necessarily sells Kodak film directly to retail outlets, whereas that fact does not make it a "wholesaler".

6.391 **Japan** responds that Kodak transfers its film to Kodak Japan, which then sells the film to the very same secondary wholesalers and retailers. Kodak thus distributes its film very successfully through a parallel sales channel to Fujifilm. In Fujifilm's case, the independent primary wholesalers transfer the film from Fujifilm to their customers. For Kodak, Kodak Japan transfers the film from Kodak to the very same customers. Thus, Kodak Japan performs the same function as Fujifilm's primary wholesalers. Japan also notes that the United States confuses Kodak Japan and Eastman Kodak Japan. Although Eastman Kodak Japan provides both marketing and technical services, and is not a wholesaler, Kodak Japan functions as a primary wholesaler.

6.392 Japan emphasizes that no national wholesaler of any manufacturer sells to all 280,000 outlets, or to anything close to that number. Fuji's primary wholesalers sell to a combined total of fewer than 5,000 accounts. Most of these accounts are large retailers; about 300 are secondary wholesalers and photofinishing laboratories that resell film on a regional basis to the hundreds of thousands of remaining retail outlets.

6.393 The **United States** contends that even if these numbers were correct, Fuji needs the four large primary wholesalers to service these 5,000 accounts. Because the foreign manufacturers have no access to these primary photospecialty wholesalers or to many of the secondary wholesalers that service these accounts indirectly for Fuji, they have to service these accounts directly. Direct distribution or other alternative channels created by foreign firms provide them with access to only a limited segment of the market, specifically in central neighbourhoods of large cities, where photospecialty outlets are relatively large and densely located.

6.394 In **Japan's** view, the primary wholesalers do not provide the key to accessing large numbers of small retail outlets because that is the function of secondary wholesalers, and they typically carry

multiple (including imported) brands.[855] The primary wholesalers, like their counterpart Kodak Japan, sell mainly to larger volume retailers. The degree of overlap is high given that nearly 90 percent of Fuji's sales volume goes to accounts that either carry Kodak film or have an existing business relationship with a Kodak supplier. Thus, Japan concludes that there is no "distribution bottleneck".

6.395 The **United States** responds that these figures vastly overstate the availability of Kodak film in the Japanese market. A Fuji survey finds that 62 percent of the primary wholesalers' customers currently carry Kodak film. This figure includes any outlet even if it carries only a token amount of Kodak film and counts all outlets in a chain even if only one outlet in that chain carries Kodak film. In order to obtain the "nearly 90 percent" figure, Japan adds Fuji's primary wholesalers' customers that do not carry Kodak film but do business with sellers of other Kodak products. The figure therefore includes all outlets served by a secondary wholesaler affiliated with one of Fuji's four primary wholesalers if that secondary wholesaler sold any other Kodak product, even if neither the primary nor secondary wholesaler was willing to carry Kodak film. The United States refers to an associated Fuji survey that was conducted of film availability at the retail level. A US analysis of this survey, from which the 90-percent figure is allegedly derived, shows discrepancies between the actual survey results and the figures reported by Japan.[856] The United States further argues that inspection of the Fuji survey also reveals that it used biased survey and sampling techniques. The Fuji survey is limited to six major metropolitan areas. There is ample evidence that the film market in Japan is not homogeneous and that foreign film is more available in major metropolitan areas than other areas.[857]

6.396 **Japan** responds that the United States' attack on these survey results reveals its own confusion. The United States attacks the survey sampling methodology, yet apparently forgets that the survey of wholesaler customers was not a sampling at all. Rather, over 95 percent of the customers, virtually the entire customer base, were surveyed. There can be no issue of "sampling bias" when the entire universe is surveyed.[858]

6.397 The **United States** emphasizes that the Kodak survey shows that Kodak film is actually available in about 40 percent of the stores in Japan. Kodak's survey design, which utilized well-accepted statistical sampling methodology, was based on the method used for Japan's National Survey of Prices. A total of 2,028 outlets in 144 cities and 45 of 47 prefectures were randomly surveyed in proportion to their share of film sales. For example, approximately half of the film sold in Japan is through photospecialty stores, so half of the outlets surveyed were photospecialty stores. The results were then weighted by film sales by prefecture because actual sales data by store are not publicly available.

6.398 According to **Japan**, historically, single-brand distribution did not stop foreign market share of colour film from doubling from 1970 to 1981 (from 10.1 to 20.0 percent), and foreign market share

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[855]According to Japan, in a survey of the 278 secondary wholesalers that carry Fuji brand film, 62.0 percent of the outlets representing 77.3 percent of the volume of film being sold carried at least one foreign brand of film.

[856]The United States notes that a review of the survey forms provided by Japan in response to the US request showed that 2,061 stores were surveyed, not 1,966 stores as claimed by Japan. Furthermore, stores were surveyed in nine different prefectures, not six cities is claimed by Japan. Japan claimed that the random sample included 600 photospecialty stores and 114 supermarkets, but on examination the United States found that the random sample instead included 609 stores of at least 10 different outlet types. Finally, the statement that "the number of samples was determined in proportion to its sales share in the film market" was found to be inaccurate. For example, 26 percent of film sold in Japan is sold in stores in the supermarket-department store category; however, only 10 percent of the outlets in the Fuji survey were of that type. Convenience stores sell approximately 8 percent of the film in Japan, but 19 percent of the stores surveyed by Fuji were convenience stores, Survey on Film Retail Outlets, 1997, Japan Ex. C-22.

[857]According to the United States, fewer than one third of the survey's 2,061 outlets were randomly surveyed. Thus, Fuji's "random sample" was drawn in a manner which would systematically bias upward the reported availability of Kodak film.

[858]In Japan's view, the United States appears to confuse the exhaustive survey of the wholesalers' customers with the sampling done for the retail availability survey. Japan responds to US allegations about the sampling techniques of the retail availability survey in Japan Ex. F-7.

of black and white film from surging more than six-fold from 1970 to 1985 (from 6.6 to 41.4 percent). At present, single-brand distribution has not prevented foreign consumer film from extensive penetration of distribution channels. Accordingly, 62 percent of the customers buying from single-brand wholesalers of Fuji brand film, representing 77 percent of sales volume, already carry Kodak brand film, obtained from other channels. Furthermore, Japan emphasizes that there are no governmental or legal barriers to domestic manufacturers' primary wholesalers carrying competing brands if they thought it to be in their business interest to do so. Japan concludes that the government did not create the market structure, and the market structure has not limited opportunities for foreign consumer photographic products.

6.399 Japan contests the US allegation that cutting prices "could bring automatic scrutiny". Japan contends that, while the United States underscores Kodak's efforts to cut prices, it does not identify a single instance of Japanese Government intervention to discourage Kodak from offering low prices. The only scrutiny of prices was and remains scrutiny by the JFTC of parallel and simultaneous price increases by all manufacturers, domestic and foreign, in the Japanese market.

(iii) Vertically integrated distribution system

6.400 According to the **United States**, the Japanese Government and Japanese analysts have frequently acknowledged that manufacturer-dominated distribution *keiretsu* operate to the advantage of the dominant manufacturers and limit competitors' access, including access of foreign firms. The JFTC's 1992 study of highly oligopolistic industries concluded that manufacturer-dominated distribution systems "may serve a means for competitive obstructionist acts of exclusionary behaviour".[859] A 1989 study by the Institute for Distribution Research observed that "once keiretsu-ka has been established, it can give the impression of [a distribution system that is] inflexible and closed. Many foreign firms, especially, have seen it as a problem with the distribution system in general".[860] The Economic Planning Agency concluded in a 1989 study that Japan's distribution system with keiretsu-nized channels was "hindering the import expansion" and "if the foreign businesses contract their own marketing channels, initial cost for participating in our nation's market will be excessive".[861] The United States quotes a former member of MITI's Industrial Structure Council who commented that "policies … protecting small distributors … are competition controlling policies [which] maintain the distribution system which is closed to foreigners".[862]

6.401 **Japan** responds that the United States struggles to develop a logical link between MITI distribution policies and incentives to vertically integrate for a simple reason: the documents themselves do not talk directly about any intent to encourage vertical integration. There are no statements - either by MITI or by the various advisory councils - directly calling for vertical integration. To the contrary, to the extent there is any discussion of vertical integration at all, one finds in the various advisory council reports ambivalence at best and often hostility towards excessive vertical integration. Japan calls attention

[859]The study observed film that "Fuji Film has contracts with seven stores; four of the *tokuyakutens* are essential and operate on a national scale". JFTC Economic Research Survey Council Report, The Competitive Situation in Highly Oligopolistic Industries, August 1992, US Ex. 92-4, p. 28.

[860]Distribution Problem Research Council, Report on the Seventh Distribution Problem Research Committee Meeting, 1989, US Ex-63.

[861]"Distribution keiretsu-nization achieves channel control and organizes the distribution route by creating a long-term and fixed trade relationship with the distributor in order for the manufacturer to develop the marketing strategy effectively.…[I]n a keiretsu-nized channel, these are cases in which imported products are difficult to handle due to fragmentation of the chain stores, etc., and this means that existing marketing channels cannot be used by the foreign businesses. Economic Planning Agency, Planning Bureau, Research Related to Imports and Prices, 1989 Report, p. 8, US Ex 89-1.

[862]Miyashita Masafusa, 4. Problems in the Wholesale Industry and Direction for Reinforcing Functions, Henkakuki no Ryutsu (Distribution in Transition: Strategic Challenges for a New Era). Edited by Yoshihiro Tajima, 22 November 1991 pp. 69-80, US Ex. 72.

to the Sixth Interim Report in 1968, which continues to see vertical integration as a problem. The report notes the importance of maintaining a balance of power throughout the distribution chain:

> "In addition, it is desirable that situations in which one party in distribution activity is subordinate to the others, and its development hindered, should be eliminated as much as possible, and that commercial activity should be conducted on the basis of fair negotiations between the parties. Great importance should be attached to the fact that, if such a balance of power is realized, even if more powerful enterprises and organizations emerge at the production distribution or consumption stage, other stages will act to counter [such counter influences] and will fulfill the function of preventing harmful effects".[863]

In Japan's view, recognizing the trend toward vertical integration, the report discusses both its advantages and disadvantages.

(iv) Alternative distribution policies

6.402 The **United States** notes that Kodak attempted to find a route to market around the closed wholesale distribution channels, but with only limited results. Kodak has aggressively sought to expand *film* sales through the photofinishing laboratory channel, but is only able to sell about one-quarter of its film through this channel. Moreover, Kodak faces constraints in further expanding its sales of *paper* to laboratories and distribution of film through laboratories because many laboratories have exclusive relationships with Japanese manufacturers.[864]

6.403 **Japan** responds that Kodak has a network of affiliated laboratories just like the domestic manufacturers. Moreover, approximately 60 percent of total paper sales in Japan are to minilaboratories, which exist completely outside the "captive market" complained about by the United States.[865] Japan also notes, quoting an industry report,[866] that affiliations between manufacturing and photofinishing laboratories are common around the world.

6.404 According to the **United States**, Kodak has sought to compete on the basis of price and product innovation seeking to both gain access to the primary wholesale channels and establish alternative routes to the market.[867] However, there was a negative correlation between Kodak's wholesale price reductions and its share of domestic sales, which declined slightly during the same period. Furthermore, Kodak introduced a variety of innovative products with no competitive Japanese counterparts and undertook aggressive marketing campaigns.[868] Contrary to Japan's argument that Fuji and Konica spent 18 times the amount of foreign brands on advertising,[869] the United States point out that the *Economist* estimates that Kodak's advertising expenditures in Japan were triple those of the Japanese manufacturers combined during the 1980s, the period cited by Japan.[870]

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[863]Sixth Interim Report, p. 10-11, U.S. Ex. 68-8.

[864]Affidavits of Sumi Hiromichi, US Ex 96-10 and William Jack, US Ex. 97-2.

[865]See also sub-section V.A.3.(e) on "The market for paper" above, in particular para. 5.67.

[866]1993-1994 International Photo Processing Industry Report, p. 7-2, Japan Ex. B-54.

[867]According to the United States, Kodak lowered prices by 56 percent during the period of 1986-1995, further widening the already sizeable gap between its wholesale prices and those of the Japanese manufacturers.

[868]The US states that the impact of advertising is typically evaluated not only by money spent, but by the extent to which brand recognition is increased. Kodak has focused on advertising campaigns that would most increase its brand recognition.

[869]Yuryoku Kigyo no Kokoku-Senden-Hi (Advertising Expenses of Major Companies), Nikkei Kokoku Kenkyusho, December 1974 - September 1994, Japan Ex. A-7.

[870]The Revenge of Big Yellow, Economist, 10 November 1990, p. 2.

6.405 **Japan** notes that Kodak has been telling retailers that it would like Kodak film to have exactly the same price as Fuji brand film.[871] Japan also notes that during most of the late 1980s, Kodak was simply unwilling to compete based on price. This empirical reality can be confirmed by statements by Kodak management. Kodak officials have made repeated public statements over the past decade to the effect that Kodak had no intention of attempting to gain market share in Japan through underselling domestic brands. In 1986, as the yen was appreciating rapidly, then Kodak Chairman Kay Whitmore made clear that Kodak would not take advantage of this exchange rate shift to undersell domestic brands:

> "The President ruled out the possibility of the company passing on exchange gains from the yen's appreciation against the US dollar to Japanese consumers in the form of lower prices. He said Kodak is not a price leader in Japan and had no intention of lowering its prices to win in competition with its Japanese rivals".[872]

6.406 The **United States** also submits that Kodak has invested heavily in Japan, establishing Kodak Japan in 1977 - less than a year after photographic materials manufacturers were permitted to own 100 percent of a new enterprise - to provide technical and marketing services. Kodak as well as Agfa also have repeatedly sought to reestablish ties to the four primary photospecialty wholesalers without success.[873]

6.407 **Japan** responds that the real story of the liberalization of investment in the Japanese film industry is that of Kodak missing opportunities to expand its presence in the Japanese market. As a result of Japan's capital liberalization policies, Kodak had many opportunities to invest in Japan. However, with the exception of a small liaison office established in 1977, Kodak made no effort to establish a presence in Japan until 1986. At this time, 15 years after the onset of capital liberalization, Kodak announced that it would expand its presence in Japan through a joint venture with Nagase to serve the Japanese photographic marketplace directly. Thus, the timing of capital liberalization for photographic materials sector thus had no impact on Kodak's investment plans during the 1970' s because Kodak had no investment plans during this period.

(h) Change in distribution policies

6.408 With respect to the US allegation that MITI's distribution policies established less favourable competitive conditions for imported film and paper, Japan responds that what matters is whether competitive conditions *today* are less favourable than those *at the time of the relevant tariff concession*.

6.409 Japan notes that even assuming that MITI's alleged distribution policies or its effects continue to the present day, there has been no material adverse change in the Japanese market structure for film or paper since 1967, and no adverse change since 1979 or 1994. The trend toward single-brand distribution of film began far in advance of 1967, and affiliations between film manufacturers and photofinishing laboratories were already common by then as well. The alleged measures that occurred after 1967 such as the 1970 Guidelines were, according to the United States' own argument, merely continuations of pre-existing policy. Japan further points out that in its discussion of the Tokyo Round claims, the US makes only allegations about the "promotion countermeasures" and the Large Stores Law, but the US does not even make allegations about "distribution countermeasures" with regard to the Tokyo Round. Japan concludes that without any material adverse change in government policy, there can be no upsetting of the competitive position and hence no nullification or impairment.

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[871]See sub-section V.A.2. on "The development of the Japanese film market" above, in particular para. 5.31.

[872]Kodak Intends to Establish Stronghold in Japan: Pres. Whitmore, Jiji Press Ticker Service, 26 August 1986, Japan Ex. A-21.

[873]WTO GATT Affidavit, Albert L. Silg, Former President, Kodak Japan Ltd., 9 January 1997, and WTO GATT Affidavit, William Jack, Manager of New Business Development, Consumer Imaging, Eastman Kodak Company, 13 February 1997, US Ex. 97-1 and US Ex. 97-2.

(i) 1990 Guidelines

6.410 In Japan's view, to the extent MITI's distribution policies have changed since 1967 or 1979, the change has been favourable for the competitive position of imports. Specifically, MITI's 1990 Guidelines, which remain in effect today, are explicitly committed to encouraging changes in distribution practices to render the Japanese market more accessible to imports. According to Japan, the United States as part of its deregulation proposals recently urged Japanese industry to adhere to those guidelines.[874] Since 1994, the United States has not identified or even alleged any change at all in MITI's distribution policies. In light of these facts, Japan concludes that the distribution policies in effect today do not establish conditions of competition less favourable for imports than those established by the distribution policies of 1967, 1979, or 1994.

6.411 Japan points out that the 1990 Guidelines addressed exactly the same kinds of "irrational" business practices as those targeted by the 1970 Guidelines, e.g., rebates, returns and dispatched employees. However, for the 1990 Guidelines, encouragement of imports was the guiding purpose for targeting these practices, given that they had their origin in the US - Japan Structural Impediments Initiative ("SII")[875] at the direct request of the United States to render the Japanese market more accessible to imports. In 1996, the US requested Japan to ensure adherence of the its business community to these guidelines.[876]

(ii) Business Reform Law

6.412 The **United States** submits that when the *Uruguay Round* ended, the exclusionary distribution system that Japan had orchestrated after the Kennedy Round, together with the Large Stores Law and the promotion countermeasures, were completely embedded in the Japanese market and were continuing successfully to impede market access for imported products like photographic film and paper. Nevertheless, Japan enacted yet another measure to ensure that any tariff concessions negotiated during the Uruguay Round would be offset, as had those of the Tokyo and Kennedy rounds.

6.413 According to the United States, in 1995, the Japanese Diet enacted the Special Measures Law to Promote Business Reform for Specified Industrialists (Business Reform Law).[877] The law is intended to facilitate "reforms" by businesses in MITI-designated industries, which are being affected by the diversification and structural changes in the domestic and overseas economic environment.[878] The Business Reform Law contains a focus on *domestic* production activities[879] in relation to "new systems concerning the distribution of products".[880] The law authorizes a broad range of assistance to businesses that are part of a designated industry, including: (i) preferential financing; (ii) tax incentives; (iii) domestic and foreign business intelligence; and (iv) potential exemptions from the Antimonopoly

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[874]Japan notes again that this US request to encourage compliance with the 1990 Guidelines occurred after the US panel request in this case.

[875]"As to trade practices concerning distribution, an improved environment will be sought from the standpoint of promoting competition and securing market openness". Final Report of the Japan - US Structural Impediments Initiative, Actions on Government of Japan Side, 28 June 1990, p. III-1, Japan Ex B-30.

[876]"Monitor and report on adherence by the Japanese business community to the MITI 1990 Guidelines on Business Practices in order to promote a free, transparent, and competitive distribution system". Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Administrative Reform, and Competition Policy in Japan, 15 November 1996, p. 7, Japan Ex B-23.

[877]Special Measures Law to Promote Business Reform for Specified Industrialists, Law No. 61, 1995 [Jigyo Kakushin No Enkatsuka Nikansuru Rinji Sochi Ho] (Business Reform Law), US Ex. 95-1.

[878]MITI Industrial Structure Division, Commentary on the Business Reform Law, Article I of Business Reform Law, US Ex. 95-4.

[879]Ibid.

[880]Ibid., p. 13, US Ex. 95-4.

Law.[881] To date, MITI has designated 165 industries as eligible for assistance under the Law, among them "Manufacturers of Cameras and Accessories"[882] and "Retail Business of Cameras and Photosensitive Materials".[883] The US' current understanding is that MITI has neither received nor approved a business reform proposal related to the photographic film and paper industry.

6.414 In view of the broad grant of authority represented in the Business Reform Law, the statements by MITI officials concerning their intended application of the law, and Japan's actions over the last 30 years in restricting import access into this sector, the United States has serious concerns that its zero-tariff bindings, which represent the culmination of negotiations over three multilateral trade rounds, are at risk. In the particular context of government-business relations in Japan, the enactment of the Business Reform Law, and the designation of this sector as one eligible for assistance, have already sent a signal that the Japanese Government is prepared to continue its support of this sector. The United States does not allege at this time that the Business Reform Law has already nullified or impaired tariff benefits that the United States reasonably expected in connection with Japan's Uruguay Round tariff concessions on photographic film and paper. But the clear potential exists for this law to be used to reinforce or supplement the other measures of protection that Japan has implemented in this sector.

6.415 **Japan** responds that the US description of the Business Innovation Law (the "Business Reform Law" as referred to by the United States) is misleading. The law's fair treatment of domestic and foreign enterprises and products is evident not only from the content of the law, but also from the fact that several foreign-affiliated companies have received benefits under the law. Japan notes that the law was never applied to the photosensitive materials retailing sector (the only eligible sector under the law which related to film and paper) and as a result of a regular revision of the coverage of the eligible sectors, even that sector is no longer an eligible sector. Moreover, Japan emphasizes that the United States specifically refrained from making any legal claims regarding this law.

4. RESTRICTIONS ON LARGE RETAIL STORES

(a) General overview of the allegations

6.416 The **United States** claims that the suppression of large stores under the Large Stores Law affects the distribution of foreign film in Japan in two respects: First, the restriction of large stores indirectly supports manufacturer domination of oligopolistic distribution structures. This structure depends on manufacturer dominance of wholesalers, and wholesaler dominance over retailers. The United States argues that retailers with greater purchasing power and business sophistication could effectively play the various wholesalers and manufacturers off of each other to gain more favourable terms, and to resist attempts to hold the retailers under the control of a single manufacturer-wholesaler chain. Second, the United States asserts that large stores provide an alternative channel to market for foreign manufacturers excluded from the wholesale distribution system. With a sufficiently developed network of large stores, a manufacturer could reach a large portion of the Japanese market with a limited number of accounts.[884] Consequently, the United States claims that Japan upset the competitive relationship between imported and domestic photographic film and paper by inhibiting the development of a viable alternative channel for the distribution and sale of imported film and paper.

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[881]The United States explains that in order to receive assistance, a business in a designated industry must submit a business reform plan to the competent ministry (e.g., MITI) which must approve the plan. Assistance is available for retooling, restructuring, expanding or contracting operations, or making additional capital investment at greatly reduced costs.

[882]Designation number 123, MITI Ministerial Order No. 31, 1995.

[883]Designation number 164. MITI Ministerial Order No. 31, 1995. The list of 165 industries is provided for under Article 2 Clause 1 of the Business Reform Law.

[884]E.g., Agfa sells about half of its film in Japan to a single store chain, Daiei, Japan's largest supermarket.

6.417 With respect to the *Kennedy Round*, the United States submits that at the same time when Japan closed off the primary Japanese distribution channels as the traditional routes of distribution to imported photographic film and paper, it began taking steps to control the growth of large stores. According to the United States, between 1968 and 1971, MITI limited the growing number and commercial viability of large stores by issuing administrative guidance with a view to:

(i) expanding and strengthening the application of the existing Department Store Law to types of stores not within the law's legislated scope;
(ii) imposing prior notification requirements;
(iii) establishing adjustment procedures to reduce the size of proposed or expanding stores; and
(iv) limiting certain retailer activities such as advertising, bargain sales and pricing, and hours of operation.

6.418 In 1973, the Diet approved the Large Stores Law which became effective on 1 March 1974.[885] Under the law as it was first enacted, builders and retailers of stores larger than 1,500 square meters were required to notify MITI prior to the completion of construction or the opening of a large store. If MITI determined that the store risked causing a significant impact on local small and medium-sized retailers, it could subsequently adjust:

(i) the size of the store;
(ii) the opening date;
(iii) the number of holidays; or
(iv) the hours of operation.

6.419 The United States alleges that the enactment of the Large Stores Law resulted in fewer large retail stores, stores of smaller size, and substantial delays in large store openings or expansions.[886] This in turn resulted in significant limitations on the opportunity for imported products to penetrate the Japanese market through large stores. According to the United States, large stores were extremely valuable to foreign film and paper manufacturers because large stores:

(i) have the potential to serve as an alternate route to distribute imported film;
(ii) have more shelf space to carry secondary and tertiary brands, including imports;
(iii) typically purchase directly from the manufacturer, not from primary wholesalers; and large stores have the capacity to act as secondary wholesalers.

6.420 Therefore, the United States claims that by reducing the aggregate size and efficacy of large stores, Japan upset the competitive relationship between imported and domestic products and, in conjunction with the other countermeasures, effectively neutralized any beneficial impact that Japan's Kennedy Round tariff concessions had on US exports of film and paper products to Japan.

[885]According to the United States, the Diet acted upon advice by the Distribution Subcommittee's Tenth Interim Report which recommended replacing the Department Store Law with a new law that would apply to all stores of a specified size, regardless of store type. Industrial Structure Council, Distribution Committee, Retail Business Under Distribution Reforms, The Direction of Revising the Department Store Law (Tenth Interim Report), November 1972, US Ex. 72-3.

[886]Frederick Nagai: Affidavit, pp. 2-4, US Ex. 97-8. The MITI Vision for the 1990's stated that under the Large Stores Law, "there have been … instances in which the adjustment process has been needlessly prolonged". After the Implementation of the "Large Store Law" Consistent Results from Time Restrictions, Camera Times, 11 May 1976, p. 5, US Ex. 76-3. After the Large Stores Law was enacted in 1974, the number of applications for "large stores" declined steadily over the five-year period 1974 to 1978 (with the exception of a temporary increase in 1977) to well below the 1974 level.

6.421 With regard to the *Tokyo Round*, the United States submits that, on 11 May 1979, exactly one month before the formal end of the negotiating round, Japan implemented an amendment to the Large Stores Law[887] and MITI issued several directives. These amendments:

(i) dramatically expanded the scope of the Large Stores Law which previously had covered stores of 1,500 square meters or more by extending it to cover stores as small as 500 square meters;
(ii) delegated to the prefectural governors responsibility for regulating large stores between 500 and 1,500 square meters; and
(iii) gave small and medium businesses a more significant role in the formal review process by requiring that builder notifications be submitted 13 months prior to the proposed building completion date during which time the builder, proposed store operator and local businesses would engage in an "informal adjustment process" to negotiate changes in the notification.[888]

6.422 The United States further explains that in January 1982, MITI gave guidance to prefectural governors discouraging acceptance of any notifications in areas having a "high level" of stores larger than 1,500 square meters or defined as "small in scale".[889] At the same time, MITI introduced a requirement that builders provide a "prior notification explanation" to the affected community before attempting to submit a notification to MITI.

6.423 According to the United States, the post-Tokyo Round changes to the Large Stores Law had two primary effects. First, the period of time between notification and the completion of the adjustment process increased significantly. Second, small and medium retailers took full advantage of the "pre-notification explanation" and "informal adjustment" processes to extract adjustments that would not be realized through the formal adjustment process.[890] The United States claims that, as a result, the number of large store notifications declined sharply notwithstanding that the amended law regulated stores of much smaller size than the law as originally enacted. This in turn upset the conditions of competition between imported and domestic photographic film and paper. The United States stresses that MITI's strengthening of the Large Stores Law was so effective that retailers attempted to circumvent it by merging with other retailers to avoid the inevitable difficulties and delays involved in trying to open a new large store or expand an existing large store. In July 1981, the JFTC issued special Retail Merger Guidelines that applied a highly restrictive market definition which had the effect of impeding retailers from using mergers to avoid the Large Stores Law.[891]

6.424 In the US view, the regulations on large stores significantly limited the opportunity for imported products to penetrate the Japanese market through large stores. This was accomplished by further

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[887]The United States notes that the amendment to the Large Stores Law was passed in November 1978, but did not become effective until May 1979. The United States and Japan concluded their substantive Tokyo Round negotiations on many products, including film, in the summer of 1978. Letter to Walter Fallon, President of Kodak, from Deputy Trade Representative Alan Wolff of 30 August 1978, US Ex. 78-6.

[888]MITI Directive Nos. 365 and 366, 11 May 1979, US Ex. 79-2 and 79-4. The prior adjustment step increased the restrictiveness of the adjustment process by providing an unofficial forum not attended by any Large Scale Store Council officials in which local retailers could levy demands upon large scale stores. Because officials at the formal adjustment stage required consensus from prior adjustment in order to approve an adjustment plan, this process resulted in agreements and memorandums of understanding that severely limited the competitiveness of large scale stores. Agreements reached pursuant to the informal adjustment process were presented in the formal adjustment process and were used in developing the Large Store Council's recommendations to MITI for the reduction in store size, delay in opening date, and changes in closing times and number of holidays.

[889]MITI, Industrial Policy Bureau, Immediate Measures Regarding Notification to Establish Large Scale Retail Stores, Policy Bureau No. 36, 30 January 1982, US Ex. 82-2.

[890]E.g., price restraints and promises not to enter into certain product lines or services.

[891]Retail Merger Guideline (extract): Administrative Procedure Standards for Examining Mergers for Transfers of Business in the Retailing Sector, 24 July 1981, US Ex. 81-6.

reducing the aggregate size and efficacy of large stores as an alternative channel for the distribution and sale of imported film. In the absence of the government's regulation of large stores, imported film would have had substantially greater opportunities for distribution and sale in the Japanese market following the Tokyo Round.[892] The United States claims that the Japanese Government imposed these measures to neutralize the ability of foreign producers to capitalize on the market opportunities that they legitimately anticipated would emerge following the tariff concessions that Japan made during the Tokyo Round and thus nullified and impaired the benefits of those concessions within the meaning of Article XXIII:1(b).

6.425 As to the *Uruguay Round* negotiations, according to the United States, at that point Japan's trading partners knew that the Japanese market was difficult to penetrate, but the way in which the Large Stores Law worked in concert with the distribution countermeasures and promotion countermeasures to systematically offset tariff concessions for photographic film and paper was not known. The United States claims that this web of liberalization countermeasures has continued to operate to nullify or impair US benefits, inter alia, due to the sharp diminution of alternative channels to primary wholesale channels of distribution.

(b) Effect of the Large Stores Law on imported products

6.426 **Japan** argues that in a non-violation case the complaining party must show how the "application" of a measure to specific products nullifies or impairs benefits with respect to those products. Since the benefit consists of legitimate expectations concerning the competitive opportunities for imported products, it follows that for a measure to nullify or impair that benefit, it must "apply" to the products in question.[893]

6.427 Japan notes that in the present case the United States bears the burden to show specifically how the application of the Large Stores Law to the specific products at issue, i.e., black and white film and paper, and colour film and paper, nullifies or impairs some benefit. Japan maintains that the law and its implementing regulations neither apply directly to film or paper, nor to any product generally.

6.428 Further, Japan submits that the law does not distinguish between domestic and imported film and thus there is no explicit disadvantage imposed on imports. Furthermore, the regulation of large stores under this law also does not impose any inherent disadvantage on imports and there is nothing intrinsic in the nature of imports that renders them less capable of competing in a marketplace where a diversity of retailing types is promoted.[894] Accordingly, the law cannot be upsetting the competitive position of imported photographic film and paper.

6.429 Moreover, Japan points out that the Large Stores Law does not vest the government with the authority to recommend or order any store to carry certain products or products of a certain origin.[895] In addition, the regulations imposed by the law on large stores do not depend on the origin of products carried by large stores or small retailers within their vicinity. Thus, the law does not create any artificial incentive for retailers to buy domestic film, nor does it discourage retailers from buying imported film. For Japan, there is thus no reason to believe that larger retail space inherently works to the advantage

[892]The United States notes that from 1990 to 1992, Japan made a number of changes to the law, purportedly to reduce its adverse impact on the operation of large stores. As the 1995 JFTC Study documents, however, these amendments failed to alleviate the major restrictive impact of the law.

[893]Japan recalls that all previous findings concerning non-violation complaints have addressed only two specific type of measures: product-specific subsidies and tariffs, which have been clearly "applied" to the products in question.

[894]See *United States - Automobiles*, GATT Doc. DS31/R, para. 5.14.

[895]Japan claims that the only distinction the law draws with respect to products is to apply more liberal rules with respect to retail stores that carry imported products.

of imported film products, because retailers choose products to maximize profit, and the size of retail space does not change the profitability of film products to the advantage of domestic brands. Accordingly, the law is thus incapable of altering even indirectly the competitive conditions between domestic and imported products.[896] Japan concludes that it is not possible for this law to frustrate any reasonable US anticipation concerning specific products at the time of any of the relevant tariff concessions.

6.430 The **United States** points out that it has been established under GATT jurisprudence that investment measures can "affect" trade in goods within the meaning of Article III, and therefore are not exempted from being the subject of dispute settlement. The panel on *Canada - Administration of the Foreign Investment Review Act ("Canada - FIRA")* found that provisions in Canada's investment law had a direct impact on trade in goods.[897]

> "… the Panel could not subscribe to the assumption that the drafters of Article III had intended the term "requirements" to exclude requirements connected with the regulation of international investments and did not find anything in the negotiating history, the wording, the objectives and the subsequent application of Article III which would support such an interpretation".

The United States emphasizes that the *Canada - FIRA* panel made clear that it was examining the challenged practices under the FIRA "solely in the light of Canada's "trade obligations" under the General Agreement".[898]

6.431 **Japan** responds that the *Canada - FIRA* panel's holding was quite narrow and provides an important benchmark for a comparison with the broad measures at issue in this dispute. Specifically, Japan notes that the panel's consideration was limited to investment measures that were conditional upon the purchase and export of origin-specific products. Thus, the Canadian measures were not broad, facially neutral requirements like the Large Stores Law, but rather origin-specific requirements pertaining to products which happened to manifest themselves as conditions to more broad investment requirements.

6.432 The **United States** further submits that previous panels found that a measure may be inconsistent with Article III:4 if it affects the distribution of products, regardless of whether the measure "directly governs" treatment of products, or rather regulates service providers and does not directly regulate products.[899] In the view of the United States, the standard certainly should be no higher under Article XXIII:1(b), where the issue is whether there is nullification or impairment of benefits "as the result of … the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement".

6.433 **Japan** recalls that in the context of Article III, the United States itself has argued that "governments make regulatory distinctions for many reasons that have nothing to do with trade protection" on specific products. Japan mentions that in its submission in *Japan - Taxes on Alcoholic Beverages* case, the United States commented on broad based laws that may affect the distribution of foreign origin goods, and argued that these types of laws should not violate Article III simply because

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[896]Large Scale Retail Store Law, Article 7, Japan Ex. C-1. (Deliberation Procedures, Section I, Japan Ex. C-4). Japan notes that the United States has not challenged this characterization and rather seems to claim that large stores favour foreign products while smaller stores carry more domestic film because of the allegedly exclusive distribution network for film.

[897]Adopted on 7 February 1984, BISD 30S/140, 161, para 5.12.

[898]Ibid. p. 157, para. 5.1.

[899]See also Panel Report on *Canada - Certain Measures Concerning Periodicals*, adopted 30 July 1997, WT/DS31/R, p.2, paras. 5.13-5.19. (Panel found that measure could be covered by Article III whether or not GATS could also apply to that measure).

of a disproportionate impact. In particular, the United States hypothetically examined Sunday retail closing laws, which are very similar to the Large Stores Law at issue here:[900]

> "Many jurisdictions have adopted Sunday closing laws, which disproportionately affect supermarkets and other large retail businesses which distribute goods of foreign origin. These stores sell exactly the same products on Sunday and on the other days of the week. We doubt that such measures should be deemed to be violations of Article III simply because of the disproportionate impact of Sunday closing laws on imports".

6.434 Japan also recalls that in the context of Article XXIII:1(b) the United States argued before the panel on *EEC - Oilseeds*: "The United States did not consider that any change in governmental policies, even if it has harmful trade effects, constitutes non-violation nullification or impairment".[901] The United States then went on to give the specific example that a change in income tax rates would fall outside Article XXIII:1(b).[902] In Japan's view, the Large Stores Law is indistinguishable in terms of its nature from the example of a change in income tax rates cited by the United States. Even if people with higher income tend to purchase more imported products, the introduction of progressive income tax rates would not be actionable under Article XXIII:1(b), despite the greater impact on those who tend to buy more imported products. Japan contends that the Large Stores Law does not regulate any of the specific products at issue here, i.e., black and white or colour film and paper. Whereas GATT disputes have traditionally focused on how specific measures affect specific products, the law in question in this case does not draw distinctions with respect to film or paper, or even mention them. Accordingly, Japan concludes that the Large Stores Law cannot upset the competitive position of imported products within the meaning of Article XXIII:1(b).

6.435 Japan suggests that under the overbroad US theory of Article XXIII:1(b), virtually every form of government policy would become actionable as measures potentially relating to specific products. For example, all restrictions on investment would become actionable, because investment could relate to efforts to sell products. Japan believes that a clear nexus must exist between specific products and the challenged government measure, and that the US allegations concerning the Large Stores Law do not meet this test.

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[900]Panel Report on *Japan - Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8, 10 and 11/R, para. 4.40. Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8, 10 and 11/AB/R, p. 21.

[901]*EEC - Oilseeds*, BISD 37S/86, 117-118, para. 114.

[902]Ibid.

(c) Causal connection

6.436 The **United States** recalls that recent Japanese Government studies document that large stores are more likely to carry imports than small stores.[903] The reasons for this greater "import friendliness" of large stores include their greater shelf space which allows them to offer a diversity of brands, and their economies of scale that make direct-to-retail sales efficient for foreign suppliers. The United States points out that numerous other studies by Japanese Government, industry, and academic experts also found the greater likelihood of large stores to carry imports.[904] The United States also claims to have submitted a methodologically rigorous survey demonstrating that large stores are more likely to carry foreign film. Specifically, according to that survey, foreign film was available in 40 percent of stores under 500 square meters, 49 percent of stores between 500 and 2,999 square meters, and 63 percent of stores 3,000 square meters and greater. Moreover, the United States' analysis of the retail film survey conducted for this case and submitted by the Japanese Government reveals that stores subject to the Large Stores Law were significantly more likely to carry foreign film than small stores (those under the Large Stores Law floorspace minimums).[905]

6.437 In **Japan**'s view, the United States has not proved that restrictions on large stores impede imports of film or paper. As to the US argument that large stores are especially accessible to imports because of economies of scale in their purchasing activities, Japan responds that the presence of economies of scale is not dependent upon retail floor space.

6.438 With regard to the US evidence showing a correlation between store size and propensity to sell imported film, Japan responds that this evidence fails to take into account the type of retail outlet and the relative film sales volume of the outlets surveyed. In Japan's view, proper analysis shows that the availability of imported film has no correlation with the store size, in particular because of the small size of film. Japan presented the results of a survey of approximately 2,000 stores, comparing

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[903]The United States cites the following Japanese Government studies in support of these points:

(i) A 1989 study by the Economic Planning Agency found that relaxing the restrictions on large stores would promote competition and "facilitate the promotion of imports;" Economic Planning Agency, Planning Bureau Research related to Impact Prices, 1989, p. 23, 45, US Ex. 89-1.

(ii) A June 1995 study by the JFTC's Government Regulation and Competition Policy Research Council found that Japan's regulation of large stores interfered with the expansion of imports of products; JFTC Concerning the Reevaluation of Government Regulations in the Distribution Sector, June 1995, US Ex. 95-11.

(iii) Another 1995 study by the JFTC found that the restrictions on large stores hindered price competition and imports; JFTC, Research on Domestic and Imported Products Sold at Lower Price, June 1995, pp. 29-30, US Ex. 95-10.

(iv) A December 1995 study by the Small and Medium Enterprise Agency found that stores with higher annual sales were more likely to carry imports. MITI Medium and Small Industry Agency, Medium and Small Retail Data Book: Current Situation and Issue in the Medium and Small Retail Industry, 1 December 1995, pp. 96, 98, US Ex. 95-19.

Japan responds that none of these studies makes any attempt to supply any statistical data in support of the contention that large stores generally are more likely to carry imported products than smaller ones.

[904]Examples cited by the United States include:

(i) In 1987, Japan's leading business association that includes all major manufacturing exporters, the Federation of Economic Organizations, issued a proposal for stimulating imports of manufactured goods into Japan. The proposal noted that "large-scale retailers are actively selling imported products and have plans to continue doing so, but on the other hand a variety of regulations make it difficult to carry out these plans [including the Large Stores Law]". Proposal On The Stimulation of Imports of Manufactured Goods Based On The Results of Case Studies of Individual Products, Japan Federation of Economic Organizations, 22 September 1987, US Ex. 60.

(ii) In 1982, a JFTC study concluded, "the relatively small size of the stores and limited retail floor space … imposes a limit on how many different products they can carry". The study also found, "most department stores and major supermarkets have taken a positive stance toward introducing foreign brand name products". Kyoso Mondai Kenkyujo, Kosei Torihiki Joho, 17 May 1982, US Ex. 43.

[905]See sub-section V.B.2.(a) on "Import-friendliness of large stores" above, in particular para. 5.243.

the relative foreign film brand availability in stores covered and not covered by the Large Stores Law: The availability was essentially identical.[906]

6.439 The **United States** contends that the fact that film is a small product is irrelevant to the correlation between store size and imports. While a single roll of film might not take up much room, carrying several different types and speeds of film from several different manufacturers takes up considerable retail space. If a retailer carries a full line of one brand of film, to create competing displays for Kodak, Fuji, Konica, and Agfa would mean quadrupling the floor space dedicated to film. Accordingly, it is not the size of the product that matters, but the size of the display for the product in all its variations and all the competing brands that is the issue.[907] In most stores shelf space is a precious commodity, and each retailer must make choices about how many different types of products and different brands to carry. The United States concludes that limitations on floor space by the operation of government regulation very much can affect the choices that retailers make about the number of brands and diversity of products they will carry.[908]

6.440 **Japan** responds that retailers do not necessarily display a full-line of one brand. They may sell a partial lines of several different brands based upon their own business decisions as to which products and which brands will maximize profit. Thus, even small convenience stores may carry multiple brands, while large stores do not necessarily have a large area devoted to film.

6.441 With respect to Japan's contention that instead of the correlation between a store's size and its likelihood of carrying foreign film, a better correlation is between a store's volume of film sales and its likelihood of carrying foreign film, the **United States** responds that these two findings are not mutually exclusive if a store's volume of film sales correlates with its size. In the US view, a large store is also more likely to have a higher volume of film sales, and in both cases it is more likely to carry foreign film. The United States argues that in general larger stores have higher volume sales[909] and that Japan has not submitted credible data to show that this logical correlation does not apply in

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[906]Survey conducted by Nippon Research Centre Ltd. and Commissioned by Fujifilm during the Section 301 proceedings. Fujifilm's Rebuttal Regarding the Alleged "Distribution Bottleneck", 21 December 1995, Japan Ex. A-16.

[907]A full display of Kodak film would include, at a minimum, 100, 200, 400, and 1000 ASA colour film, in rolls of 12, 24, and 36 exposures, for slides and for prints, as well as black and white film and "multipacks" combining rolls of various speeds, and single-use cameras. In the colour film product line alone, Kodak offers the following items: Super Gold in 100, 200, 400 and 1600 - in single rolls (12, 24, 35, and 36 exposures), and in 2, 3, 4, or 5 roll packs; Royal Gold in 25, 100, and 400 - in single rolls (24 and 36 exposures), and 2, 3, or 5 roll packs; Ectochrome Dyna in 50, 100, 200 and 400 - in single rolls (24 and 36 exposures), and 5 and 20 packs; Chrome in 25, 64, and 200 in single rolls (24 and 36 exposures), and 3 and 10 packs; single use cameras in five different varieties including a new APS version.

[908]In a letter of December 1996 to MITI, Japan's largest photospecialty retailer, Yodobashi, makes clear that a downward revision of its floorspace plans for a new store affected the retailer's ability to market foreign film as it had planned. The letter protested the decision in the large-store review process to reduce the store's floorspace from the proposed 8,050 square meters to smaller than 6,500 square meters: "… if we reduce the store's floorspace, a situation can be anticipated in which our company's store-opening plan itself might become impossible to implement. Moreover, even if we tried to maintain the previously planned efficiency using the reduced floor area by changing the content of our store plan, we would have no other choice than to drastically change the plan so that, for example, the sales display of imported film … would have to be reduced". Letter Form Akikazu Fujizawa, President, Yodobashi Camera K.K. to Director General Tohoku Region Trade and Industry Bureau, MITI, Members of the Tohoku Committee and Large Retail Store Deliberation Council, RE: Report from Yodobashi Camera to MITI Concerning the Opening of Their New Retail Store in Sendai, 6 December 1996. US Ex. 102.

In response, **Japan** points out that in the letter, the President notes that shelf-space for imported film will have to be cut back, but also explains the real reason for this policy is the poor sales record of imported film, not its foreign origin. Moreover, according to Japan, the store in question, Yodobashi Camera, is actually selling imported film today.

[909]Data published by MITI show a direct correlation between store size and annual sales in Japan: e.g., less than 1 percent of the smallest stores (less than 33 square meters) have annual sales greater than 300 million yen, while percent of the largest store category (more than 218 square meters) have sales in excess of 300 million yen. MITI, Current Status and Challenges Facing Small and Medium-Sized Retailers, 1 December, 1995, p. 1, US Ex. 92.

the case of photographic film.[910] In fact, an analysis of the Japanese survey data submitted at the US request[911] reveals that stores subject to the Large Stores Law were significantly more likely to carry foreign film than small stores (those under the Large Stores Law floorspace minimums), and that the stores subject to the law also sold higher volumes of film.[912] The United States concludes that Japan has refuted neither the general studies nor the film-specific study showing a clear correlation between store size and likelihood to deal in imports. The United States maintains that the suppression of large stores in Japan is a suppression of sales opportunities for imports.[913]

6.442 **Japan** further argues that both of the surveys agree that a store selling a high volume of film, for example photospecialty stores and supermarket stores, are likely to carry multiple brands to meet their consumers' demand, while others like kiosks tend not to do so, as described in Section V.B.2(c) above. Japan further points out that it is clear that what a market survey shows is not the competitive relationship between products, but the results of market competition, which is generated from the complex interaction of various factors, among which the competitive relationship is no more than one factor. Thus, competitive relationship cannot be deduced from market survey results.

6.443 For Japan, the United States claims regarding the Large Stores Law do not have any logical relevance to photographic paper, since that is a producer, not a consumer product. First, photographic paper is not sold at retail, it is rather sold to photofinishing laboratories which are virtually never covered by the Large Stores Law. Second, the US argument about discouraging multiple brands is irrelevant in the context of photographic paper because no purchasers use multiple brands of paper at the same time. Thus, in Japan's view, the Large Stores Law does not affect the propensity of a photofinisher to choose domestic or foreign brands of photographic paper.

(d) Change in policies or continued restrictions of large stores

6.444 The **United States** argues that the concern that large stores would undermine the manufacturer-dominated distribution system is recurrent in surveys by Japanese Government: It is reflected in the 1969 survey of transaction terms in the photographic film sector;[914] in 1986, the Economic Planning Agency made the same connection;[915] in 1989, a Japanese survey drew the same connection between

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[910]The United States criticizes that Japan presents an unusable diagram, with an unreadable scale, based on indefensible methodology, from which no conclusion can be drawn.

[911]First Panel Meeting, Japan's Response to US Question 2.

[912]In the US view, as with any scientific study, credibility depends on submitting the entirety of one's data and analysis for scrutiny and verification by other experts. The United States in this case provided the entirety of its data to Japan, including each individual questionnaire response.

[913]The United States has performed another run of its data using store type as a proxy for sales volume. Specifically, the United States sorted its data on the assumption that: (I) kiosks, small convenience stores, pharmacies, and cleaners were likely to deal in small volumes of film; (ii) large convenience stores, convenience stores at tourist sites, and grocery stores were likely to deal in intermediate volumes of film; and (iii) photospecialty stores, supermarkets, and discount stores were likely to deal in the largest volumes of film. According to the United States, this data shows that the correlation between store size and imports holds even when controlling for sales volume, (i.e., these store types).

In response, referring to the category (iii) above, **Japan** argues that the two surveys themselves indicate no meaningful difference in the imported film availability at stores included in this category, regardless of whether the store size is above or below 500 square meters. The remaining stores - not major distribution channels of film - consist of convenience stores and kiosks for the most part, and show the lower availability of imported film. Stores selling a high volume of film, for example, photospecialty stores and supermarket stores, are likely to carry multiple brands to best meet consumers' demand, while other stores like kiosks tend not to do so.

[914]Institute of Distribution Research, Fact-finding Survey Report Pertaining to Transaction Terms: Actual conditions of Transaction Practices in the Wholesale Industry, March 1969, pp. 1-21, 287-319, US Ex. 15.

[915]"What are the factors behind such a large number of micro-sized retail stores in Japan? The following factors may be cited … (3) keiretsunization of distribution by oligopolistic manufacturers". Distribution and Business Practices of Imports, Edited by the Price Policy Department, Price Bureau, Economic Planning Agency, 28 March 1986, US Ex. 54. In addition, the United States presents an economic analysis from Japanese antitrust scholars that confirm the connection between restrictions on large stores and Japan's oligopolistic distribution system. These scholars explain that the Large Stores Law disrupted

the growth of large stores and a challenge to vertically integrated distribution.[916] In the US view, this demonstrates that concern about the market power of large stores and chain stores persists in all segments of the market.[917]

6.445 **Japan** responds that it was never the intention of the Japanese Government to protect the alleged oligopolistic, manufacturer dominated distribution structure in the Japanese film market. On its own terms, the Large Stores Law regulates large stores without regard to what relationship they and nearby small and medium-sized retailers have with any manufacturer or distributor. Japan points out that the Large Stores Law was designed to preserve a diversity of retailing outlets, a policy pursued by many national and local governments around the world. Accordingly, the law does not regulate convenience store chains, which are outside the alleged exclusive distribution network of domestic manufacturers, and which are competing with small retailers that may have a particular affiliation with domestic manufacturers. Japan further submits that the materials cited by the United States do not support the US claims; for example, the 1969 report simply notes the need for existing stores to streamline commercial practices to improve their efficiency.

6.446 Japan points out that, while the law and its 1978 amendments were passed after the 1967 tariff concessions, these changes represented an "outgrowth" of pre-existing policy, namely the Department Store Law of 1956. Japan emphasizes that the Large Stores Law is more liberal than the Department Store Law was in 1967, in particular, in light of its more liberal notification system and fewer regulations on store holidays and closing time.

6.447 Further, Japan asserts that the Large Stores Law today is more liberal than its operation in 1994. Thus, even if it were accepted that restrictions on large scale retail stores are unfavourable to imported products, the law is now more favourable to imports. Three sets of deregulation of the Large Stores Law during the early 1990s were completed by 1994, and there have been no significant changes since then. In particular, Japan explains why the law is currently more liberal than in 1979: The law does currently not make any adjustment for a closing time that is no later than 8:00 p.m., or for store holidays no fewer than 24 days; whereas in 1979, the corresponding figures were 6:00 p.m. and 48 days. Since 1994, the law has also been liberalized largely to exclude stores in the 500 square meters to 1,000 square meters range from the normal adjustment procedures under the law.[918] Japan further emphasizes that efforts by the Japanese Government to ensure that local governments more faithfully adhere to the national standards for administering this law make it more liberal.

6.448 Japan submits that in the alternative, if the changes in measures which occurred after the relevant tariff concessions are not currently in effect, but were nonetheless deemed relevant to a determination regarding the upsetting of the competitive position of imports, the 1978 amendments extending the reach of the law from stores with 1,500 square meters to stores with as few as 500 square meters could

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"pursuit of economies of scale" in the distribution sector, which contributed to inefficiency and a lack of competition in the distribution sector. This in turn "had provided a comfortable profit source for Japanese exporting firms" and had worked "to foreclose the access of foreign products into the Japanese market". The scholars added, "[a] distributor's dependence on a particular manufacturer would make distribution channels exclusive and raise entry barriers significantly". The Antimonopoly Laws and Policies of Japan, J. Iyori and A. Uesugi, Federal Legal Publications, Inc., 1994, p. 293, US Ex 94-1.

[916]In June 1989, the Economic Planning Agency (EPA) concluded that deregulation of restrictions on stores would: "not only serves to encourage horizontal competition among different types of businesses, but also encourages vertical competition through the exercise of buying power, thereby producing the results and effects of a relative lowering of commodity price levels and broadening the line of product offered through the promotion of develop-and-import schemes". EPA, Economic Theory of Deregulation, 10 June 1989, US Ex. 64.

[917]As a general matter, in the US view, there can be no doubt that large stores tend to have more market power than small stores. The United States submits that surveys and studies performed by and for the Japanese Government repeatedly make the connection between controlling large stores and protecting the oligopolistic distribution system.

[918]Japan argues that stores in this retail space range are in principle exempt from the Large Stores Law process and that only 2.9 percent of stores in this retail space range had to go through the law's full process.

be seen as a regulatory tightening. However, Japan argues that these changes were already part of the operating environment of the law by 1979. With respect to the US complaints about alleged regulatory tightening in the early 1980s, Japan responds that these allegations are legally irrelevant since those measures have since been repealed. The relevant comparison is between current competitive conditions and the competitive conditions, at the time of the relevant tariff concession, not competitive conditions that may have occurred along the way.

6.449 The **United States** responds that stores with a floor space of less than 500 square meters, e.g., convenience stores, are frequently subject to review and adjustment under the measures applied by local governments.[919] Japanese Government studies have found that these local regulations continue to be widespread and that they impose a significant burden on the opening of stores less than 500 square meters. Just as under the Large Stores Law, the local measures frequently require a builder or retailer to provide advance notice of its plans to establish or expand a new store, and to undertake adjustments with local competitors. In support of this position, the United States provides an agreement between a convenience store retailer and a local shopping center association in which the association made several demands of the retailer. In the end, the retailer felt compelled to enter into an agreement with the shopping center, which among other things limited the retailer's floorspace, mandated certain holidays and closing times, restricted the retailer's ability to "sell competing products at a significant discounted price," and required the retailer to advertise on behalf of its competitors.[920]

6.450 **Japan** responds, however, that in January 1992 the Government expressly abolished administrative guidance regarding prior explanation, and made this fact well known to all the prefectural and municipal governments, as well as all the MITI branches by Circulars. Since then, the government has made its best efforts to correct any local regulations which require or recommend prior explanations or prior adjustments, and consequently, no such local regulations exist.

6.451 Further, Japan points out that at the stage of the Council deliberation, it is neither MITI nor prefectural governments, but the Council itself that selects parties to present their views. The relevant circular requires that those parties include consumers and neutral persons of learning and experience, and that the choice ensure equitable representation. Further, according to Japan, the United States relies on several erroneous translations of the cited reports by the Japanese Government in support of its contention that the Council is strongly influenced by local retailers.

6.452 The **United States** rejects Japan's arguments that the Large Stores Law and related measures do not currently suppress the growth of large stores, and that the law has been liberalized significantly in recent years. In the US view, Japan does not appear to refute the fact that the law aggressively checked the growth of large stores in past years, but rather asserts that it liberalized the law in the early 1990s.

6.453 The United States maintains that the operation and application of the Large Stores Law does currently suppress the growth of large stores as well as that Japan has imposed restrictions on large stores for decades in the past. This suppression of large stores has supported the oligopolistic distribution system, and has limited an alternative channel for foreign products to reach the Japanese market. Without Japan's strong measures against large stores, in the US view, large stores might have brought sufficient bargaining power and competition into the Japanese distribution system to erode the exclusive vertical control over distribution exercised by Japanese manufacturers.

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[919]According to the United States, Japanese Government studies have found that local regulations continue to be widespread and impose a significant burden on the opening of stores less than 500 square meters.

[920]Arrangement Between A New Retail Store and the Local Shopping Center Association, 1996, US Ex. 93.

(e) Conclusions

6.454 The United States summarizes that it has documented conceptually, empirically, and anecdotally how the formal and informal adjustment processes continue to impose substantial burdens on the establishment and operation of large stores in Japan.

6.455 *Conceptually*, the United States explains that:

- Floor space reductions reduce store revenue, and therefore may force a retailer to operate at a size less than optimal for its profitability.[921]

6.456 *Empirically*, the United States argues that it has demonstrated that the formal and informal adjustment procedures continue to be applied aggressively:

(i) According to the United States, data submitted by Japan indicates that in 1992 to 1995, floorspace reductions were imposed in 22 to 27 percent of the cases. For these cases, the average amount of floor space reduction was 24 percent. Thus, even today, after the supposed liberalization, one-quarter of large stores face reductions of one-quarter of their proposed floor space. For the United States, this is a significant burden on large stores. Moreover, information submitted by Japan indicated that in 4 percent of store notifications, the formal adjustments imposed are so burdensome as to cause the store to cancel its plans to open.

(ii) Information submitted by Japan also documents that approximately one-quarter of large stores are forced to add holidays and shorten hours of operation.

(iii) The United States point out that these numbers greatly understate the extent of reductions, since, as the Japanese Government itself documents, in many cases stores undertake adjustments as a result of the informal adjustment process that takes place before a store submits formal notification. According to the United States, the Japanese Government documents that many stores are likely to prefer to make their adjustments through the informal process, since if they fail to reach consensus with their competitors, they may be subjected to an even greater adjustment in the formal process.

6.457 *Anecdotally*, the United States reported on several cases in which stores faced significant adjustments and restraints on their operations as a result of either the formal or informal adjustment process.[922]

6.458 **Japan** contends that the United States has failed to demonstrate how the Large Stores Law currently nullifies or impairs tariff concessions for consumer photographic film.

a. *Conceptually*, Japan points out that the United States has failed to explain why restrictions on large stores alter the competitive conditions relating to the specific product, i.e., consumer film, so as to disadvantage imports. Japan emphasizes that the law does not in any way regulate which products are carried by large stores, much less the origin of these products; similarly, the law does not regulate large stores based on which products they or the small retailers in their vicinity carry, much less the origin of the products they carry. Japan argues that retailers

[921]The United States submits recent evidence from a retailer describing the revenue loss for different levels of floor space reduction, as well as an industry journal report attributing declines in the profitability of Japan's largest retailer to reductions in its floor space and operations arising from the Large Stores Law.

[922]See, sub-section V.B.6.(a) on "Adjustments under formal procedures" above, in particular para. 5.330.

choose products to maximize profits, and that there is no reason to believe that restrictions on the size of retail space changes the relative profitability of film products to the advantage of domestic brands of film. Moreover, Japan explains that there is no reason to believe that small and large stores approach profit maximizing differently.

b. *Empirically*, Japan argues that the United States also has failed to demonstrate any causal connection between restrictions on the operations of large retail stores and the sale of imported consumer photographic film. For Japan, although the competitive relationship between products cannot be deducted from market survey results, the only verifiable survey relied upon by the United States failed to actually take account of either the type of retail outlet or the film sales volume of the outlets surveyed. Further, both of the surveys indicate that stores selling a high volume of film, for example, photospecialty stores, and supermarket stores, are likely to carry multiple brands to meet their consumers demand, while others like kiosks tend not to do so, as described in Section V.B.2(c). Thus, while the United States fails to meet its burden of demonstrating a causal connection, the evidence provided by Japan demonstrates a lack of causal connection.

5. PROMOTION "COUNTERMEASURES"

(a) General overview

6.459 According to **Japan**, when the Japanese economy entered the phase of mass production and consumption in the 1950s, premiums sales, including promotional lotteries, became increasingly popular. Prize money and merchandises grew very expensive. The society grew concerned about these promotional prizes which encourage speculative behaviour and could impede consumers' rational selection of goods. Concerned about the lack of adequate means to control misrepresentations, the public called for the introduction of effective control of misleading representation.

6.460 With respect to the *Kennedy Round*, the **United States** submits that the 1967 Cabinet Decision approved the use of countermeasures for "preventing foreign enterprises from disturbing order in our industries".[923] The Japanese Government recognized that, in general, the marketing and promotional abilities of Japanese firms were weaker and their costs were higher than those of foreign enterprises, and thus Japanese firms would be at a disadvantage in relation to foreign firms. To address these problems, the JFTC imposed new restrictions on the use of premiums. The United States claims that the JFTC's actions in this regard upset the conditions of competition between imported and domestic products after the Kennedy Round by severely limiting the inducements enterprises could use to attract wholesalers, retailers, and consumers to their products.

6.461 Following the *Tokyo Round*, according to the United States, the Japanese Government applied its promotion countermeasures against film and paper in distinctly new ways. For the first time, Japan unleashed its cartel-like private sector enforcement councils to regulate commercial matters specifically related to film and paper. The codes established by these councils constrain the use of two forms of economic inducements: (1) dispatched employees; and (2) economic contributions to retail promotions. The codes also restrict a variety of different representations made in advertisements for photographic materials, especially where discount or price-oriented promotions are involved. The United States alleges that the series of promotion countermeasures serves to reinforce the framework of restrictions the Japanese Government established after the Kennedy Round. These new and strengthened measures operated to upset the competitive relationship between imports and domestic products in Japan's photographic materials market by constraining the ability of imports to assail the dominance of domestic

[923]1967 Cabinet Decision p. 3, US Ex. 67-6. In the film sector, the domestic industry was "afraid that Kodak would use its capital strength to control the market with huge incentives like low prices, or attach some kind of gift to the film". New York Times, 5 July 1995, US Ex. 95-14.

market leaders through aggressive marketing techniques and utilization of alternative distribution channels.

6.462 The United States submits that during the negotiations of the *Uruguay Round*, the United States and Japan's other trading partners who produced photographic film and paper knew that the Japanese market was difficult to penetrate, but the way in which the promotion countermeasures, the distribution countermeasures, and the Large Stores Law, worked in concert to systematically offset tariff concessions was not known. The United States claims that the ongoing application of this web of liberalization countermeasures has continued to operate to nullify or impair benefits accruing to the United States not only from the Uruguay Round, but also the Tokyo and Kennedy rounds, due to, inter alia, the inability to price and promote products effectively and competitively as a result of restrictions under the Premiums Law and Antimonopoly Law.

(b) JFTC Notifications under the Premiums Law

6.463 The United States points out that, in May 1967, the JFTC issued Notification 17, which banned most premium offers between businesses. The United States has explained that this restriction had a particularly inhibiting effect on establishing or improving relations between photographic material manufacturers and Japanese distributors. The United States further submits that, in July 1971, the JFTC issued Notification 34, ruling that prizes offered through advertised lotteries, involving no required purchase of a product, could not exceed 1,000,000 yen. In March 1977, the JFTC issued Notification 5 which imposed limits on the value of a premium and had the effect of severely restricting the offering of premiums on photographic film and paper to general consumers. Given the relatively low price of these products, the value of any premium falling within the JFTC's restrictions would be negligible. The United States argues that, with Notification 17 and MITI's 1970 Guidelines for Standardized Transaction Terms, the JFTC's new measures on premiums upset the competitive relationship between imported photographic film and paper and the domestic products by severely limiting the ability of challenging brands, e.g. foreign manufacturers, to attract Japanese consumers through marketing and promotions. Following the Kennedy Round, imported photographic film and paper had a very limited market share - the legacy of years of import restrictions, high tariffs, and foreign investment restrictions. Producers challenging leading brands need to promote their products to attract consumers. For products like film, the promotion must be significant enough to overcome strong consumer brand loyalty because the consequences of product failure are so significant, e.g., poor pictures of an important event. By imposing significant limitations on the premiums that can be offered in open lotteries or in conjunction with sales to general consumers, the JFTC not only severely restricted the extent to which the foreign enterprises could draw attention to their imported products, but also prevented foreign enterprises from exceeding the premiums offered by their Japanese competitors. The United States concludes that in so doing, Japan disrupted the conditions of competition in the Japanese market that otherwise would have prevailed and that would have enabled imports from other countries to take advantage of the tariff concessions.

(i) Competitive position of imports

6.464 The United States alleges that the promotion countermeasures have directly interfered with and upset the competitive relationship between domestic and imported products in the Japanese market by constraining the ability of the person selling imported products to: (1) attract consumer interest in imported products through discounts, gifts, coupons and other price-cutting methods; and (2) rely on innovative promotional campaigns, particularly ones in which prices or price comparisons are discussed. According to the United States, the Japanese Government perceived that the marketing and promotional abilities of Japanese firms were weaker and their costs were higher, and Japanese firms were less able to compete aggressively on the basis of price with foreign firms and imports. While foreign producers regularly advertise and otherwise promote their products in Japan, they have been substantially chilled from doing the promotions necessary to compete effectively. The seeming neutrality of these measures belies the fact that they decisively tip competitive conditions against imports,

which more than domestic products need to rely upon premiums and other promotions if they are to attract the attention of distributors and consumers.

6.465 **Japan** contends that the Premiums Law does not establish conditions of competition that are unfavourable for imported film or paper. The express text of the Premiums Law makes no distinction between imported or domestic products. In general, the regulation of premiums and representations under the Premiums Law, which aims at protecting consumers' interests and promoting competition, applies equally to imported and domestic products, and thus does not disadvantage imports. Moreover, there is nothing about restrictions on excessive premiums or misleading representations that is inherently unfavourable to imports, nor is there anything intrinsic in the nature of imports that makes them particularly reliant on misleading representations or the excessive premiums regulated by this law.[924] The Premiums Law is trade-neutral in the sense that its impact on the market access will be felt equally by domestic and foreign products. In response to the "chilling effect" argument, Japan argues that the United States should show how the combination of the regulation, a code, and the Promotion Council has operated systematically against imported products. Japan concludes that the present regulations are not excessively restrictive or disadvantageous for imported products with a lower market share, than for domestic products.

6.466 The **United States** concedes that the promotion measures are facially neutral. However, in the US view, Japan ignores the disparate impact its measures have had on imported photographic materials and understates the significance of the promotional activities it has banned. Although the measures are facially neutral, they help preserve the dominant position of Japanese film and paper manufacturers by shielding them from significant forms of promotion competition. Marketing is especially important to foreign producers challenging the domestic market leaders because they have been excluded from the primary wholesalers, they have limited distribution alternatives in terms of large retail stores, and their opportunities to compete through price discounts are minimal.

6.467 **Japan** argues that other economically advanced countries have counterparts of these regulations, and the Japanese regulations are in no way more restrictive than these counterparts. Moreover, even if regulations are eased, dominant brands are likely to counter such attempts with promotional activities of their own. Consequently, in this particular market at least, relaxation of the regulations would not necessarily operate to the advantage of the challenging brands.

6.468 The **United States** argues that Japan's promotion countermeasures must be viewed in light of the peculiarities of Japan's photographic materials market. These restrictions disadvantage imported film and paper because they serve to reinforce the significant advantages of the domestic manufacturers that have dominated Japan's photographic materials market since 1945. These domestic manufacturers have consistently controlled 80 to 90 percent of Japan's market. They have exclusive access to Japan's leading photospecialty wholesalers and their products are allocated far greater shelf space in retail stores which most often do not carry any foreign film at all. In the US view, given the oligopolistic nature of the market and the bottle-necked distribution system, foreign photographic material manufacturers are acutely dependent upon marketing to generate demand for their products among wholesalers, retailers and consumers. In particular, impediments placed in the way of offering premiums or advertising about a price discount act as a barrier against greater market access for imports.

6.469 **Japan** submits that the Premiums Law, JFTC Notifications and other JFTC regulations govern activities of business entities as they focus on competitive behaviour of these entities. The provisions are unrelated to the origin of the products, and do not inherently afford more favourable treatment to domestic products. Thus, there is no element of discrimination which would nullify or impair benefits accruing to the United States under Japan's tariff concessions. According to Japan, the United States

[924] *United States - Automobiles*, DS31/R, para. 5.14 (unadopted).

emphasizes the disadvantage felt by a challenging brand against a dominant brand, and not that between imported products and domestic products. Japan recalls that Fuji is not the only domestic brand, there are domestic challenging brands including Konica in the Japanese market.

(ii) Objectives underlying the promotion "countermeasures"

6.470 Japan notes that the Premiums Law is a sub-set of competition law whose objective is the prevention of excessive premiums and misleading representations for purposes of consumer protection. Article 1 of the Premiums Law defines its objective as "to secure fair competition, and thereby to protect the interest of consumers in general by establishing provisions to prevent inducement of customers by means of unjustifiable premiums or misleading representations". Reference to the twin objectives of fair competition and consumer protection is also recorded in various parts of the Diet minutes.[925]

6.471 The **United States** contends that Japan's restrictions not only were intended to protect consumers, but they also were designed to protect domestic production. For the United States, this purpose is evident in a variety of measures, such as Japan's 30-year restriction on the use of premiums between businesses, a measure which had less to do with consumer protection than dampening competition from foreign competitors.[926] In the US view, Japan has recognized that its dominant domestic manufacturers are vulnerable to promotion competition from foreign producers.[927] Japan believed that foreign competitors have advantages in terms of the expertise and capital they could rely upon in promoting their products in Japan.[928] According to the United States, the Japanese Government determined that, if unchecked, foreign competitors, especially Kodak, could increase their presence in Japan's market through innovative promotions,[929] and Japan, therefore, instituted countermeasures to "create a foundation" on which Japanese companies could "compete on equal terms" with their foreign rivals.[930] In enacting the Premiums Law, Japanese officials hoped that the facially neutral measure would prevent circumstances in which "foreign trading companies … may come into Japan and enjoy advantageous positions through excessive advertisements or by inviting buyers to foreign countries".[931]

6.472 In **Japan**'s view, the US claims rest on a conspiracy hypothesis. Japan emphasizes that the truth is that the JFTC has long been an active advocate of a more open Japanese economy.[932] For

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[925]Minutes of the House of Councillors, Committee on Commerce and Industry, 13 April 1962, Japan Ex. D-19, US Ex. 62-2.

[926]The JFTC explained when it promulgated Notification 17: "The primary objective of [Notification 17] is (a) rationalization of the distribution stage …; and (b) eliminat[ion] of the stronger prey upon the weaker sales competition based on the power of capital … If US capital were to conduct [premium offers] directed at the Japanese distribution sector, this would be no match for [Japan], so the restrictions should be applied as a breakwater before liberalization". Severe Restrictions Placed on Businesses for Premium Offers: Shatokuren Hears JFTC Explanations at Jyosui Kaikan on the 12th, Nihon Shashin Kogyo Tsushin, 20 June 1967, US Ex. 67-8.

[927]"Along with the liberalization of capital and trade, the major issues facing this industry today include the US landing in Japan and market expansion … The struggle to capture market share will depend substantially on promotional activities based on financial strength". MITI, Manual for the Systemization of Camera and Film Distribution, March 1975, p. 58, US Ex. 75-5.

[928]See, e.g., Preparing for Capital Liberalization: Rationalization of Trade Practices is Urgent Task; Foreign Capital Attacks on Two Fronts - Production and Sales, Nihon Shashin Kogyo Tsushin, 10 June 1967, p. 10, Draft a Standard Contract for Film With Criteria for Standardization of Transactions Terms, Zenren Tsuho, August 1971, US Ex. 71-11.

[929]New York Times, 5 July 1995, US Ex. 95-14.

[930]1967 Cabinet Decision p. 4, US Ex. 67-6.

[931]Diet Record of the 40th Session of the Lower House Committee on Commerce and Industry, No. 31, 18 April 1962, US Ex. 62-4.

[932]The JFTC Chairman stated in 1967: "Although it is the JFTC's responsibility to vigorously enforce the Antimonopoly Law, should foreign capital commit acts of [unfair trade practices], we shall not discriminate the foreign capital by imposing more burdensome regulations compared to Japanese entities. We recognize the importance of industrial reorganization and of strengthening the international competitive position of the Japanese business in pursuance of the policy towards capital liberalization ."..

Japan, the JFTC's history is pictured by the United States as that of a collaborator in counteracting the effects of trade liberalization.

6.473 The **United States** responds that Japan has offered no explanation as to how consumers benefitted from the JFTC's simultaneous certification of a camera cartel, the issuance of a notification almost completely banning the use of premiums by any business that manufactures or sells cameras, and the approval of codes restricting the use of premiums among camera manufacturers and wholesalers. The United States emphasizes that the JFTC has acknowledged that a major factor in taking these protective measures was stiff competition from Kodak, especially the development of its innovative, easy installation film.[933]

6.474 With respect to "fair competition codes" (discussed in Section (c) below), the United States argues that the Japanese Government established its private-sector-enforced code system, at least in part, to counteract the perceived superior marketing abilities and promotion budgets of foreign firms. As a leading Japanese antitrust scholar has explained: "Fair competition codes can also be effective in controlling foreign firms if they disturb the market".[934]

6.475 According to the United States, even though the countermeasures were neutral on their face, the impact (and intended impact) on competition decidedly was not. In fact, the measures substantially disrupted the competitive relationship between imports and domestic products by placing severe constraints on a key comparative advantage of the imports, i.e., their ability to promote and market products effectively and creatively. In the view of the United States, these restrictions take on even greater significance given the closed distribution system, oligopolistic nature of the market, and the existence of other constraints such as the Large Stores Law.

6.476 **Japan** notes that the "intent" of the government is irrelevant for purposes of a non-violation claim, given that the panel on *Japan - Taxes on Alcoholic Beverages*[935] found that the interpretation of domestic law should be based primarily on the text of the statute, rather than the legislative history. Japan responds to US arguments about "intent" to protect the domestic industry by introducing regulations more favourable to domestic products as follows:

6.477 Japan submits that in statements before the Diet Committee at the time of introduction of the Premiums Law, the reference to foreign capital reflects an origin-neutral response to anticipated changes in competitive conditions on the eve of liberalization of foreign capital, a phenomenon unprecedented for the Japanese economy. In Japan's view, no intent of discrimination can be found. The introduction of the Premiums Law was well before the capital liberalization of the late 1960s, and was a result of circumstances unrelated to foreign capital.

6.478 Japan emphasizes that the Cabinet Decision of June 1967 did not contain any measure related to the Premiums Law. Nor did the JFTC take any measure. The reports of the Foreign Capital Council's Expert Committee also reflect an origin-neutral response to anticipated changes in competitive conditions on the eve of capital liberalization.

6.479 Japan admits that the JFTC officials in charge of Notification 17 appear to have been conscious of foreign capital. For Japan, however, it is a legitimate, universal phenomenon for people in the policy-making process to assess the impact of a major policy change on the market. Japan does not find intent to discriminate against imported products in favour of domestic products. On the contrary,

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[933]Otsuka Noritami, JFTC Trade Practices Division, Recent Activities Concerning the Premiums Law, Kosei Torihiki, November 1965, p. 3, US Ex. 65-5.

[934]Matsushita Mitsuo, Antimonopoly Law and International Transactions, 25 May 1970, p. 817, US Ex. 70-2.

[935]*Japan - Alcoholic Beverages*, WT/DS8/R, para. 87.

two Chairman of the JFTC made very clear in 1967 that the Commission should not discriminate against foreign capital.

6.480 Japan emphasizes that the ultimate litmus test of intent should be whether or not there is recognizable "intent" or "objective" built in the structure of the system in dispute, rather than individual statements. The fundamentally origin-neutral regulation of the Premiums Law contains no such built in mechanism based on an "intent" or "objective" of discrimination.

(iii) Causal connection

6.481 Japan argues that there is no constraint suffered by foreign film producers in promoting their products. They can compete on price and quality, and are free to spend as much as they want for advertising. According to Japan, Kodak, the leading foreign brand, is often sold at retail at substantial discounts off manufacturer's suggested retail price.[936] Although in general Kodak chooses not to advertise as heavily as its domestic competitors, it does engage in focused campaigns of targeted heavy advertising, with predictable results.[937] In Japan's view, these facts are inconsistent with the US claims that foreign producers are unable to promote their products effectively due to Premiums Law restrictions.

6.482 The **United States** contends that the ability of foreign manufacturers to use price discounts to expand their presence in Japan has been rather limited. Kodak has reduced its prices by 56 percent since 1986, substantially undercutting its Japanese competitors, yet Kodak's dramatic price discounts have had virtually no effect on the market. Similarly, Agfa's aggressive efforts to use discount channels to market its products have yielded only marginal results. Price reductions by foreign photographic material producers, even to levels well below those of domestic competitors, often are not passed on to consumers at the retail level.[938] This lack of price competition in the photographic materials sector is reflected by the fact that Japan's consumer price index for film has shown almost no movement between the third quarter of 1989 and the third quarter of 1996, a period of seven years.[939] Little price differential exists among Fuji, Konica and Kodak at either the retail level[940] or with respect to wholesaler prices to retail outlets.[941] The same lack of price differentiation is observable with respect to various film speeds, types of outlets and individual cities. The United States concludes that limited price competition, coupled with foreclosed distribution channels, renders promotions especially significant to foreign photographic material producers.

6.483 **Japan** points out that American business has been able to compete freely, subject to no restriction whatsoever under the Premium's law, in pricing and quality, the two most important aspects of market competition. There is a wide range of promotional initiatives; the JFTC regulates nothing other than

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[936]Japan notes that among other promotional strategies, Kodak sells film in multipacks at low per-roll prices, cross-promotes with other products, and advertises extensively. Fujifilm's Rebuttal Regarding Vertical and Horizontal Price Fixing, 28 March 1996, pp. 22-23.

[937]Japan notes that Kodak's heavy advertising and promotion in Nagano site of the 1998 Winter Olympics (of which Kodak is a corporate sponsor), has led to a doubling of its market share in the area.

[938]According to the United States, Japan's own exhibits reflect the connection between price stabilization and the promotion countermeasures. A Policy Outline on Commercial Transactions with Customers by the Federation of Primary Wholesalers, stated:

"The notices on the "Fair Competition Code on the Restrictions on Supplying Premiums in the Camera Wholesale Industry" and the Japanese Fair Trade Commission's "Restrictions on the Matters Related to Supplying Premiums", *have both been playing an important role as a part of market price stabilization*. Primary wholesalers will ensure nothing regrettable occurs by giving full consideration to these issues when sponsoring events". Japan Ex. B-31. (Emphasis added.)

[939]Photo Market, 1996, p. 31, US Ex. 101. The United States further submits that in 67 percent of the 99 medium-size cities and small towns surveyed by the Japanese Government in its annual Retail Price Survey, the retail price of film did not go up or down by even one yen for a two-year period between 1992 and 1994. Statistics Bureau, Management and Coordination Agency, Japan's Annual Report on the Retail Price Survey, 1992, pp. 523, 610, 631, US Ex. 74.

[940]Management Analysis of Photo Stores, Camera Times, 1979-1996, US Ex. 40.

[941]Construction Research Institute, Information on Prices, Monthly Edition, December 1972 - September 1996, US Ex. 22.

distortive practices, namely, (i) excessive premiums, i.e., excessive free gifts, and excessive prizes offered through lotteries or competition, and (ii) misleading representations. However, the Antimonopoly Law and the Premiums Law, or their implementation, do not restrict low price offers of photographic film and paper, or the amount of public relations expenditures. Nor are lawful premiums or non-misleading representations restricted.

6.484 The **United States** contends that Designation 6 under JFTC Notification 15 of 1982 prohibits "unjust low price sales", including "unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties to the business activities of other entrepreneurs".[942]

6.485 In addition, the United States provided a number of specific examples in which application of the Premiums Law and the Antimonopoly Law, and the activities of fair trade councils constituted by the JFTC, had the effect of restricting Kodak's discounting and promotional efforts. In the 1983 trial-pack incident, for example, actions by the JFTC and the Promotion Council curtailed Kodak's promotional campaign for a reduced-price package of different rolls of film. The episode involved Kodak's principal new film product of the first half of the 1980's and chilled Kodak's promotional efforts in later years.[943] JFTC Notification 5 of 1977 prevented Kodak from implementing a variety of joint promotions (e.g., offering a free roll of film with a McDonald's Happy Meal and implementing promotions for its Panorama single use camera).[944] The JFTC has taken action to suppress a variety of promotional efforts undertaken by retail outlets in connection with the sale of Kodak products.[945] Kodak has been limited in its ability to dispatch employees to work on the premises of retail stores by periodic directives from the Promotion Council.[946]

6.486 **Japan** submits that regulations on premiums and representations under the Antimonopoly Law and the Premiums Law do not restrict low price offers.

(iv) Change in policies

6.487 Japan submits that in the course of a review of its regulations under the Premiums Law:

(i) the JFTC has streamlined its general rule on excessive premiums last year;
(ii) the restriction on premium offers to businesses has been abolished; and
(iii) the ceiling on prizes has been raised.

Japan notes that each of these measures facilitates new entry into the Japanese market, in a non-discriminatory manner and that these initiatives are undertaken pursuant to the JFTC's commitment under the Structural Impediment Initiative (SII). In Japan's view, these initiatives should be compelling evidence to prove that the JFTC is committed to vigorously pursuing the goal of free and fair competition in the Japanese market.

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[942]Unfair trade practices, JFTC Notification 15, 18 June 1982, US Ex. 82-6. The United States does not consider this designation to be a liberalization countermeasure and seeks no review of this measure by the Panel. The United States only raises it to rebut Japan's contention that Japanese law contains no limitation on low price offers. The United States further notes that the Japanese Government has admitted that it would "monitor" film prices so that Kodak could not dominate the market in Japan as it had elsewhere. Considering Tariff Reductions and International Competitiveness: MITI Examines Print Price and Investigates the Direction of Film Prices (MITI Business Bureau Report), 12 November 1970, reprinted in Zenren Tsuho, December 1970, p. 43, US Ex. 70-8.

[943]Ishikawa Sumio Affidavit p. 2, US Ex. 97-10, Hiromichi Sumi Affidavit, US Ex. 96-10.

[944]William Jack Affidavit, p. 7, US Ex. 97-2.

[945]Affidavit of Isshi Norito, p. 1-3. IS Ex. 97-5, Suzuki Yosuyuki Affidavit, p. 1-2, US Ex. 97-6, William Jack Affidavit, p. 6-9, US Ex. 97-2.

[946]Promotion Council Issue No. 6-3, 17 January 1995; US Ex. 95-7 and National Photographic Industry Fair Trade Promotion Council Issue No. 8-1, 22 July 1996, US Ex. 96-7.

6.488 Japan argues that the enforcement mechanism was certainly augmented by the 1972 amendment, which delegated part of the authority to the prefectural governments. However, in Japan's view, this modification in no way served to alter competitive relationships in favour of domestic goods.

6.489 The **United States** underscores that in the past, the JFTC has interpreted the Premiums Law in a sweeping manner: "Premiums which are the object of notifications refers [sic] to products, cash, marketable securities, entertainment, or other economic benefits which are given in connection with a transaction involving commodity or service".[947] The JFTC has explained that it distinguishes between premiums and price discounts or rebates on a case-by-case basis, examining the facts "in light of normal business practices, taking into account details of the transaction, details of the economic benefit, the method and the conditions of offer, and the customs of that particular industry".[948] In this regard, in the US view, the JFTC has acknowledged that some forms of discounts or rebates may be premiums.[949]

6.490 **Japan** stresses that the Premiums Law does not restrict low price offers or free samples. On the contrary, the Law serves to promote low price offers and other price/quality competition by placing a restriction on excessive premiums. Japan notes that the word "money" as part of premiums was included primarily to cover lottery prizes. Cash lottery prizes, which were widely used in 1962, could become excessive, and are included in premiums subject to restriction.

6.491 The **United States** disagrees with Japan's statement that the use of free samples and low price offers would be "lawful under the Premiums Law at any point in its history". Notification 17 of 1967, restricting premiums between businesses, and Notification 5 of 1977, restricting premiums to general consumers, provide that samples are exempt from coverage only if they are "found reasonable in the light of normal business practices". In addition, certain low price offers may be regulated as an "unjust low price" under Designation 6 of Notification 15 of 1982.

(c) Fair Trade Councils and Fair Competition Codes

6.492 The United States submits that, following the Tokyo Round, in October 1979, the Japanese Cabinet approved the establishment of a Distribution Sector Office (DSO) in the JFTC to "administer duties pertaining to unfair trade practice designations related to distribution".[950] The DSO studied 16 business sectors, and in December 1981 issued findings on cameras and photographic materials advising "camera, photographic materials, colour photo laboratories and related industries" to address "problems" created by manufacturers dispatching employees to large retail stores.[951] Thereafter, the JFTC called upon the photographic industry to develop "self-regulating rules" controlling "the permanent dispatch of sales people".[952]

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[947]FTC/Japan Views: Information and Opinion from the Japan Fair Trade Commission, No. 2, April 1988, p. 15, US Ex. 88-3.

[948]Ibid. p. 16.

[949]Ibid.

[950]Cabinet Order No. 43 of 1979, US Ex. 79-1.

[951]According to the United States, dispatched employees are a unique form of economic inducement between businesses since they reduce costs for wholesalers and retailers and thereby allow for increased sales based upon cost or price reductions passed down the line of distribution.

[952]Kosugi Misao, Trade Practices Department, Distribution Sector Office JFTC, Status of Distribution of Cameras, Kosei Torihiki, No. 377, March 1982, p. 8, US Ex. 82-3.

(i) Promotion Council

6.493 The United States points out that the domestic photographic industry responded in 1982 by forming the Fair Trade Promotion Council (Promotion Council) and by promulgating the "Self-Regulating Measures Regarding Making Business Dealings With Trading Partners Fair". The Council represented all elements of the photographic industry, i.e., manufacturers, wholesalers and retailers, and was formed to act on behalf of the JFTC in enforcing the "Self-Regulating Measures".[953] The Self-Regulating Measures and the Council's articles of association govern the use of dispatched employees and monetary contributions to retail promotional campaigns.[954] The articles of association are noteworthy due to the extraordinary latitude they convey upon the Council, including providing for a firm to seek pre-approval from the council before using dispatched employees.

6.494 **Japan** submits that the Promotion Council was established by the photographic industry as an organization to implement voluntary standards on dispatched employees. The industry was in fact working on such standards even before the JFTC published a report and issued administrative guidance.

6.495 In 1983, the JFTC urged the Promotion Council to expand into dumping and loss-leader advertising.[955] In the view of the **United States**, the Promotion Council recognized that dumping cases are quite complex and often difficult to win, and determined that imposition of regulations controlling advertisement of prices would prove to be a more effective means of restraining competition because the standards are more subjective and do not require the analysis of complex cost and pricing data.[956]

6.496 In May 1984, the Promotion Council issued "Self-Regulating Standards Concerning Display of Processing Fees for Colour Negative Film" defining the information that must appear in connection with a representation of prices for colour film developing and printing, including the printing fee, developing fee, processing time, and paper manufacturer.[957]

6.497 For **Japan**, the intention of "Self-Regulating Standards Concerning Display of Processing Fees for Colour Negative Film" was to give consumers adequate information of both charges. In Japan's view, as such, these self-regulating standards are not related to sales of film products.

6.498 According to the **United States**, by regulating the use of dispatched employees, promotional funds and price-related representations, the Promotion Council serves to prevent undue competition for film, paper and other photographic goods.[958] The Council's enforcement record reflects the extraordinary range of its activities and the potency of its enforcement powers. The Promotion Council succeeded in foiling Kodak's most important promotional campaign of the 1980's, the VR Trial-Pack. Working with the JFTC, the Council determined before the campaign had even begun that Kodak's anticipated advertisement of a discount price was a misrepresentation. The JFTC summoned Kodak's representatives and issued administrative guidance to Kodak to (1) clarify the limited nature of the offer, identifying the volume of trial packs, the stores carrying them and the terms of the offer, and

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[953]The "fair trade councils" that had been previously established represented only one horizontal level of the industry, e.g., just manufacturers or wholesalers.

[954]Self-Regulation Rules Regarding Making Business Dealings with Trading Partners Fair, reprinted in Camera Times, 22 June 1982, p. 3, US Ex. 82-8.

[955]Yamada Akio, Premiums and Representations Guidance Division Director, JFTC, Suggestions on How the Fair Trade Promotion Council Should be, Zenren Tsuho, May 1983, p. 2, US Ex. 83-9.

[956]What the Fair Trade Promotion Council is Doing Now, and What it Plans to do in the Future, Zenren Tsuho, October 1983, pp. 5-6, US Ex. 83-21. Round table discussion on anonymous Promotion Council and Zenren members reported. Ibid.

[957]Self-Regulating Standards Regarding Representations Have Been Finalized, Kosei Torihiki Joho, 28 May 1984, p. 3, US Ex. 84-4. The Standards define "businesses developing" as "those who receive colour film directly from the general consumer for processing". Ibid. Promotion Council called for the promulgation of a "fair competition code".

[958]49th Zenren Conference, Iwate, General Assembly, Camera Times, 19 October 1982, US Ex. 82-11.

(2) cut back its second shipment of trial packs and announce at each store counter when the product was no longer available. Accordingly, the promotion was cut back and advertisements for the campaign were quite muted.

6.499 **Japan** submits that the JFTC was not working with the Promotion Council. There is no alignment between the JFTC and the Promotion Council, and no laws allow the JFTC to delegate its authority to the Promotion Council. In addition, the trial pack was shipped eventually in the planned volume in the VR campaign.

(ii) Retailers' Council

6.500 The **United States** further notes that in 1987, the JFTC approved the establishment of the Retailers Fair Trade Council (Retailers Council) and the Fair Competition Code Regarding Representations in the Camera and Related Products Retailers Industry (Retailers Code).[959] The Retailers Code provides the Retailers Council with authority to take enforcement actions for misrepresentations in promotions not only under the code itself, but also under the Premiums Law and related competition laws.[960] Like the Promotion Council, the Retailers Council acts as a substitute enforcement body for the JFTC in the view of the United States.

6.501 The United States points out that the Retailers Code sets forth numerous requirements for almost all forms of promotions in the photographic retail sector. The code specifies that advertised price comparisons must rely on the manufacturer's suggested retail price, the importer's suggested retail price, or the shop's normal retail price. The code restricts the use of terms like "cheapest" or "very best" unless "objective factors" can be demonstrated. Similarly, the code prohibits the use of expressions such as "super cheap", "give-away price" or "super special price" if such expressions will lead the "consumer to believe the offer is better than it actually is".

6.502 In the US view, the Retailers Code is quite distinct from the Manufacturers and Wholesalers Premiums Codes promulgated in 1965 and 1966, respectively. Unlike the earlier codes, which exclusively apply to the use of premiums, the Retailers Code governs *representations* about promotions for photo items, including film and paper.[961] The Retailers Council applies the code to promotional activities of non-members and not just businesses that agreed to adhere to the codes. This practice comports with the position of the Japanese Government that competition codes must apply industry-wide in order to have their intended effect: "there is likely to be little effect if the industry as a whole is not targeted and regulated".[962]

6.503 **Japan** argues that it is necessary to elaborate on fair competition codes or fair trade councils as none of them cover photographic film and paper. Excessive premiums and misleading representations may be found routinely anywhere in Japan. Furthermore, these activities tend to quickly spread among competitors, and to escalate in the process. It is therefore desirable for effective enforcement of the

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[959]Fair Competition Code Regarding Representation in the Camera and Related Products Retailers Industry, Kanpo, [Official Gazette] 11 April 1987, p. 1, US Ex. 87-4.

[960]Article 14.7 of the Fair Competition Code states that the RFTC shall perform "Activities pertaining to making the Act Against Unjustifiable Premiums and Misleading Representations and other laws and ordinances pertaining to Fair Trade widely understood and preventing violations thereto". US Ex. 87-4.

[961]According to the United States, the Retailers Code does not specifically limit the photographic items which fall within its scope. In the US view, the Retailers Council construes the Code as covering film and paper.

Japan notes that although the implementation rules of the Retail Industry Code specifically refer to such miscellaneous goods as tripoids or bags, they do not make any reference to such major items as film and paper and that this means that film and paper are consciously excluded.

[962]Asai Shigeo, Premiums and Representations Division, Trade Practices Department, JFTC, Protect Consumers from Misleading Representations and Advertising, Tsusansho Koho, 8 June 1971, pp. 9-19, US Ex. 71-8. See also Itoda Shogo, JFTC Secretary General, Jirei Competition Policy Law (15 December 1995), pp. 420-21, US Ex. 95-20.

Premiums Law to have business entities agree on self-restraint of such behaviour and to prevent actual violation of the Law. It is against this background that Article 10 of the Law allows business entities to adopt, subject to the JFTC's approval, voluntary rules on premiums and representations, to ensure consumers' proper selection of merchandise and fair competition in the market.

(iii) Coverage of photographic materials

6.504 Japan emphasizes that no fair competition code covers photographic film and paper and that observance of the "spirit of the code", as provided for in the Retailers' Code, may not extend to items not included in the "camera category". Even if the industry were to decide to expand the scope of the codes to include these products, such a decision has no impact on the operation of the Premiums Law, or the Antimonopoly Law, unless it is approved by the JFTC.

6.505 Given that there is no fair competition code applicable to the photographic film or paper, Japan argues that thus the JFTC's approval has not in any way nullified or impaired the benefits of concessions for the United States in respect of these products. More fundamentally, a non-violation claim against JFTC approval of fair competition codes raises no particular issue distinct from the issues surrounding the regulation under the Premiums Law and JFTC Notifications because the JFTC does not approve any code which is inconsistent with the regulation. Therefore, Japan concludes that as long as no nullification or impairment results from the content of the JFTC regulation, the JFTC approval does not nullify or impair benefits of Japan's trading partners.

6.506 With respect to Japan's contention that the codes and councils do not regulate the sale or promotion of photographic materials and that the codes were not *drafted* with film or paper in mind, the **United States** responds that the *actual* market effects these codes and councils is to stultify promotions for photographic materials in the Japanese market, and that it is this *actual* effect to which the United States objects.

6.507 For the United States, the evidentiary record reflects the relationship between the codes and photographic materials. In the case of the Promotion Council, e.g., its 1984 Self-Regulating Measures provide that they cover "DP representations", or "representation[s] of the photo processing fee for colour negative film".[963] With respect to the Retailers Code, its language provides an ample basis for the widespread perception among retailers that it in fact applies to film and development or processing. The United States points out that Article 2.2 of the Retailers Code provides that "[t]o attain the objectives outlined … above … businesses are to respect the spirit of this code even when the products being dealt with do not correspond exactly to Cameras and Related Products". An industry member explained, it would "indeed have been impossible to persuade *Zenren* members whose main line of business is development printing to contribute if [the regulations] only [apply to] hardware".[964]

6.508 **Japan** argues that the statement of the Secretary General of Zenren in the same article ("I will endeavour to make both photosensitive materials and development printing fall under the code") should be understood as an expression of will to extend the code to film and paper which presently do not fall under the coverage.

6.509 The **United States** believes that it is irrelevant whether the codes and councils govern film and paper *de jure* or *de facto*. What does matter is that Japan has organized the most powerful elements of its domestic photographic industry and allowed them to set standards on how products in their sector may be promoted. The United States contests Japan's statement that rules adopted by Japan's leading

[963]Self Regulating Standards Regarding Representations of Developing Fees for Negative Colour Film have been Finalized, Kosei Torihki Joho, 28 May 1984, p. 3, US Ex. 84-4.

[964]Discussion of Progress of Fair Trade Council Focuses on Making Fair Competition Code Fully Known, Zenren Tsuho, August 1987, p. 3, US Ex. 87-7. Japan contests the correctness of this translation. See translation issue 18.

photographic retailers or wholesalers, which govern the promotion of almost every item these businesses sell, will have no effect on film and paper.[965] In the US view, Japan has invited its photographic industry to devise and enforce rules in their self-interest, and obvious market realities associated with such extraordinary industry cooperation should not be ignored.

(d) Conclusions

6.510 The United States argues that Japan liberalization countermeasures directed against wholesalers and retail stores through a series of promotion restrictions have disadvantaged imported foreign photographic material manufacturers by constraining their ability to increase sales through the use of gifts, prizes and other economic inducements, or to rely upon innovative advertising campaigns, particularly where price or price comparisons are discussed. The United States alleges that Japan imposed these countermeasures for the purpose of dampening import competition and, to ensure their success, enlisted the aid of the domestic photographic materials industry in enforcing the regime.

6.511 **Japan** claims that there is no measure in the Premiums Law, JFTC Notifications or other JFTC regulations which nullifies or impairs benefits accruing to the United States. Accordingly, in Japan's view, the United States has not demonstrated the relevant conditions to substantiate its non-violation claim.

[965]The United States questions that promotions otherwise banned would be welcomed by members of a "fair trade council" simply because they are used, e.g., for film instead of a tripod or camera bag.

E. REASONABLE ANTICIPATION

1. THE LEGAL TEST

6.512 The **United States** claims that it negotiated in three separate rounds of multilateral trade negotiations for tariff concessions from Japan in the photographic materials sector. At each point in time that it received a tariff concession from Japan, the United States had a reasonable expectation, based on the "pertinent facts available" at the time of the negotiation, that Japan would not take future action to nullify or impair the concession. The United States emphasizes that there were no facts of which the United States reasonably "should have been aware" concerning measures that the Japanese Government may have taken prior to the conclusion of a tariff negotiation that thereafter nullified or impaired the concessions.

6.513 The United States recalls that the *EEC - Oilseeds* panel found that parties negotiating tariff concessions, a principal benefit of which is the opportunity for improved price competition with respect to domestic products, may be assumed not to anticipate actions by the country granting the concession that offset the price advantage to result from the tariff reduction:

> "The Panel considered the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset".[966]

6.514 Further, the 1961 Panel Report on *The Operation of the Provisions of Article XVI* explained that a party's reasonable anticipation would be evaluated in light of the "pertinent facts available" at the time it negotiated the tariff concession.

> "By this the Panel understands that the presumption is that unless such *pertinent facts were available* at the time the tariff concession was negotiated, it was then reasonably to be expected that the concession would not be nullified or impaired by the introduction or increase of a domestic subsidy."[967]

6.515 The United States further submits that the panel on *EEC - Canned Fruit* approached the issue of reasonable anticipation with respect to measures that existed prior to the conclusion of the tariff negotiations by asking whether the country receiving the concessions "should have been aware" of the measures in question such that it "should have taken due account of [them] in negotiating concessions" with respect to the relevant products.[968]

6.516 **Japan** contends that, although the United States tries to assume the burden of proof away by incorrectly quoting precedents for over broad propositions, interpreted properly, the precedents cited by the United States do not support its position. In the 1961 Panel Report on *the Operation of the Provisions of Article XVI*, the terms of reference were quite specific in referring to "subsidies" and a few other specific policy issues. Japan's notes that the following passage reveals important limitations on exactly what parties can be held to reasonably assume:

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[966]*EEC - Oilseeds*, BISD 37S/86, 128-131, para. 148; paras. 149-150.

[967]Panel Report on *Operation of the Provisions of Article XVI ("Operation of Article XVI")*, adopted on 21 November 1961, BISD 10S/201, 209, para. 28.

[968]*EEC - Canned Fruit*, GATT Doc. L/5778, p. 29, para. 79 (unadopted).

> "So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assumed for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned".[969]

6.517 For Japan, it is thus clear that this panel report hardly establishes the kind of general principle which the United States claims, but rather reflects a very specific concern about domestic subsidies granted to products that had been subject to tariff concessions. Moreover, this language also makes clear that the domestic subsidy must be introduced or increased subsequent to the tariff concessions relevant in this context. The same limitations existed in the *EEC - Oilseeds* panel: the measures at issue in that case were product-specific domestic subsidies introduced subsequent to the relevant tariff concessions.[970] The finding of the *EEC - Oilseeds* panel about the assumption of reasonable expectations has to be understood in the specific factual context of that case.

6.518 The **United States** accepts that a number of prior panel reports have inquired whether a product-specific subsidy was introduced or increased subsequent to the tariff negotiations.[971] However, the United States submits that the current dispute is not about product-specific subsidies, which are easy to detect and whose effects are easy to predict. The United States emphasizes that a Member cannot be held to the same standard of knowledge about non-transparent, non-traditional and often non-sector-specific measures as for product-specific measures. But, the United States rejects Japan's characterization of the factors and findings in the *EEC- Oilseeds* dispute. In that case, the panel rejected the EC's argument that the existence of some measures at the time of the tariff concession -- which were later substantially enhanced -- meant that the United States could or should have reasonably anticipated their modification or enhancement.[972]

6.519 As to the issue of the kind of knowledge that forms the basis of legitimate expectations with respect to the relevant tariff concessions, **Japan** explains that the "reasonably anticipated" requirement recognizes that trade negotiations do not take place in a vacuum; countries bargain against a background of their own and other countries' policies and economic conditions, i.e., past, present, and anticipated in the future. Expectations concerning this background shape the concessions that are offered and those that are accepted. It is therefore reasonable to assume that countries take into account other countries' past, present, and anticipated future policies when negotiating trade concessions.

6.520 Accordingly, participants of the type of negotiations stipulated by Article XXVIII*bis* of GATT should be deemed to have taken into account all existing policies and measures, as well as all policies and measures that could be reasonably anticipated at that time, when negotiating the tariff concessions. For Japan it follows that countries should not be allowed to claim nullification or impairment by reason of measures or policies that already existed or could have been reasonably anticipated at the time when the relevant tariff concession, i.e., the 1994 Uruguay Round tariff concessions, were made. In Japan's view, its interpretation is consistent with the findings of the *EEC - Oilseeds* panel, which held that

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[969]Panel Report on *Operation of Article XVI*, op. cit., para. 27.

[970]The *EEC - Oilseeds* panel found that "the case before it does not require the Panel to address the question of whether the assumption created by the 1955 decision of the CONTRACTING PARTIES applies to all production subsidies, including generally available subsidies serving broad policy objectives … [a]t issue in the case before it are product-specific subsidies ."… *EEC - Oilseeds*, BISD 37S/86, 128, para. 148.

[971]The *Australia - Ammonium Sulphate* and *German - Sardines* decisions did not involve product-specific subsidies. *See Report of the Working Party on the Australian Subsidy on Ammonium Sulfate*, adopted 3 April 1950, BISD II/188-196, para. 12; Panel on *Treatment by Germany of Imports of Sardines*, G/26, adopted 31 October 1952, BISD 1S/53-59, paras. 16-17.

[972]*See, e.g., EEC - Oilseeds*, paras. 81 and 149.

whether or not the measures at issue could have been reasonably anticipated by the complaining party is one of the important elements in the examination of a non-violation complaint.[973]

6.521 For the **United States**, there are two compelling reasons why Japan's "reasonably anticipated" test should be rejected:

a. First, there is no textual basis for such a rule in the General Agreement. Article XXIII:1(b) refers to "the application … of any measure, whether or not it conflicts with the provisions of this Agreement." In the US view, the drafters' selection of the term "any measure" evidences their intent that Article XXIII:1(b) be read to address all situations in which a Member believes that benefits accruing to it under the General Agreement have been nullified or impaired by another Member's measures. Therefore, the United States concludes that the ordinary meaning of Article XXIII:1(b) does not provide a basis for Japan's argument that any measure should be excluded from consideration that existed - or is related to a measure that existed - prior to the time at which the Final Act of a multilateral tariff negotiation is signed.

b. Second, it is well established that "a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII:1(b), to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession … ".[974] The Member receiving the concession is entitled to this presumption "unless such pertinent facts were available at the time the tariff concession was negotiated" that would undermine this expectation.[975]

6.522 The United States submits that the criteria developed in GATT jurisprudence on the issue of what kind of knowledge forms the basis for legitimate expectations follow a fundamental and practical logic: So long as Members are aware of the "pertinent facts" concerning measures of other Members, "there is nothing to prevent [them], when they negotiate reduction of tariffs, from negotiating on matters … which might affect the practical effects of tariff concessions".[976] By contrast, in the US view, if the "pertinent facts" are *not* available, parties cannot be expected to address them during tariff negotiations. Nor can Members be expected to conduct extensive research on each tariff item to determine whether there are measures that could reasonably be expected to nullify or impair. The United States submits that, as the *EEC - Canned Fruit* panel found, the issue is whether and to what extent the country receiving the concessions "should have been aware" of the measures in question such that it "should have taken due account of [them] in negotiating concessions" with respect to the relevant products.[977]

6.523 According to **Japan**, there is no precedent or decision to support the US theory that the lack of knowledge of certain pre-existing "measures" by the complaining party leads to a conclusion that a balance of tariff concessions needs to be adjusted when new knowledge is acquired:

a. The panel on *EEC - Oilseeds* only dealt with a case where the measures at issue were introduced subsequent to the relevant tariff concessions and not a case about pre-existing measures;

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[973]Ibid., p. 129, para. 149.

[974]Ibid., p. 127, para. 147. Working Party Report on *Other Barriers to Trade*, adopted on 3 March 1955, BISD 3S/222, 224, para. 13.

[975]Working Party on *Operation of Article XVI*, BISD 6S/201, 209, para. 28. The presumption was established for and has been applied only in non-violation cases involving subsidies. The logic of the presumption, in the US view, should also apply to a non-violation case involving any type of measure: the complaining party should only be held to knowledge of measures for which pertinent facts were available at the time of the negotiation.

[976]See *Operation of Article XVI*, op. cit., para. 28, citing Working Party on Other Barriers to Trade, op. cit., para 14.

[977]*EEC - Canned Fruit*, GATT Doc. L/5778, p. 29, para. 79 (unadopted).

b. The 1955 Working Party Report on *Other Barriers to Trade*[978] made it clear that the domestic subsidy must be introduced *subsequent* to the relevant tariff concessions in this context;

c. The 1961 Panel Report on *Operation of the Provisions* of Article XVI[979] also dealt with the reasonable expectation that the concession would not be nullified or impaired by a subsequent measure (i.e., the introduction or increase of a domestic subsidy in that case);

d. The 1985 panel on *EEC - Canned Fruit,*[980] which is unadopted, is the only precedent that dealt with a measure that already existed at a time of a tariff concession under consideration. However, that panel found that the complaining party should have been aware of the existence of the measure, and not that a complaining party was excused from being presumed to have knowledge about a pre-existing measure.

6.524 More generally, Japan contends that the United States tries to shift the burden of proving that it could not have reasonably anticipated the alleged measures at issue. Japan emphasizes that it is the United States that bears the burden of proving that the challenged measures were not reasonably anticipated at the time of the tariff concessions.

6.525 The **United States** does not disagree that the complaining party has the initial burden of showing that it did not reasonably anticipate the challenged measures at the time of the tariff concessions. The United States has made such a showing in this case based on the pertinent facts available at the time of each negotiation. However, the responding party, in order to prevail, must provide firm evidence rebutting the complaining party's demonstration that it was not aware of pertinent facts that would have altered its reasonable expectations. If that were not the case, complaining parties would bear the burden of proving why they should not have anticipated that the defending party would implement its tariff concessions in bad faith. A party receiving a tariff concession does not and should not have to prove why it did not assume that the party granting a tariff concession would frustrate the value of those tariff concessions.

6.526 The United States explains that information on the existence of many of the individual measures at issue in this case was not "available" because it was not printed in sources that governments typically use to announce trade policies or to which trade negotiators or foreign business persons typically have access. Even if trade negotiators could have, with extensive efforts, identified and located some of the measures, they could not have developed a coherent picture of the group of measures because they were issued in dozens of sources ranging from the reports of government-industry committees on which no foreigners served to articles in industry association journals available to the association's predominantly Japanese membership. The United States emphasizes that it is exactly the interrelationship between these measures that deprives foreign producers of market access.

6.527 **Japan** rejects the US argument that it could not have known the additional, combined effects of the measures at issue, given that, in Japan's view, the United States admitted that it was aware of the existence of many of the measures and their alleged general effects. In response to the US notion of measures "working together," Japan points out that the US argument on this point is not specific and that, in Japan's view, nothing "working together" with nothing is still nothing.

6.528 For the **United States**, in determining what measures it should have been aware of before entering into tariff negotiations with Japan or what measures the United States should have anticipated that Japan would impose after the tariff negotiations, it is important to consider the nature of the

[978]Working Party Report on *Other Barriers to Trade*, op. cit., para. 13.
[979]Panel Report on *Working Party on the Operation of the Provisions of Article XVI*, op. cit., p. 224, para. 28.
[980]*EEC - Canned Fruit*, GATT Doc. L/5778, (unadopted).

measures. In the US view, the type of measures at issue in this dispute are dramatically different - and substantially harder to detect and comprehend - than the product-specific subsidies at issue in prior Article XXIII:1(b) disputes.[981] The United States explains that the individual measures used by the Japanese Government to implement its countermeasures program are not the kinds of measures countries would normally examine to determine whether tariff concessions might be nullified or impaired. According to the United States, Japan's measures are not the types of trade instruments that have typically been used by governments to restrict the benefits flowing from tariff concessions, are not labelled trade instruments, and could not be found in statutory compilations of typical trade instruments, such as subsidies, anti-dumping measures, other customs measures or safeguards.

6.529 **Japan** disagrees with the US argument that it could not have anticipated the Japanese measures in question because they are hard to detect and comprehend by virtue of their nature, because of the publicity of the alleged measures in this case, US concerns about them expressed in the National Trade Estimates Reports and bilateral discussions during the late 1980s and the first half of the 1990s. Japan further argues that it is reasonable to assume that US trade negotiators are in communication with representatives of their exporting industries.[982] Industry representatives are fully aware of industry-specific trade barriers, real or imagined, and are fully capable of communicating any concerns they have. Trade negotiators are, and should be deemed to be, well-equipped to judge whether existing policies or market conditions are likely to undermine the value of a particular tariff concession offer. Accordingly, in Japan's view, the US argument that trade negotiators should be presumed unaware of published documents and publicly known facts is unconvincing.

6.530 The **United States** underscores that most of these measures are neutral on their face. Thus, assuming that trade negotiators had the insight to understand the singular nature of government regulation of business in Japan and had time to examine these measures of law, even then, they would likely not have understood the measures' role and effect. In addition, the United States points out that many of the measures were not sector-specific and were issued in literally dozens of sources, ranging from the reports of government-industry committees on which no foreigners served, to articles in industry association journals available to the association's predominantly Japanese membership. Even if, with extensive efforts, trade negotiators had been able to identify and locate these measures, they would not have been able to understand how the measures operated generally in the Japanese economy as a whole, let alone how the countermeasures worked specifically in the photographic materials sector.

6.531 **Japan** emphasizes that all of the US allegations in this case, (i) that single-brand distribution impedes imports, (ii) that the Large Scale Retail Store Law impedes imports, and (iii) that regulations under the Premiums Law impede imports, have been applied generally to products across the board, and these general concerns were clearly on the minds of US trade negotiators during the Uruguay Round. In Japan's view, the United States cannot have formed some legitimate expectation that its concerns - assuming that they were valid - would not apply to film and paper among other products.[983]

6.532 The **United States** requests the panel to direct its inquiry at whether the United States was aware, or should have been aware of the effects of an existing measure, or could have anticipated the effects of a new measure, on the specific products or tariff concessions under consideration, taking

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[981]*See EEC - Canned Fruit*, GATT Doc. L/5778, p. 18, para. 52 (unadopted) (finding that the United States should have been aware of a subsidy granted on canned peaches in May 1978 prior to the conclusion of the Tokyo Round in June 1979, and taken due account of this in the negotiations).

[982]Japan notes that the United States documented that US trade negotiators were in communication with Kodak during the Tokyo Round negotiations.

[983]Japan notes that the United States itself stressed its long held and deep interest in this sector in its submissions to this Panel: "During the Tokyo Round, the United States once again attached a high priority to negotiating tariff concessions on photographic film and paper from Japan." "The value that the United States placed on obtaining tariff concessions on photographic film and paper… is evident from its continuing efforts to secure improved access to the Japanese film and paper market during three successive rounds of multilateral trade negotiations."

into account all relevant facts and circumstances. These include, (i) the nature of the measure (i.e. whether it is product-specific like a subsidy or more generic like Japan's Premiums Law and Large Stores Law), (ii) the manner in which the measure was promulgated and publicized, and (iii) the way in which the measure operated in conjunction with other measures. The United States explains that the complaining party's knowledge of a measure and its effect on the specific products under negotiation is relevant in determining what benefits the complaining party could reasonably have expected to flow from the tariff concessions for which it bargained. For example, a complaining party should have lesser expectations if, at the time of the negotiations, it has knowledge of a measure - or can predict the introduction of a measure - and its effect on the benefits flowing from a tariff concession.

6.533 **Japan** emphasizes that the effects of the measures should be irrelevant to the reasonable anticipation test. An examination of whether the effects of the measures, including potential effects, are reasonably anticipated could, in Japan's view, lead to subjective and arbitrary judgements on the content and the extent of the effects to be anticipated. The benefit of tariff concessions under Article II is not the actual economic result of tariff concession (i.e., import volumes), but the expectation of improved competitive conditions for imports. For Japan, it would thus be inappropriate to try to judge the effects of the measures at issue in light of actual trade results when determining the existence of "reasonable anticipation".

6.534 Japan further advocates a clear and stable standard of judgement in examining whether or not to allow the alleged lack of knowledge of certain measures by the complaining party to justify a non-violation complaint. To this end, the evaluation of whether a certain measure could have been reasonably anticipated or known should be determined based not on the "subjective" criteria of whether a particular government at a particular time could have anticipated or known the measure at issue, but rather on objective criteria, such as degree of publicity of the measure.

6.535 The **United States** underscores that negotiators from other countries in the Kennedy, Tokyo, or Uruguay Rounds could not discern whether the distribution countermeasures, Large Stores Law, and the promotion countermeasures would disrupt the flow of benefits flowing from market access commitments. In the view of the United States, to require Members in the midst of ongoing multilateral tariff negotiations to undertake the type of investigation and analysis that would have been necessary to uncover the individual elements of Japan's liberalization countermeasures and the nature and scope of the scheme as a whole, would fundamentally undermine the process of tariff negotiations under Article II of GATT. If this were the standard, the United States suggests that no negotiator could ever be sufficiently certain that a concession would not be nullified or impaired to accept such a concession. In particular, the United States stresses that a Member should not be required to assume that all measures existing at the time of a tariff negotiation have the potential to nullify or impair specific tariff concessions or to anticipate that the party granting the tariff concession will introduce new measures to nullify or impair its concessions. For the United States, such an approach would imply that WTO Members should assume that tariff concessions are not negotiated in good faith.

6.536 **Japan**, in turn, requests the Panel to apply strictly the criterion of reasonable anticipation. Otherwise, there would no longer be any security in the balance of tariff concessions, since the non-violation remedy would expose tariff bargains to constant attack on the ground that certain Members had insufficient understanding of what they were doing when they accepted other Members' trade concessions. In that event, Japan argues, Article XXIII:1(b) would be rendered perversely self-defeating. In Japan's view, a provision designed to preserve the integrity of tariff concessions would instead become an instrument for undermining it.

6.537 According to the **United States**, Japan has argued that the United States knew or had reason to know of some of the discrete elements of the liberalization countermeasures and, therefore, its non-violation argument fails. The United States acknowledges that over time other countries have become aware of conditions in Japan other than tariffs that pose obstacles to imported products. However,

the United States did not understand, until it began to prepare this case in the WTO, and only through extensive research did it come to understand that the Japanese Government played a central role in closing the distribution system. Nor was the United States aware that Japan used other measures affecting wholesaling, retailing and marketing to prevent foreign products from circumventing the closed distribution system.

6.538 **Japan** responds that the United States gives no reason why, after it has been unable to acquire the requisite knowledge for the past two decades or more, the clouds have suddenly lifted the end of the Uruguay Round, revealing everything to it and allowing it to bring its complaint.

6.539 The **United States** maintains that Japan acted at the end of each negotiating round to establish, reinforce, and substantially enhance measures that caused the systematic exclusion of imports from key distribution channels. The United States points out that it took extensive investigation and review of thousands of documents from a wide variety of seemingly unrelated sources to piece together and understand the full import of Japan's actions. In the US view, for these actions to be now excused on the basis that other parties should have known about or anticipated its actions would undermine confidence in the tariff negotiating process under Article II.

6.540 In **Japan's** view, the US approach would overburden and possibly halt a tariff negotiation process, because the party granting the concessions would feel compelled to present in detail to the other parties to the negotiation extensive information regarding any policy and any action which could otherwise be used for future non-violation claims. In this regard, Japan argues that while the presumption of the lack of knowledge of measures on the part of a complaining party may be established for such measures as domestic subsidies introduced subsequently to the tariff concessions, measures which already existed at the time of tariff concessions, especially those which were publicly known, should be deemed to be known by the party receiving the tariff concessions.

6.541 Japan requests the Panel to reject the US non-violation claims because the United States could reasonably have anticipated the alleged measures at the time of the 1994 tariff concessions. For Japan it is clear that the United States could have reasonably anticipated the particular Japanese policies at issue in this case at the time the respective tariff concessions were being made. Accordingly, Japan contends that the United States has not met its burden of providing a "detailed justification" for its claims under Article 26.1(a) of the DSU.

2. SPECIFIC NEGOTIATING ROUNDS ON TARIFF CONCESSIONS

(a) General overview

6.542 The **United States** declares that at each point in time it received a tariff concession on consumer photographic film and paper from Japan (i.e., in the Kennedy Round, Tokyo Round and Uruguay Round), the United States had a reasonable expectation, based on the "pertinent facts available", that Japan would not impose measures to nullify or impair the concessions. The United States asserts with respect to the measures Japan applied subsequent to each round, there were no facts available that would have enabled the United States reasonably to anticipate those actions would undermine the concessions. The United States is convinced that following the Kennedy, Tokyo and Uruguay Rounds, with respect to Japan's ongoing application of certain measures neither the United States nor any other contracting party either should or could have been aware of the existence or operation of these measures such that it "should have taken due account of [them] in negotiating concessions".[984]

[984] *EEC - Canned Fruit*, op.cit., p. 29, para. 79.

6.543 As to the issue of the kind of knowledge that forms the basis of legitimate expectations with respect to the relevant tariff concessions, **Japan** argues that for US expectations to be legitimate in this context, they must have taken into account all of Japan's measures that could have been reasonably anticipated at the time the 1994 *Uruguay Round* tariff concessions were made.

6.544 In the alternative, if the Panel decides that the 1994 Uruguay Round tariff concessions were not the only concessions relevant to this case, Japan contends that the US non-violation claims remain flawed by threshold timing problems.

6.545 As to the *Tokyo Round*, Japan argues that almost all of the alleged measures in dispute occurred before the 1979 Tokyo Round tariff concessions, which were the first tariff concessions on colour film and paper. In Japan's view, those alleged measures that occurred subsequently should have been reasonably anticipated by the United States. Accordingly, for Japan there are no alleged measures in dispute that are capable of nullifying or impairing benefits accruing with respect to colour film or paper. All that remains is black and white film and paper, which currently comprise less than two percent of the total Japanese consumer photosensitive materials market.[985]

6.546 With respect to the *Kennedy Round*, Japan further admits that many of the alleged measures in dispute occurred after the 1967 tariff concessions on black and white film and paper.[986] Nevertheless, according to Japan, even these alleged measures were "outgrowths" of previously announced policies, and thus should have been reasonably anticipated by the United States. Consequently, in Japan's view, even if expectations concerning earlier tariff concessions remain protected, the US non-violation claims cannot meet the first basic requirement, i.e., a "benefit" of legitimate expectations capable of being nullified or impaired.

6.547 The **United States** responds that all of Japan's tariff concessions - in the Kennedy, Tokyo and Uruguay Rounds - are relevant. Japan's liberalization countermeasures were directed at *consumer* photographic film and paper, whether black and white, or colour. Until 1970-1972, black and white was the predominant consumer film (and paper) used in Japan; thereafter, it was colour. The tariff concessions the United States received from Japan tracked this progression of the market.[987]

6.548 In the view of the United States, Japan is arguing, in effect, that the United States should have known that Japan was nullifying or impairing its Kennedy Round tariff concessions, and should have anticipated that it would continue nullifying or impairing its subsequent tariff concessions in the Tokyo and Uruguay Rounds on photographic film and paper. In the understanding of the United States, Japan suggests that a Member is deemed to have knowledge of any measure that existed - or is related to a measure that existed - prior to the time at which the Final Act of a multilateral tariff negotiation is signed, and to anticipate that such measures would undermine the tariff concession.

(b) Kennedy Round

6.549 **Japan** submits that the Kennedy Round was formally concluded on 30 June 1967. All substantive negotiations were finished at the last minute.[988] During the Kennedy Round, Japan accepted bound tariff reductions for black and white film and paper, but made no concessions at all with respect to colour film or paper. Thus, the Kennedy Round is only relevant at all if the alleged measures nullified

[985]Photo Market 1996, p. 55, Japan Ex. A-1.

[986]There were no Kennedy Round concessions on colour film or paper. Japan notes that the first US submission incorrectly indicates that there were bound tariff concessions on colour film and paper in the Kennedy Round, but that the second US submission correctly indicates the absence of any bound tariff concessions.

[987]See also paras. 2.2, 2.4, 5.26 and 6.43, above.

[988]See Gilbert Winham, International Trade and the Tokyo Round Negotiation (1986), p. 77-78 (noting EC internal difficulties that prevented any serious negotiations from starting until January 1967), Japan Ex. E-6.

or impaired the concessions related to black and white film and paper. Moreover, Japan recalls that black and white film and paper only represent about 2 percent of the present Japanese market. Thus, to the extent the Kennedy Round is relevant to this case, it is only relevant to a trivial portion of the products at issue. However, foreign brands have represented as much as 40-50 percent of the market.

6.550 The **United States** claims that during the period 1964 to 1967, there were no pertinent facts available to negotiators from the United States or any other GATT contracting party that challenged their reasonable expectations that Japan would not nullify or impair Japan's Kennedy Round concessions on photographic film and paper. At the time of the Kennedy Round negotiations, (i) Japan had not articulated a clear policy of distribution systemization; (ii) had not determined that it would aggressively limit the expansion of large stores; and (iii) had not indicated it would use restrictions on economic inducements to prevent foreign enterprises from penetrating the Japanese market. Nor was there any reason that the US Government should have known that the Japanese Government would take such actions at the conclusion of the Kennedy Round.[989]

(i) Distribution "countermeasures"

6.551 **Japan's** notes that two items listed by the US preceded the tariff concessions of the Kennedy Round:

(i) 1967 Cabinet Decision; and
(ii) JFTC Notification 17 (1967).

6.552 First, Japan explains that the 1967 Cabinet Decision was adopted on 6 June 1967, before the final agreement concluding the Kennedy Round agreement on 30 June 1967. The Cabinet Decision ratified public debate from the preceding two years and clearly endorsed distribution modernization as a way to remedy inefficiency and prepare for imminent capital liberalization. Second, the JFTC issued Notification 17 in May 1967, even earlier than the 1967 Cabinet Decision.

6.553 The **United States** responds that at the time of the Kennedy Round negotiations, there were no pertinent facts available concerning the actions Japan was preparing to take to implement its liberalization countermeasures program. The 1967 Cabinet Decision, which approved the use of countermeasures to prevent foreign enterprises from penetrating the Japanese market through key distribution channels, had yet to be promulgated and implemented. The United States argues that Japan had not articulated a clear and coordinated systemization policy to block access to primary wholesalers.

6.554 In the US view, the Japanese Government's array of opaque, informal measures to implement the systemization policy could not have been foreseen:

(i) 1969 Survey Report on Transaction Terms;
(ii) 1970 Guidelines;
(iii) 1971 Basic Plan;
(iv) 1975 Manual;
(v) JDB funding for Konica's wholesalers (which commenced in 1976);
(vi) SMEA funding for photo processing laboratories (first designated in July 1967).

6.555 According to **Japan**, while the items listed by the United States occurred after the 1967 concessions, the following items were an "outgrowth" of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices:

[989]See also paras. 5.26 and 6.339 above. For the US response to Japan's arguments concerning Japan's tariff concessions on colour, and black and white film and paper, see para. 6.337-6.338 in the sub-section VI.D.3.(c).(v). on "Black and white film and paper" above.

(i) the 1969 Survey;
(ii) the 1970 Guidelines; and
(iii) the 1971 Basic Plan;
(iv) the international contract notification requirement.

6.556 In Japan's view, the same holds true for the interim reports of the Distribution Committee, and the first and second interim reports of the Distribution Committee of 1964 and 1965, respectively, which also endorsed modernization of the distribution sector. Japan points out that these reports were published in the MITI Gazette, a widely read official MITI publication. Japan explains that the 1967 Cabinet Decision, which occurred before the conclusion of the Kennedy Round and almost a year prior to the Japanese acceptance of the Kennedy Round package, clearly embraced distribution modernization as a necessary response to imminent capital liberalization. Japan point out that this decision was published and widely publicized. For Japan, it is inconceivable that the United States Embassy in Tokyo would not have watched closely how Japan resolved the high-profile debate about capital liberalization that had been taking place in 1966 and 1967. Japan further argues that the requirement for international contract notification also took place prior to the conclusion of the Kennedy Round. Although the United States cites a minor change in 1971, the requirement for international contract notification itself goes back to 1953. Therefore, Japan concludes that the United States should have reasonably anticipated that the Japanese Government would continue to pursue these policies.

6.557 Japan also submits that SMEA financing predates the conclusion of the Kennedy Round. According to Japan, under SMEA financing, whose general framework was established in 1956, photofinishing laboratories were designated as an eligible industry on 1 April 1967.[990] This specific financing program to photofinishing laboratories thus predated the Kennedy Round deal. In Japan's view, the United States could not have had any legitimate expectation that financing would not be granted to qualifying applicants in the photographic sector.

6.558 Even assuming that MITI's distribution modernization policies during the 1960s and '70s encouraged single-brand distribution of film and paper as a means to exclude foreign brands from traditional distribution channels, for Japan it is clear that these trends began well in advance of the conclusion of the Kennedy Round. As to *film*, Japan argues that two of Fuji's four primary wholesalers were already single-brand dealers, as were all of Konica's primary wholesalers that eventually became subsidiaries. Japan claims that the United States should have been aware of this trend, since Fuji's third primary wholesaler, Misuzu, terminated its dealings with Kodak in April 1967, months before the final Kennedy Round deal. Similarly, Kodak's distributor in Japan, Nagase, acquired Kuwada in 1967, and converted Kuwada into a single-brand distributor. Kodak not only knew of the trend, Kodak was part of the trend. Public press accounts documented the trend toward single-brand distribution for film as well as cameras. As early as 1964, trade publications were already noting the trend toward single-brand wholesale distribution.[991] As to *paper*, Japan submits that affiliations between manufacturers and photofinishing laboratories were already common by 1967.[992] In Japan's view, the United States could not have any legitimate expectation that these trends would not continue.

6.559 The **United States** claims that Japan did not articulate, let alone implement, a clear and coordinated systemization policy to block access to primary wholesalers until after the Kennedy Round had concluded, that none of its subsequent actions was foreseeable to Japan's negotiating partners during

[990]According to Japan, the United States alleges that the date was July 1967. Japan contends that the designation date was in fact 1 April 1967, an extremely common date for such designations in Japan, since 1 April marks the start of a new fiscal year for the government.

[991]Distribution Keiretsu Gaining Strength - As Shown by Fuji's Special Contract (Tokuyakuten) Shops, Zenren Tsuho, May 1964, p. 5, US Ex. 64-3.

[992]According to domestic industry sources, these affiliations began as early as 1960 and were relatively common place by 1965. Affidavit of Tanaka Takeshi, p. 3, Japan Ex. A-10.

the Kennedy Round and that these actions have been difficult to uncover, identify and understand even with the benefit of intensive and unprecedented investigation and 25 years hindsight.

(ii) Restrictions on large stores

6.560 The United States claims that at the time of the Kennedy Round negotiations,

(i) the Large Stores Law had not yet been proposed; and
(ii) MITI's two key directives, which laid the foundation for the law by expanding the scope of the Department Store Law, were not issued until June 1968 and September 1970, respectively.

6.561 **Japan** responds that the enactment of the Large Stores Law in 1973 and subsequent amendments in 1978 and up to today, while subsequent to the Kennedy Round, have represented the continuation of a longstanding policy of preserving retailing diversity through regulation of large stores. Specifically, the Department Store Law was enacted in 1956, and required new department stores to obtain permits before opening. According to Japan, the Large Stores Law merely represented an extension of this preexisting regulatory policy to other types of large stores that were starting to arise (e.g., supermarkets, discount stores) and to block the deliberate circumvention of the law. Japan argues that the United States could not have had any legitimate expectation that large stores would be allowed to displace small and medium-size retailers in the absence of any government adjustment process.

6.562 Moreover, in Japan's view, the currently existing Large Stores Law is more liberal than the Department Store Law for the following reasons: First, the former substituted a notification system for the latter's permission-based system. Second, the former's regulations on store holiday and closing hours are less restrictive than the latter's.[993] Third, while only 84 percent of applications were permitted and implemented under the Department Store Law, approximately 96 percent of notified plans are implemented under the Large Stores Law. Therefore, Japan concludes that even if it were accepted that restrictions on large retail stores are unfavourable to imported products, there is nothing unfavourable to the imports that the United States could not have anticipated at the time of the Kennedy Round tariff concessions.

(iii) Promotion "countermeasures"

6.563 The **United States** argues that, at the time of the conclusion of the Kennedy Round, Japan's decision to use fair competition codes as an "effective countermeasure" was just about to be announced and implemented.[994] There was no reason why the United States could or should have known that Japan was about to take these actions which resulted in nullification or impairment of its Kennedy Round tariff concessions.

6.564 **Japan** submits that the Premiums Law was enacted in 1962. This law targeted conduct that had been identified by the JFTC as unfair trade practices as early as 1953. According to Japan, Notifications 5 and 34 merely represented elaborations of the general norms set forth in the Premiums Law. The 1972 amendments granted enforcement authority to prefectural governments. Japan contends that all of these developments should have been reasonably anticipated by the United States, since the United States had no legitimate basis for expecting that excessive premiums and deceptive advertising would go unregulated, or that this regulation would not be enforced vigorously.

[993]Japan notes that, under the Department Store Law, the minimum number of store holidays without permission was 48 days (4 days a month) for urban areas and 24 days (2 days a month) for other locations for a year.

[994]Report of the Foreign Investment Council Expert Committee, reprinted in Finance, June 1967, p. 3, US Ex. 67-5.

(c) Tokyo Round

6.565 **Japan** submits that the Tokyo Round was formally concluded on 11 July 1979. The Tokyo Round marked Japan's first tariff concessions on colour film and paper, as well as additional concessions on black and white film and paper.

6.566 The **United States** argues that at the time the United States negotiated the 1979 Tokyo Round concessions on photographic film and paper, the three elements of Japan's liberalization countermeasures had all, to one degree or another, been put into place and applied. In entering into the Tokyo Round negotiations, the United States was aware that Japan regulated large stores through the Large Stores Law and promotions and inducements through the Premiums Law and the Antimonopoly Law.

6.567 However, according to the United States, what negotiators could not have known, and did not know, was: (i) the extent to which Japan's closed distribution system for photographic film and paper was the result of the government's "distribution countermeasures"; (ii) that the distribution countermeasures, the Large Stores Law and the promotion countermeasures worked together to impede market access. The United States emphasizes that during the Tokyo Round negotiations, neither the United States nor any other GATT contracting party could have anticipated the actions Japan would take (iii) to dramatically expand the scope and invasiveness of the Large Stores Law following the Tokyo Round; (iv) to escalate by a substantial degree the enforcement of the Premiums Law and the Antimonopoly Law to the photographic film and paper sector to undermine Japan's tariff concessions, specifically for the purpose of consolidating and strengthening the exclusionary distribution system against new threats from commercial challengers such as large stores. In this context, the United States points out that the panel on *EC - Oilseeds* specifically rejected the EC's argument in that case that the existence of some measures at the time of the tariff concession - which were later substantially enhanced - meant that the United States could or should have reasonably anticipated their modification or enhancement.[995] Moreover, the United States maintains that no country was in a position to conduct the kind of investigation that would have been required to understand that Japan had utilized a broad array of informal, nontransparent measures to engineer virtually import-free distribution channels and was continuing to apply a variety of measures to maintain those channels.

6.568 In **Japan's** view, the United States should have reasonably anticipated alleged measures in effect at the time of the tariff concessions: The Large Scale Retail Store Law and the Premiums Law were published laws with published regulations and their requirements were public facts; Likewise, all of the so-called "distribution countermeasures," which are not even included in the US non-violation claim concerning the Tokyo Round tariff concessions, were public facts, as were their alleged effects on the distribution structure for film and paper.[996] Thus, Japan concludes that no significant government measures or policy changes occurred after 1979. According to Japan, there were procedural changes in one pre-existing law, and industry self-regulation actions under the general authority of another pre-existing law. In Japan's view, there was thus no measure, unanticipated at the time of the 1979 tariff concessions, that was capable of upsetting the competitive position of imported film or paper. Even assuming that expectations concerning 1979 tariff concessions remain protected as a separate benefit, Japan asserts that the US non-violation claims relating to those concessions are unfounded.

(i) Distribution "countermeasures"

6.569 The **United States** submits that by the late 1970's, importers like Agfa and Kodak were denied access to primary wholesale channels due to wholesalers' exclusive relationships with domestic manufacturers. What the United States claims not to have been able to know was the extent to which

[995]*See, e.g., EEC - Oilseeds*, p. 129, para. 149.

[996]All Fujifilm primary wholesalers were single-brand distributors by 1975; all Konica primary wholesalers were single-brand wholesalers at their inception, and subsidiaries by 1977.

concerted government policy had caused this exclusion and obstructed alternative channels, and the degree to which ongoing application of government measures continued to support this distribution system as an exclusionary system. According to the United States, following the Tokyo Round, Japan developed (i) new business assistance programs to bolster the systemization of laboratories and exclude imports of both film and paper from this alternative channel; pressed forward with strengthening the (ii) informational ties between manufacturers and wholesalers; and continued to rely upon (iii) Chambers of Commerce in ongoing application of standard transaction terms. Moreover, the United States argues that it could not have anticipated the effects of (iv) the international contract notification provisions which required reporting of all contracts between foreign manufacturers and Japanese distributors. Further, the United States argues that it could not expect that departures from standardized transaction terms could be (v) "unfair trade practices" under the Antimonopoly Law.

6.570 In **Japan's** view, by the time of the conclusion of the Tokyo Round, virtually all of the alleged distribution measures in dispute had already occurred. Japan argues that the historical measures and actions discussed by the United States are thus legally irrelevant to a proper analysis of the 1979 tariff concessions, i.e., the first concessions for colour film and paper, because they occurred *before* the 1979. The "Distribution Systemization Manual" was issued in March 1975, more than four years before the conclusion of the Tokyo Round. The JDB loan was made in 1976 and the SMEA financing came in 1967.[997] The last multibrand primary wholesaler, Asanuma, stopped carrying Kodak in 1975, again four years before the conclusion of the Tokyo Round. Therefore, for Japan it is clear that the United States could reasonably anticipate the alleged measures that already existed and the market structure as it existed at the end of 1975, when the tariff concessions were finalized in 1979 during the Tokyo Round.

6.571 In Japan's view, the United States does not even allege any so-called "distribution countermeasures" subsequent to the Tokyo Round, although these alleged distribution measures are the centrepiece of the US non-violation claims.

(ii) Restrictions on large stores

6.572 With respect to restrictions on large stores, the **United States** alleges that, as the Tokyo Round concluded, Japan tightened the enforcement of the Large Stores Law and related measures to block new challenges to the closed distribution system. The United States claims that Japan built on these substantial new restrictions by:

(1) creating the "prior adjustment" and "formal adjustment" processes (1979);[998]
(2) adding the "prior explanation" requirement to precede the builder's Article 3 Notification, i.e., requiring the builder to meet with and obtain the consent of local retailers before submitting the Article 3 Notification (1982);[999] and
(3) mandating that the adjustment process "be carried out in a restrictive manner" (1982).[1000]

6.573 The United States submits that Diet amendments to the Large Stores Law that became effective in May 1979 vastly expanded the coverage and impact of the law in two key respects. First, the law, which had previously applied only to stores with 1,500 square meters and above, was broadened to include stores with 500 square meters or more, causing store applications under the law to explode,

[997]Japan notes that the United States indicated that the SMEA financing was granted in 1977. However, Japan claims that SMEA financing for photofinishing laboratories was first authorized in April 1967 and that even US documents mention such financing in the late 1960s.

[998]MITI Directive No. 365 of 1979, US Ex. 79-2.

[999]MITI Directive No. 36 on "Immediate Measures Regarding Notification to Establish Large Scale Retail Stores", 30 January 1982, US Ex. 82-2.

[1000]Ibid.

increasing by 300 percent in 1979. Second, large stores under the law were divided into Class I stores (1,500 and above), which fell under direct MITI jurisdiction, and Class II stores (500 to 1,500) which were placed under the regulation of prefectural governors. The United States explains that this division substantially increased the personnel and other resources available to investigate and order adjustments to stores. In the US view, as a consequence, Class II store applications, which reached 1,029 in 1979, fell to 424 in 1980 and to 308 in 1981, as implementation suppressed these stores.

6.574 **Japan** argues that by the time of the conclusion of the Tokyo Round, virtually all of the alleged measures in dispute regulating large stores had already occurred. According to Japan, only the following alleged measure regulating large stores occurred *subsequent* to the July 1979 tariff concessions, i.e., MITI administrative guidance on "prior explanation" and treatment of new notifications under the Large Scale Retail Store Law (1982).

6.575 In Japan's view, other historical measures and actions discussed by the United States are thus legally irrelevant to a proper analysis of the 1979 tariff concessions. All other alleged measures in dispute, as enumerated below, regulating large stores occurred *before* the 1979 tariff concessions, and therefore should have been reasonably anticipated by the United States at the time those concessions were made:

(i) the Large Scale Retail Store Law of 1973;
(ii) the amendments of the Large Scale Retail Law of 1978.

6.576 According to Japan, the United States argues that the 1978 amendments occurred after the 1979 tariff concessions. Specifically, in Japan's view, the United States seems to argue that substantive negotiations between the United States and Japan on film were concluded by August 1978, and that this date should serve as the time of the concessions. For Japan, the United States position in this case has no support in prior non-violation cases since tariff concessions have uniformly been timed by the date of the final act of the negotiating round in question, e.g., 11 July 1979 for the Tokyo Round.[1001] Japan notes that the 1978 amendments were endorsed by the Cabinet on 6 June 1978, approved by the Diet on 20 October 1978, and officially promulgated on 15 November 1978. Japan maintains that the United States knew or should have known about these amendments while the Tokyo Round was ongoing. Japan points out that the United States could have reopened negotiations on film or any other product allegedly impacted by the amendments. Japan emphasizes that the Cabinet action took place almost three months before the USTR letter to Kodak announcing film tariff concessions on 30 August 1978. Accordingly, Japan contends that any alleged upsetting of competitive conditions as a result of the 1978 amendments should reasonably have been anticipated by the United States.

6.577 In Japan's view, data submitted by the United States shows that from 1982 notifications of both categories of large scale stores consistently increase in number and that, accordingly, the 1982 administrative guidance had no material effect on the preexisting operation of the law. Japan describes that there was a decline from peak levels during the 1979 to 1981 period, but whatever caused that decline could logically have nothing to do with a measure passed in 1982. Similarly, after 1982, both the percentage of retail sales in Japan through large scale stores and the percentage of retail establishments that are large scale stores have increased steadily and consistently.[1002] Therefore, Japan concludes that, by any of these empirical benchmarks, the 1982 amendments did not represent a material change in the law.[1003]

[1001]See e.g., *EEC - Canned Fruits*, L/5778, p. 6, Table 2, para 14.

[1002]Japan contends that, although the numbers increased, the United States calls these trends "constant". But whether one views the trends as increasing or constant, Japan considers as the relevant legal conclusion that the 1982 amendments were not a material change in the law.

[1003]According to Japan, the United States acknowledges that this guidance was repealed in 1992 and is thus no longer in effect.

6.578 The **United States** submits that Japan complemented these restrictions under the Large Stores Law with new constraints on the ability of medium and large retailers to merge and expand: i.e., new constraints on potential direct challenges to the exclusionary distribution system.[1004] The JFTC then codified the restrictive policy reflected in its blocking order in new Retail Merger Guidelines which, according to the United States, were specifically directed at the retail sector in order to limit opportunities for larger retailers to avoid the tightening restrictions of the Large Stores Law through pursuing acquisitions, rather than by having to open or expand stores.

6.579 **Japan** responds that the United States' argument on the difficulty of mergers between large-scale retailers -- due to the review rule to consider the market share of large-scale stores alone -- is misguided. Even if such mergers become easier, the total area of floor space will not increase, therefore, there is no link between the merger regulations and the large-scale store regulations.

6.580 Japan further submits that the measures in question - which, according to Japan, have been abolished - were predictable "outgrowths" of preexisting policies. The 1982 MITI administrative guidance on "prior explanation" during the Large Scale Retail Store Law process introduced a mere procedural change to the law, requiring prior explanation of the new store plan.[1005] The basic operation of the law, i.e., regulation of large stores to preserve diversity of retailers, remained unchanged. Japan contends that the United States should have reasonably anticipated that the law would be subject to such procedural modifications that did not affect its underlying substance. In Japan's view, there was nothing unexpected about the 1982 guidance.[1006]

6.581 Japan further emphasizes that the current Large Scale Retail Store Law is an extension of the respective law of 1979, and actually more liberal than the one in 1979. Accordingly, Japan contends that, even if it were accepted that restrictions on large retail stores are unfavourable to imported products, there is nothing unfavourable to the imports which the United States could not have reasonably anticipated at the time of the tariff concessions in the Tokyo Round. Japan argues that this deregulation can be seen by comparing the past law with the present law with respect to the (i) exemption of retail stores with retail space less than 1,000 square meters, (ii) regulations on store holidays, and (iii) regulations on closing time.

(iii) Promotion "countermeasures"

6.582 With respect to the Premiums Law, the **United States** submits that Japan's negotiating partners could not have anticipated that Japan would respond to the Tokyo Round tariff cuts by engaging in elaborate and aggressive efforts to thwart foreign firms' ability to market and promote imports in the photomaterials and other sectors. According to the United States, within a year of the conclusion of the Tokyo Round:

[1004]The United States notes that in 1981, the JFTC blocked a proposed merger between a leading supermarket chain, Kyushu Daiei and a large local supermarket in Kyushu by the name of Uneed.

[1005]Japan further notes that the 1982 guidance also refers to potential large stores exercising "self restraint". To the extent this guidance simply suggested that stores themselves think about how their plans would affect the surrounding community, this guidance had no real impact on the operation of the law. In Japan's view, the United States jumps to the conclusion that this guidance was a "freeze". Pursuant to the guidance, prefectural governments might designate municipalities as those in which self-restraint on new notifications should be advised, provided the municipalities met with the specified requirements. In Japan's understanding, just a fraction of municipalities were designated as such.

[1006]Japan points out that the United States itself notes that earlier notification policies had already been adopted in May 1979, two months prior to the end of the Tokyo Round.

(i) the JFTC pressed for the creation of an umbrella group, the Federation of Fair Trade Councils, to coordinate the activities of the fair trade councils overseeing the 52 fair competition codes for representations and the 30 codes for premiums;[1007]
(ii) the JFTC approved the establishment of a Distribution Sector Office ("DSO") and directed it to examine 16 business sectors, including cameras and photographic materials;[1008]
(iii) the domestic photographic industry responded to JFTC guidance in promulgating its first set of "Self-Regulating Measures Regarding Making Business Dealings With Trading Partners Fair" in June 1982;
(iv) the formal establishment of the Promotion Council and its broad articles of association followed in December 1982;
(v) the Promotion Council's actions - together with the Zenren and JFTC - to derail Kodak's marketing campaign for the VR pack occurred in June 1982;
(vi) the Promotion Council published its second set of self-regulating measures in 1984;
(vii) the JFTC's efforts in this regard culminated in the creation of the Retailers Fair Competition Code and Fair Competition Council in 1987, to set and enforce standards for misrepresentations in advertising related to price/promotional terms.

6.583 **Japan** contends that, by the time of the conclusion of the Tokyo Round, virtually all of the alleged promotion measures in dispute had already occurred. According to Japan, only the following alleged promotion measures in dispute occurred *subsequent* to the July 1979 tariff concessions:[1009]

(i) Fair Trade Promotion Council self-regulatory code on dispatched employees (1982);
(ii) Fair Trade Promotion Council statement on photofinishing price representations (1984);
(iii) Camera Retailers' Fair Competition Code on advertising (1987).

6.584 In Japan's view, other historical measures and actions discussed by the United States are thus legally irrelevant to a proper analysis of the 1979 tariff concessions. All other alleged promotion measures in dispute occurred before the 1979 tariff concessions, and therefore should have been reasonably anticipated by the United States at the time those concessions were made.

6.585 With regard to the Camera Retailers' Fair Competition Code, Japan insists that it is irrelevant to this case because it relates only to cameras. Moreover, in Japan's view, the JFTC approval of the Code in 1987 was an application of the pre-existing Premiums Law, and brought about no change to the implementation policy of the Law.

6.586 As to the Fair Trade Promotion Council actions on dispatched employees and photofinishing price representations, Japan responds that such actions are irrelevant here since they are private conduct. Therefore, Japan contends that there is no government measure which the United States could not have anticipated.

[1007]The Fair Competition Code System and Status of Establishing Fair Competition Codes, Kosei Torihiki, No. 390, April 1983, pp. 37-38, US Ex. 83-8.

[1008]Cabinet Order No. 43 of 1979 as reported in JFTC Annual Report 1980, p. 283, US Ex. 79-1.

[1009]The United States mentions the 1979 establishment of the Distribution Sector Office in the JFTC. This action, however, led only to sector-specific advisory reports, not any governmental action.

(d) Uruguay Round

6.587 According to the **United States**, by the time of the Uruguay Round negotiations, the United States and other countries were beginning to understand that conditions in Japan other than tariffs that posed obstacles to imported products and that Japan's distribution system was difficult in general.[1010] The United States concedes that, at the time of the conclusion of the Uruguay Round, it was aware that Japan regulated large stores through the Large Stores Law and promotions and inducements through the Premiums Law and the Antimonopoly Law. But the United States could not have known, and did not know, how the three types of countermeasures worked together within the context of Japan's closed distribution system for photographic film and paper, nor what its restrictive effects were. The United States explains that even at the time of the Uruguay Round it still did not have (and could not have had) sufficient appreciation for the way government policies interwove and supported this closed distribution system in the film sector.

6.588 The United States submits that it was only with the preparation for consultations in this case that the United States gained an understanding of

(i) how the standardized transaction terms worked;
(ii) how the Large Stores Law continues to suppress large stores through non-transparent mechanisms as well as formal procedures;
(iii) how the suppression of large stores directly supports the oligopolistic distribution system in Japan's photosensitive materials sector;
(iv) how the restrictions on promotions directly limit opportunities for foreign film and paper;
(v) how subsidization of the laboratories takes them out of reach of foreign suppliers;
(vi) how Japan's active development of information links further enhanced systemization of distribution to the exclusion of foreign imports.

6.589 **Japan** contends that the issues now raised by the United States were not just discussed in reports, they have also been the subject of intense bilateral discussions between the United States and Japan. According to Japan, in the late 1980s and early 1990s, many of these issues were extensively discussed and debated between the United States and Japan as part of the Structural Dialogue (1986-1988) and the Structural Impediments Initiative (1989-1990).[1011] Therefore, Japan contests the US claim that the alleged measures are not of the kind that trade negotiators should reasonably be expected to understand, since the kind of allegations before this Panel are precisely the kind that US trade negotiators have emphasized for years in their dealings with Japan. In light of this history, Japan objects to the US argument that it could not have reasonably anticipated the alleged measures in dispute as of 1994. For Japan, it is obvious that the United States did know during the Uruguay Round about (i) single-brand distribution, (ii) the Large Stores Law, and (iii) restrictions under the Premiums Law, and had already formulated the allegations concerning them which that it has presented to this Panel.

6.590 The **United States** rejects Japan's argument that the United States could have anticipated that these measures would diminish the value of Japan's Uruguay Round tariff concessions. The United States maintains that bilateral discussions between the United States and Japan during the Uruguay Round in the late 1980s and early 1990s under the Structural Impediments Initiative do not demonstrate that the United States could have "anticipated" or understood Japan's program of measures at issue

[1010]1990 National Trade Estimates Report on Foreign Trade Barriers (NTE), p. 124, Japan Ex. E-4.

[1011]Summary Report on US-Japan Structural Dialogue (Japan Ex. E-5) and SII Final Report. (Japan Ex. B-30) By contrast, on these occasions, the United States even endorsed some of the measures the Japanese Government took. For example, the Report said, "obviously, [the Premiums law including Fair Competition Codes] is not intended to be an impediment to new entry by foreign or domestic firms, and the Fair Trade Commission (FTC) has enforced and will continue to enforce this system so that it does not impede such entry". SII Final Report.

in this case: According to the United States, none of the actual *measures* at issue was discussed in relation to its effect on the photographic film and paper sector because the focus of these bilateral discussions was on *private* obstacles to trade.[1012] The United States further emphasizes that it did not have any idea at the time, and only recently became aware of, the Japanese Government's direct responsibility for these measures, and the collective impact of these measures on the development and maintenance of Japan's exclusionary market structure for film and photographic paper.

6.591 Specifically, the United States submits that none of the 21 measures it has identified was subject to bilateral discussions with Japan in the late 1980s or early 1990s, with the exception of the following:

(1) The JFTC's restrictions on the use of premiums, including its restrictions on
  (i) premiums to wholesalers contained in JFTC Notification 17;
  (ii) premiums to consumers contained in JFTC Notification 5; and
  (iii) prize offers in open lotteries contained in JFTC Notification 34.
(2) The JFTC's notification requirements for international contracts, including those contained in JFTC Rule 1 concerning "Rules on Filing Notification of International Agreements on Contracts".
(3) The Large Stores Law.

(i) Distribution "countermeasures"

6.592 The United States took at face value Japan's commitments in the SII to address these private sector obstacles and liberalize its restrictive distribution structure. For example, in 1993, during the closing months of the Uruguay Round negotiations, the United States acknowledged "new commitments by the Government of Japan contained in the Second Annual Report of SII … in the areas of distribution and exclusionary business practices".[1013]

6.593 The United States confirms that the JFTC's notification requirements for international contracts, including those contained in JFTC Rule 1 concerning "Rules on Filing Notification of International Agreements on Contracts" were discussed with Japan in the context of the SII. However, the United States contends that it was completely unaware of the role the international contract notification requirements played in obstructing access to distribution channels in Japan by authorizing the Japanese Government to scrutinize transaction terms between foreign manufacturers and domestic distributors in line with Japan's guidance on standardizing transaction terms.

6.594 In **Japan's** view, the United States should have known and did know as of 1994 about all of the alleged measures currently in dispute. As to distribution policies, all of the alleged "distribution countermeasure" documents were published.[1014] Many official MITI publications, which are precisely the "sources that governments typically use to announce trade policies".[1015] In Japan's view, the alleged effects of MITI's distribution modernization policies, i.e., the decisions by the primary wholesalers not to carry other brands of film, were publicly known facts.[1016] In particular, according to Japan, the

[1012]See, e.g., Ibid.. See also 1994 National Trade Estimates Report on Foreign Trade Barriers (NTE): "In short, exclusionary and particularly collusive business practices often prevent new participants, be they Japanese or foreign firms, from easily entering the Japanese market and competing for market share", 1994 NTE p. 145, Japan Ex. E-4.

[1013]1993 National Trade Estimates Report on Foreign Trade Barriers, p. 146, Japan Ex. E-4.

[1014]Japan notes that the United States was able to obtain copies of all of these items from public sources. The only exception is the 1975 Manual, drafted by a public corporation, but never officially published.

[1015]Japan points out that, e.g., the various interim reports and the 1970 Guidelines cited by the United States were all published in the MITI Gazette (the "Tsusansho Koho").

[1016]According to Japan, the United States argues that it did not know and could not have known "the extent to which Japan's closed distribution system for photographic film and paper was the result of the government's 'distribution countermeasures.'" Japan agrees in the sense that the connection between MITI's distribution modernization policies and single-brand wholesale distribution of film was unknowable because it was nonexistent. In Japan's view, since 1975, the

United States complains about the alleged "distribution countermeasures" in this proceeding on the ground that they encouraged single-brand distribution of film and paper. In this context, Japan notes that the United States has regularly complained about single brand distribution in National Trade Estimates Report on Foreign Trade Barriers ("NTE Reports") published by the Office of the United States Trade Representative. In the 1990 Report, the section entitled "Distribution System" contains the following passage:

> "The complexity and rigidity of Japan's distribution system raises the costs of new market entry and limits market penetration of US firms. … Exclusive relationships among retailers, wholesalers, and manufacturers, and large numbers of small wholesalers and retailers make setting up a distribution system expensive for new-to-market companies. This added cost of entry affects both US manufacturers of consumer and producer goods".[1017]

6.595 Japan emphasizes that the 1994 NTE Report[1018] even included the a film-specific passage in the section entitled "Distribution:"

> "Japan's distribution system can also serve to limit the market share of companies that have gained access to Japan's market. A leading U.S. producer of *consumer film*, for example, has encountered problems in increasing its market share in Japan due to restrictive distribution channels. Despite significant investment and years of effort, the company's market share remains extremely low compared to its market share in the rest of the world".[1019]

(ii) Restrictions on large stores

6.596 The **United States** claims that, at the time of the 1994 Uruguay Round tariff negotiations, it was not aware, and not able to be aware, that Japan had seized upon the Large Stores Law as a key instrument to protect and support the vertical integration of distribution in the consumer photographic materials sector. Furthermore, in the US view, it could not have been aware of the extent to which supporting vertical integration of distribution was in fact affirmative Japanese Government policy.

6.597 With respect to the Large Stores Law, **Japan** points out that the law and relevant regulations have been published and that their requirements are currently known and have long been publicly known facts.[1020] Moreover, Japan contends that the United States has been making these claims concerning the Large Stores Law with respect to imports generally for years. Thus Japan concludes that the United States not only should have known, it certainly did know about these measures.

6.598 Japan refers to the example of the 1990 NTE Report's chapter on Japan which includes the following specific headings: "Law on Large Retail Stores," and "Marketing Practice Restrictions". The section on "Law on Large Retail Stores" contains the following statement:

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only alleged "distribution countermeasure" is continued acquiescence by the Japanese Government in single-brand wholesale distribution. This alleged "measure" was a publicly known fact that should have been known and was indeed known by US trade negotiators before 1994. If an alleged "measure" consists simply of a market structure, and that market structure was known at the time of the tariff concession and has not changed since, there can be no frustration of legitimate expectations and hence no nullification or impairment of the benefit of the relevant tariff concessions.

[1017]1990 National Trade Estimates Report on Foreign Trade Barriers, p. 124, Japan Ex. E-4.

[1018]The 1994 National Trade Estimates Report of Foreign Trade Barriers was published on 31 March 1994, before the Uruguay Round Agreement was concluded, and was obviously written even earlier.

[1019]1994 National Trade Estimates Report on Foreign Trade Barriers, p. 172-173, Japan Ex. E-4 (emphasis added).

[1020]The Large Scale Retail Store law was published in Kampo on 1 October 1973. The Premiums Law was published in Kampo in 1962.

> "Although export losses due to this law's impact cannot be quantified, they are believed to be significant as a large number of products are affected. Since larger retailers are usually more willing to risk introducing new products, often directly imported from overseas suppliers, or aggressively promote imported product lines, limits on retail expansion effectively hinder the import of US goods".[1021]

6.599 According to Japan, the US concedes that the Large Scale Retail Store Law and several key elements of its claim about the Premiums Law were subject to specific bilateral discussions in the late 1980s and that its awareness and expectations concerning a specific law should apply to all products. Given that the law treats film no differently than it treats other products, in Japan's view, it is not credible for the United States to assert that while it was aware of how the law applied generally, it was not aware of how the law applied to film. For Japan, the US argument would make it virtually impossible to identify "reasonable expectations" for specific products and would undermine this element of the non-violation remedy.

6.600 With respect to the talks under the Structural Impediments Initiative, the **United States** argues that it took at face value Japan's assurances to liberalize restrictive distribution structures, and to substantially liberalize the Large Stores Law as one of the central means for doing so.[1022] According to the United States, Japan specifically indicated with respect to the Large Retails Stores Law that it would:

(i) shorten the coordination process for opening stores;
(ii) relax regulations on closing times and holidays;
(iii) address separate regulations by local public authorities;
(iv) exempt from coordination procedures after notification the new opening or expansion of new space dedicated to import sales;
(v) further review the Large Stores Law every two years.

6.601 The United States admits that Japan did in fact implement formal changes to operating hours and the coordination process for opening new stores and expanding space dedicated to imports, as stated in the SII report. The United States also concedes that Japan took action to address separate local regulations. Therefore, the United States was initially optimistic that these changes would be effective in increasing competition in Japan's distribution sector which is also reflected in the 1993 National Trade Estimates Report published by the USTR.[1023]

6.602 However, the United States submits that by 1994, subsequent to the conclusion of the Uruguay Round, it became clear that the limited reforms of the Large Retail Stores Law and other areas of business practice and government regulation put in place by Japan had not fundamentally changed the

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[1021]1990 National Trade Estimate Report on Foreign Trade Barriers, p. 124, Japan Ex. E-4.

[1022]In the 1990 SII report, for example, Japan stated that with regard to the Large Stores Law:

"As dynamic changes are called for in the distribution industry, deregulation measures will be taken in order to meet new needs of consumers, to enhance the vitality of the distribution industry and to ensure smooth procedures for opening new stores. Deregulation measures will be put in place by both the central Government and local public authorities".

[1023]The 1993 National Trade Estimates Report noted that "the distribution system is one of the six major areas being addressed in SII. The Joint Report issued in June 1990, contains a series of Japanese Government commitments addressing important distribution system issues. One of the most important was a pledge to ease significantly restrictions on new large-scale retail stores, including the further shortening of the new store application waiting period to twelve months by the end of 1991. The revision of the Large Retail Store Law in 1990 has largely been effective in reducing barriers to the establishment of retail outlets". Japan Ex. E-4.

restrictive nature of the law or the local regulations. The USTR's 1994 National Trade Estimates report reflects this growing disappointment.[1024]

6.603 The United States maintains that despite its commitment to "dynamic changes" to deregulate the Large Stores Law and to open distribution systems, Japan has continued to aggressively apply the law in a way that limits the ability of large stores to open and expand in Japan, stores as small as 500 square meters, as compared to 1500 square meters when the law was implemented in 1974. The delays, downward adjustments in floor space, reduced hours of operations, forced holidays, and burdens of the adjustment process significantly impair the ability of large stores to expand and operate at the pace and levels they would choose in the absence of regulation. The United States further submits that it did not expect Japan would continue to require or encourage large stores to undertake "prior consultation" or "local consultation" with their local competitors, and would continue allowing the voice of local competitors to dominate the large store review process.[1025] This process of undertaking adjustments with local competitors is particularly burdensome for large stores, as often large stores must agree to burdensome restrictions in order to ensure smooth passage through the formal review system.

6.604 **Japan** responds that the Large Stores Law today is more liberal than its operation in 1994. Three sets of deregulation of the law during the early 90's were completed by 1994, and there have been no significant changes since then. Any effort by the Japanese Government to ensure that local governments more faithfully adhere to the national standards for administering this law in fact makes the law more liberal, not less.

(iii) Promotion "countermeasures"

6.605 The **United States** claims that only recently it became aware of the extent to which the Japanese Government and the fair trade councils use the Premiums Law and the fair competition codes to limit how foreign photographic materials manufacturers and their distributors may promote their products. Likewise, the United States submits that it became aware only recently of the actions by the fair trade councils in the photographic sector to discipline both members and non-members in order to limit competition by new entrants on the basis of price or promotional offers.

6.606 With respect to the promotion measures, **Japan** states that the Premiums Law and pertinent notifications were published and their requirements are currently, and have long been, publicly known facts.[1026] All JFTC notifications and fair competition codes are also published, and are therefore publicly known facts.[1027] Japan underscores that the United States should be charged with knowledge of these published documents and publicly known facts. It further submits that the 1990 NTE Report's section on "Marketing Practice Restrictions" attacks the Premiums Law and even refers specifically to film:

> "Japan Fair Trade Commission (JFTC) regulations significantly restrict the use of premiums and other sales incentives offered to consumers, distributors and retailers. Under Japan's "Premiums Act" of 1962, the JFTC may authorize the establishment

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[1024]The 1994 National Trade Estimates Report noted that "In revising the Large Scale Retail Store Law, MITI rejected suggestions that the law be abolished, a move MITI maintained could have the effect of increasing local government regulations on large stores. The United States believes that MITI, at a minimum, should take steps to further streamline the Large Scale Retail Store Law, for example by reducing the current review period from 12 months to 3 months". USTR, 1994 National Trade Estimates Report, Japan Ex. E-4.

[1025]According to the United States, the fact that local competitors continue to dominate the large store review process is documented by Japanese Government studies.

Japan, however, points out that this US assertion relies on several translation errors of the cited documents, as described in sub-section V.C.2.(b).(ii) on "Substantive provisions of the Premiums Law" above, in particular paras. 5.400-5.402.

[1026]The Large Scale Retail Store law was published in Kampo on 1 October 1973. The Premiums Law was published in Kampo in 1962.

[1027]The US submission provides copies of all the JFTC notifications from readily available sources.

> of Fair Competition Codes. … Under this scheme domestic manufacturers establish industry promotion rules that are then accorded legal status by the JFTC. These rules impair foreign firms' ability to compete in the Japanese market. … Eliminating further restrictions could increase sales of many products. … it could also increase market opportunities for goods like film and candy, which are used as premiums".[1028]

Thus, Japan concludes that in 1990 the United States was making exactly the same arguments that it has made to this Panel. Japan further mentions that much of the language quoted above was then repeated, virtually verbatim, in the 1991, 1992, 1993, and 1994 reports.[1029]

6.607 With respect to the Premiums Law, the **United States** submits that the United States and Japan discussed in the context of the SII the JFTC's restrictions on the use of premiums, including its restrictions on

(i) premiums to wholesalers contained in JFTC Notification 17;
(ii) premiums to consumers contained in JFTC Notification 5; and
(iii) prize offers in open lotteries contained in JFTC Notification 34.

6.608 However, the United States emphasizes that, while these items were discussed as a *general* matter, the law was not discussed in its relation to the photographic materials sector. The United States further contends that the specific codes at issue in this case, specifically the Retailers Fair Competition Code, were never discussed. Moreover, to the extent that the Premiums Law and the fair competition codes were discussed generally during SII, the United States believed that Japan would follow through on its commitments in the SII Report "to enforce this system so that it does not impede new entry" by foreign or domestic firms.

[1028]1990 National Trade Estimate Report on Foreign Trade Barriers, p. 125, Japan Ex. E-4.

[1029]Japan Ex. E-4 provides the relevant excerpts from each of these National Trade Estimates Reports on Foreign Trade Barriers.

F. THE COMBINED EFFECT OF THE THREE SETS OF MEASURES

6.609 *Distribution countermeasures:* In the view of the **United States**, the "distribution countermeasures" work together as an organic whole. The individual specific studies, reports, surveys, guidelines, financing programs, or other distribution countermeasures standing alone may not have been sufficient to accomplish Japan's goal of restructuring the distribution system. According to the United States, MITI explained that the process of establishing a new industrial order would require back-and-forth interaction between government and industry over time. MITI expected government and industry to work together to set the targets for industrial restructuring, and for businesses to make efforts to achieve the targets, supported by government fiscal and other incentives. Leading scholars in Japan agree that one way that administrative guidance is made effective is by a continuing process of studying, surveying, cajoling, and targeting the use of fiscal incentives that keeps the private sector focused on the goals set by the government, assesses their achievement of those goals, and builds peer pressure on those who are falling behind in their achievement.

6.610 The US claim is that the measures listed in the "distribution countermeasures" section operate as a set, i.e. the distribution countermeasures as a set (i) violate Article III:4 and (ii) nullify or impair benefits under the GATT within the meaning of Article XXIII:1(b).

6.611 *Distribution countermeasures in combination with the Large Stores Law:* The United States alleges that the Large Stores Law and related measures have operated to support the vertically aligned distribution system fostered by the Government of Japan in the photographic film and paper sector. A 1971 MITI survey and report regarding transaction terms demonstrates that MITI viewed large stores as a threat to Fuji and Konica's oligopolistic distribution systems. It cites as two threats to this oligopolistic system the "growth of retail routes (especially regular chains and supermarkets) other than the photo retail route and changes in transaction terms due to this leadership", and secondly the "effects of full participation of Eastman Kodak". The guidance explained why large stores threatened oligopolistic distribution: "When this share [the share of film sales by supermarkets] becomes larger, influence over manufacturers will grow, and the market system controlled by manufacturers will be shaken". Without the measures to restrict the growth of large stores, the United States contends that large stores would have brought sufficient bargaining power and competition into the Japanese distribution system to erode the exclusive vertical control over distribution exercised by Japanese manufacturers. Therefore, the United States takes the position that the Large Stores Law and related measures should be considered as important measures in Japan's overall efforts to create and support manufacturer-dominated, vertically aligned distribution in Japan.

6.612 Therefore, the US claim is that the Large Stores Law and related measures and the distribution countermeasures *in combination* nullify or impair benefits under the General Agreement within the meaning of Article XXIII:1(b).

6.613 **Japan** contends that the United States merely takes a statement out of context to support its argument that the Large Scale Retail Store Law has "operated to support" the distribution system allegedly fostered by the government in the photographic film and paper sector.[1030] Japan argues that innocuous comments about "future problems" are a discussion about the threat of the reintroduction of irrational business terms, not the possible threat of large stores to some supposed oligopolistic distribution system that the government was allegedly trying to protect. Japan points out that it viewed

[1030]Specifically, Japan notes that the United States selects a few sentences from the residual category "other" at the end of a several hundred page report on transaction terms. Japan's 1969 Survey, p. 309, Japan Ex. B-1.

"free competition" as a positive development.[1031] The fear expressed regarding the increase in sales by supermarkets was not over the threat to some established domestic oligopoly, but rather a fear that these new retail channels would introduce irrational business practices, such as abnormally long payment periods, product returns, and dispatched employee practices.[1032]

6.614 *Restrictions on large stores:* The **United States** claims that independently of the role that the Large Stores Law plays in supporting the oligopolistic distribution system in the Japanese photographic film and paper sector, the restrictions on large stores have limited market access by curtailing an alternative channel to market foreign products. Even if unrestricted growth in large stores did not alter the exclusive manufacturer domination over Japanese wholesalers, it still would allow expansion of a sales channel that has proven to be more friendly to imports in Japan. The United States presents as an example that Agfa makes at least half its film sales in Japan to the Daiei supermarket chain, Japan's largest retailer. If Daiei's growth had not been retarded for three decades by repressive Japanese government regulation, it might be an even larger chain today and Agfa's sales to it would be greater. On the other hand, if Japan's primary wholesalers were not in exclusive relationships with Japanese manufacturers and were willing to carry foreign film, the need to rely on large stores as an alternative would be much reduced.

6.615 Thus, in addition to the position stated above regarding the Large Stores Law in combination with the distribution countermeasures, the US claim is that the Large Stores Law and related measures *by themselves*, in the context of a closed distribution system, nullify or impair benefits under the General Agreement within the meaning of Article XXIII:1(b).

6.616 In response, **Japan** first emphasizes that the Large Stores Law does not regulate which products large retailers can carry nor does it take into account what products, much less the origin of the products, that a retailer sells when determining whether and what adjustments are necessary. Second, Japan rebuts the alleged import friendliness of large stores by arguing that retailers, whether large or small, choose the brands they carry to maximize profit; there is no reason to believe that the size of stores in any way changes the profitability of particular products. In Japan's view, there is in fact no correlation between a store's size and its likelihood of carrying foreign brands; Agfa's success with Daiei, alleged by the United States, may have resulted from Agfa's concentration of its business effort on Daiei, and thus, has no logical connection to the large retail space of some of Daiei's stores (in addition to large stores, Daiei operates a number of small and medium-sized stores). Third, Japan points out that on its own terms, the law regulates large stores without regard to what relationship they and nearby small and medium-sized retailers have with any manufacturer or distributor; the law was designed to preserve a diversity of retailing outlets, a policy pursued by many national and local governments around the world. Accordingly, Japan concludes that the Large Stores Law cannot be upsetting the competitive position of imported photographic film and paper.

6.617 *Promotion countermeasures:* The **United States** alleges that the promotion countermeasures also have supported the closed, manufacturer-dominated distribution system. Most directly, Notification 17 under the Premiums Law took away an important means for foreign manufacturers to offer Japanese distributors a more attractive deal to handle foreign products. Notification 17 essentially ruled out all manners of premiums from manufacturers to wholesalers, except those of token value. Limiting the ability to offer premiums restricted the ability of foreign manufacturers to use their financial and marketing strengths to entice Japanese distributors from their exclusive relationships with Japanese

[1031]Japan points out that the United States left out a key portion of the quote: "the market system controlled by manufacturers will be shaken, *thus leading to an environment of free competition*" (emphasis added). Japan also notes a translation error: at the end of this quote, Japan inadvertently left out the phrase "and this effect is desirable". Although it is unlikely that the initial quote would be viewed as identifying a threat, the corrected quote clearly indicates that "free competition" is "desirable".

[1032]1969 Survey, Japan Ex. B-1, p. 309.

manufacturers, or to solidify their relationships with Japanese distributors. Because Notification 17 directly supported the Japanese manufacturer dominated distribution system, it should be considered both as a distribution countermeasures and a promotion countermeasure. Other promotion countermeasures also helped to restrict market access for foreign photographic film and paper in Japan. When a foreign manufacturer has limited access to the distribution system, it is especially important that it be able to reach Japanese wholesalers, retailers and consumers with attractive premiums and promotions. Taken individually, any one of the limits on premiums and promotions might not have substantially impaired the ability of foreign firms to compete in Japan. But taken as a group, the promotion countermeasures did have a significant chilling effect, particularly in the context of the system of enforcement through the fair competition codes and fair trade councils. Accordingly, the United States claims that the promotion countermeasures should be considered as a set for the purposes of Article XXIII:1(b).

6.618 Given the market structure in Japan in which foreign manufacturers effectively had no access to the primary wholesaler channels, the US claim is that the promotion countermeasures as a set *by themselves* have nullified or impaired benefits under Article XXIII:1(b),

6.619 **Japan** rejects the US claims with respect to the various individual allegations, since, in its view, none of the alleged measures individually adversely affect imported products or alter the conditions of competition facing imported products. Japan emphasizes that even when the distribution policies and the measures related to the Premiums Law are individually considered as a "set of measures", they do not in any way disadvantage imports because, in Japan's view, combining nothing with nothing still produces nothing.

6.620 *Promotion measures, distribution measures and restrictions on large stores:* The **United States** further claim that the promotion countermeasures as a set have operated *in combination* with Japanese Government efforts to restructure the distribution system through the distribution countermeasures and large stores measures to nullify or impair benefits under the GATT within the meaning of Article XXIII:1(b).

6.621 **Japan** contends that the US claims of the three categories of measures acting in combination with each other are factually and logically flawed. First, in Japan's view, the United States did not submit credible evidence that the measures were intended to and in fact acted in combination. Japan also alleges that the United States has not provided evidence that the Large Stores Law in any way sought to affect foreign product given that the law currently applies and has always applied uniformly to all entities seeking to provide retailing services. Similarly, Japan contends that the United States has not provided evidence of JFTC actions adversely affecting foreign products. According to Japan, the measures had very different policy objectives, and were not intended to work together.

6.622 Japan concludes that panels should review measures themselves, not the consequences or the actual trade impact of the measures[1033] given that there are a myriad of influences on marketplace results. When the United States asks the Panel to focus on the alleged interaction of individual measures, in Japan's view, it appears to assess this interaction by looking to marketplace results such as low import market share. Japan contends that the United States has not shown any explicit interaction of these

[1033]Panel Report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, AB-1996-2, p. 16; Panel Report on *United States - Section 337 of Tariff Act of 1930*, adopted on 7 November 1989, 36S/345, 386-387, paras. 5.11-5.13; Panel Report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, 154-159, paras. 5.1.1-5.1.9. Japan concedes that these panel reports addressed this issue in the context of Article III, given the similarity of the elements to be examined, Japan deems the Article III precedents cited as useful guide in evaluating the US non-violation claims.

measures, but has no alternative but to rely implicitly on the marketplace results.[1034] Accordingly, Japan concludes that the United States is thus asking this Panel to do what panels have repeatedly declined to do in the past, i.e., to go beyond the terms of the measures themselves and assess the marketplace results. Japan strongly disagrees with this approach as a matter of WTO legal principle, noting that, however, were the Panel to consider market share figures relevant, it actually undermines the US claims. Japan recalls that virtually nothing happened after the 1979 Tokyo Round concessions, but that some government actions occurred after the 1967 Kennedy Round concessions on black and while film and paper. The level and growth of import market share for black and white film and paper, however, are completely inconsistent with any conceivable nullification or impairment.[1035]

[1034]In the 1996 NTE Report, USTR noted that in this case "liberalization countermeasures" were implemented between 1967 and 1984, but that "MITI's past protection of this sector continues to have a lingering effect today in the distribution structure for consumer photographic materials". In Japan's view, it is clear that the United States is complaining about alleged "lingering effects", not measures.

[1035]Specifically, the foreign market share for black and white film and paper grew as high as 41.4 percent (1985) and 54.0 percent (1989) respectively.

VII. LEGAL ARGUMENTS CONCERNING VIOLATION CLAIMS

A. ARTICLE III OF GATT

1. *INTRODUCTION*

7.1 The **United States** argues that at the beginning of the Kennedy Round, foreign and domestic photographic materials manufacturers sold film and paper to Japan's primary wholesalers who, in turn, distributed these products to secondary wholesalers, photo finishing laboratories and retailers. At that time, manufacturers competed with one another to do business with wholesalers. When the Kennedy Round was concluded, the Japanese Cabinet directed that a framework should be established for "countermeasures to be taken by the Government".[1036] According to the United States, the Japanese Government feared as it reduced formal market barriers that foreign photographic materials manufacturers would establish and expand relationships with domestic wholesalers in order to use the Japanese distribution system to penetrate the Japanese market. The Cabinet specifically called for countermeasures to restrain foreign enterprises and strengthen Japanese competitors.[1037] The purpose of those policies was to foster single-brand distribution for film and exclusive arrangements or affiliations between domestic manufacturers, primary photospecialty wholesalers and photofinishing laboratories, and thereby to exclude imported film and paper from traditional distribution channels. By the mid-1970's, all of the primary wholesalers exclusively handled domestic film and paper. Foreign manufacturers were left with less efficient alternatives such as distribution through smaller, more regional secondary wholesalers or direct-to-retail sales.

7.2 The United States alleges that the Japanese Government has promulgated laws, regulations and requirements that have effectively excluded imported photographic materials from a key distribution channel, i.e., primary wholesalers, and have maintained this exclusion for more than 20 years. Foreign photographic material manufacturers were denied essential opportunities to distribute and sell their products in the Japanese market contrary to Article III:4 which mandates that the conditions for sale and distribution of imported products be no less favourable than those for domestic goods. The Japanese Government is alleged to have engineered this exclusionary distribution system by applying a combination of formal measures with a series of closely-related, informal measures. The fact that Japan at times has employed untraditional and even opaque methods of according less favourable treatment should not stand as an impediment to a legal review under Article III:4.[1038] The United States requests the Panel to examine all the facts surrounding the imposition of the distribution countermeasures, taking into consideration any unique features of the Japanese system of government, in order to determine whether Japan has failed to provide equality of competitive conditions for imported products. Regardless of whether Japan sought to hinder imports or merely help domestic producers, the direct consequences of its actions were to diminish opportunities for foreign photographic material manufacturers to distribute their products. The United States claims that by creating distribution channels open exclusively to domestic manufacturers, Japan intentionally enhanced competitive opportunities for domestic manufacturers to the detriment of imports in violation of Article III:4. By restructuring the photographic

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[1036]1967 Cabinet Decision, pp. 3-4, US Ex. 67-6.

[1037]"Modernization lags behind most in the distribution sector. Here, the power of resistance against the inroad of foreign capital is weak and the impact of foreign capital advancing into this sector will also pose a significant impact in the production sector". "[I]t would be necessary to restrain foreign enterprises coming into Japan after liberalization, from disturbing order in domestic industries by resorting to the strength of their superior power, and from advancing into the non-liberalized sectors by evading control". "The establishment of countermeasures for strengthening the capacity of our enterprises for international competition and for preventing foreign enterprises from disturbing order in our industries and market would be a basic necessity if the liberalization is to be promoted and if our people are to enjoy its economic benefits". Ibid., p. 4.

[1038]The US points out that GATT/WTO jurisprudence, above all the Appellate Body's decision in *Japan - Taxes on Alcoholic Beverages*, makes clear that the protective nature and application of a measure may be discerned not only from the very language of the measure itself, but also revealed from its design, architecture and structure, and from an understanding of the practical realities of the relevant market.

materials distribution system, Japan applied distribution countermeasures so as to afford protection to domestic manufacturers, contrary to the principle stated in Article III:1 of GATT.

7.3 **Japan** argues that the United States fails to identify "laws, regulations, or requirements" that would serve as the appropriate subject matter for an Article III claim. Furthermore, Japan stresses that since none of the alleged specific distribution policies cited by the United States is still in effect, they are not properly before the Panel. Japan rejects the contention that MITI's distribution modernization policies during the 1960s and 1970s were imbued with a protectionist purpose[1039], afforded protection to domestic production and thereby accord "less favourable treatment" to imports in violation of Article III. According to Japan, MITI set out to encourage distribution modernization through rationalization of transaction terms and systemization of distribution practices well before capital liberalization became an issue. These goals were pursued to raise the productivity of the relatively backward distribution sector, and thereby alleviate the growing labour shortage and upward pressure on consumer prices. Once capital liberalization got underway, distribution modernization came to serve another policy objective, namely promoting the international competitiveness of the distribution sector. There is no evidence that the Japanese Government sought to block foreign goods from traditional distribution channels. Rather, Japan sought to enhance the efficiency and competitiveness of the domestic distribution sector with a view to enabling it to compete more effectively with new foreign entrants.

7.4 Japan notes the United States does not cite a single government document or advisory council report which articulates any kind of policy of encouraging vertical integration of domestic manufacturers into distribution in film, paper, or any other industry for that matter. According to Japan, the evidence shows that as mass production developed ahead of mass distribution in Japan, some leading manufacturers did seek to modernize their distribution channels through instituting single-brand distribution or engaging in outright vertical integration. The response of the Japanese Government was not to encourage this trend, but to monitor it on a case-by-case basis, allowing the competitive benefits of vertical integration while seeking to control the anti-competitive consequences. With respect to the United States claims that the alleged "distribution countermeasures" and their purported ongoing effects on the market structure for film and paper accord less favourable treatment to imports in contravention of Article III:4, and that they are applied so as to afford protection to domestic production in violation of Article III:1, Japan contends that the United States overlooks the established principle that Article III:1 does not create any independent obligations, and that the United States fails to establish any violation of Article III:4.

7.5 As a preliminary matter, Japan notes that several of the alleged measures that Japan believed to be part of the United States claims are not included in the list of alleged "distribution countermeasures"[1040] that the United States provided in response to a Panel question. Accordingly, Japan requests the Panel not to consider these claims as being within the scope of the claims raised by the United States under Article III.[1041]

[1039]Japan notes that a recent GATT panel has specifically rejected the "aims and effects" test with respect to Article III, noting the difficulty of determining the intent of a government in enacting a law based on the legislative history. See *Japan - Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/R, para. 6.16. Thus, Japan contends, the United States allegations regarding the subjective intent of the Government of Japan are irrelevant to this analysis.

[1040]Japan mentions specifically that the United States does not list the Ninth Interim Report (1971) or the Tenth Interim Report (1972). In paragraph 10 of its third party submission, the EC points to the creation of the Natural Colour Photography Promotion Council in 1963, the 1990 Guidelines, and the Business Innovation Law (1995) in support of its theory that Japan has violated Article III. However, these actions, were also not cited by the United States and, in Japan's view, are therefore not a part of the US Article III claims. Japan notes that the United States mentioned the Business Innovation Law in passing but the law was not included in its list of distribution measures provided by the US in response to a Panel question.

[1041]Japan also emphasizes that only the "distribution countermeasures" are subject to both Article III and Article XXIII challenges; the "Large Stores Law" and "promotion countermeasures" are subject only to Article XXIII and limited Article X challenges.

2. ARTICLE III:1

7.6 Article III:1 of GATT provides:

> "The [Members] recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production".

7.7 The **United States** underscores that the Appellate Body has explained that the "broad and fundamental purpose of Article III" is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production."[1042] Thus the United States argues that the Appellate Body has indicated that sentences 1 and 4 of Article III are inextricably linked, finding that Article III:1 "informs the rest of Article III" and establishes "part of the context" for interpreting the other paragraphs in Article III.[1043]

7.8 **Japan** points out that Article III:1 of GATT is only a statement of general principles and does not impose any obligation on Members in addition to those specified elsewhere in Article III.[1044] In Japan's view, this conclusion follows from the ordinary meaning of the language of the provision and from GATT precedent. Article III:1 provides that laws and regulations "should" not be applied so as to afford protection to domestic production. By using "should" instead of "shall,"[1045] Article III:1 is meant to serve as a statement of general principles for the rest of Article III, and is to be used as a guide to interpreting the specific obligations contained in the other paragraphs of Article III, including paragraph 4 thereof. In Japan's view, GATT precedents support this interpretation. The panel on *Japan - Taxes on Alcoholic Beverages*[1046] specifically held that "Article III:1 does not contain a legally binding obligation but rather states general principles". The Appellate Body upheld this interpretation.[1047] As Article III:1 does not contain any specific obligations, it is impossible for any Japanese measure to violate Article III:1.

7.9 The **United States** responds that it is not requesting this Panel to find an independent violation of Article III:1. Rather, the United States views the general principle embodied in Article III:1 as being an integral aspect of Article III as a whole and Article III:4 in particular. The United States, along with the EC, believes that Article III:4 can be understood fully only if read in connection with Article III:1. The United States argues that its position in this regard is consistent with the leading decision on the issue, the Appellate Body's recent decision in *Japan - Taxes on Alcoholic Beverages.* In that matter, the Appellate Body noted that the general principle embodied in Article III:1 "informs" and constitutes part of the context of the rest of Article III.[1048]

[1042]Appellate Body Report on *Japan - Taxes on Alcoholic Beverages,* adopted on 1 November 1996 WT/DS8/,10,11/AB/R, p. 16 (quoting *United States - Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, pp. 385-386, para. 5.10).

[1043]*Japan - Taxes on Alcoholic Beverages*, op. cit., p. 18.

[1044]Japan notes that only recently the United States agreed with Japan's interpretation. In *United States - Gasoline* the United States argued that Article III:1 was "only hortatory and could not form the basis of a violation". *United States - Gasoline*, WT/DS2/R, op. cit., para. 6.17.

[1045]Japan notes that the other provisions of Article III, each of which contain specific obligations, use the word "shall".

[1046]*Japan - Alcoholic Beverages*, WT/DS8, 10, 11/R, p. 107, para. 6.12.

[1047]Appellate Body Report on *Japan - Alcoholic Beverages*, WT/DS8,10,11/AB/R, AB-1996-2, p. 18.

[1048]Ibid, p. 18. Although *Alcoholic Beverages* involved Article III:2 rather than Article III:4, the United States believes that much of its reasoning is pertinent to the present dispute.

7.10 The United States notes that, based on this analysis, the Appellate Body found that the "broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. … Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products".[1049] Quoting an earlier panel report, the Appellate Body stated: "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise, indirect protection could be given".[1050] The Appellate Body further ruled that panels should examine the various factors surrounding the promulgation of a measure to determine whether it serves protectionist purposes.[1051] The Appellate Body emphasized the fact-specific nature of the inquiry, stating that a measure's "protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure … In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in a given case".[1052] The Appellate Body cautioned against adopting a formulaic approach: "WTO rules are not so rigid or inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts and real cases in the real world".[1053]

7.11 The United States believes that Japan apparently agrees with the EC[1054] and the United States that Article III:1 does not form the basis of an independent cause of action but that it provides essential interpretive guidance for all the provisions of Article III which must be read with this principle in mind. Where the parties appear to part company, the United States suggests, is in their understanding of how Article III:1 affects Article III:4. Whereas the United States believes that Article III:4 must be applied in a sufficiently broad manner to effectuate the general principle of paragraph 1[1055], in the US view, Japan essentially would limit Article III:4 to cases of *de jure* discrimination achieved through the most formal government action. In the US view, Japan's position does not advance the principles of paragraph 1, nor does it comport with well-established GATT jurisprudence, especially the Appellate Body's decision in *Japan - Alcoholic Beverages*.

[1049]Ibid., p. 16, citing *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, 158-159, para. 5.1.9; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* , adopted on 10 November 1987, BISD 34S/83, 113-114, para. 5.5(b).

[1050]Ibid., quoting *Italian Discrimination Against Imported Agricultural Machinery (Italian Agricultural Machinery),* BISD 7S/60, 63-64, para. 11.

[1051]Ibid., pp. 28-29. In doing so, the Appellate Body was not adding a legal element to other paragraphs of Article III. Rather, the Appellate Body was instructing panels to give Article III sufficient breadth to reach measures imposed by WTO Members that protect domestic production. See, e.g., *United States - Section 337*, op. cit., paras. 6.2-6.3 (panel found that less favourable treatment was accorded even though there was no deliberate attempt to discriminate against imports).

[1052]Ibid.

[1053]Ibid., p. 31.

[1054]According to the United States, in its third-party submission, the EC indicated their support for the position of the United States and reaffirmed the WTO precedent described above. Specifically, the EC maintained that "Japanese internal policies concerning [consumer photographic film and paper] products were in fact designed to afford protection to domestic products on top and independently from their facial objective of pursuing general internal policies under their jurisdiction".

[1055]The Appellate Body in *Japan - Alcoholic Beverages* made clear that it viewed paragraph 1 as supplying a" broad and fundamental purpose … Otherwise indirect protection could be given" (op. cit., p. 16, quoting *Italian Agricultural Machinery*, op. cit., para. 11). This position reaches back to doctrine established in the early days of the GATT, when the panel in the *Italian Agricultural Machinery* dispute read Article III expansively, determining that it covers "*any* laws or regulations which *might* adversely modify the conditions of competition between the domestic and imported products on the internal market" (op. cit., p. 64, para. 12, emphasis added).

3. ARTICLE III:4

7.12 Article III:4 of GATT provides in the relevant part:

> "The products of the territory of any [Member] imported into the territory of another [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

7.13 The **United States** submits that the national treatment principle, as it applies to the facts of this dispute, derives from two commitments made by GATT contracting parties and subsequently by WTO Members:

(1) to refrain from impairing the conditions of sale or distribution of imports for the purpose of protecting domestic production; and

(2) to treat imported products no less favourably than like domestic products.

7.14 **Japan** underscores that to prove that any of the policies cited above are in violation of Article III:4, the United States must establish the existence of each of the following two elements:

(1) There is a "law", "regulation" or "requirement" affecting the sale or distribution of the products in question; and

(2) that law, regulation or requirement accords "less favourable" treatment to imported products than that accorded to like domestic products.

(a) "Laws, regulations or requirements" within the scope of Article III:4

(i) The legal test

7.15 The **United States** explains that the Japanese Government restructured the photographic materials distribution system through its system of "concerted adjustment",[1056] working closely with the private sector to formulate a plan of inherently coercive nature for counteracting international competition.[1057] Specifically, the government planned, promoted, facilitated and contributed essential direction, guidance, technical expertise, and financing to coordinate establishment of narrow vertical lines of distribution, with primary wholesalers' handling the products of a single domestic manufacturer. In implementing the restructuring plan, the government employed formal as well as informal methods, often providing direction through administrative guidance. According to the United States, Japan has long used informal methods of government-private sector cooperation and administrative guidance to direct industry adjustment.[1058] Viewed as a whole, with its formal and informal components, and with its underlying structure of cooperation between government and industry, the Japanese regime is the embodiment

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[1056]MITI, Formation of a New Industrial Order, 9 May 1962, MITI History, Volume 17, pp. 403-407, US Ex. 62-5.

[1057]The United States also refers to the EC's statement in its third party submission: "[T]he *Semiconductors* Panel Report was considering not only the formality but the reality of a very peculiar system, the Japanese interconnection between government and industry. This particular situation is characterised by a significant capability of the Government to directly influence the behaviour of private companies through the traditional peer structure of the society and the strong pressure that it can produce without the need of adopting legally binding instruments". Based on this analysis, the EC characterized Japan's measures as "requirements" pursuant to Article III:4 but, given the extraordinary array of measures at issue in this dispute, in the US view, the Panel need not restrict its inquiry to that one term.

[1058]Yamanouchi Kazuo, Kokka Komuin No Tame no Gyosei Shidoron [Administrative Guidance Theory for Government Officials], 1986, pp. 1-2, US Ex. 86-1.

and effectuation of Japanese Government policy and falls within the scope of "all laws, regulations and requirements" in the meaning of Article III:4.

7.16 **Japan** contends that there was nothing in MITI's distribution modernization policies of the 1960s and 1970s that amounted to a "law", "regulation" or "requirement" in the meaning of Article III because they were not enacted by the Diet as a "law", nor were they promulgated as "regulations" under the relevant administrative procedures, nor do they qualify as "requirements" given that the ordinary meaning of a government "requirement" refers clearly to some form of government mandate.

7.17 The **United States** deems Japan's definition of the types of measures covered by Article III:4 as too restrictive if the term "laws" is understood to refer only to the command of a legislature inscribed in a statutory code, and the term "regulations" is limited to a series of codified rules promulgated by an administrative agency. The United States explains that the phrase "all laws, regulations and requirements" speaks to government actions, i.e., action taken in the name of a WTO member, by government officials or parties authorized to act on the government's behalf, in pursuit of government policies. The very language of Article III:4 indicates, that it was intended to cover "all" government action which would include the formulation of government policy and its implementation.

7.18 In referring to Article 31 of the Vienna Convention, the United States argues that the object and purpose of Article III is to "avoid protection in the application of internal tax and regulatory measures". If the phrase "laws, regulations and requirements" would be interpreted to encompass only highly formalized, mandatory rules, Article III would fail to prohibit a significant amount of government action affording protection to domestic production and according less favourable treatment to imports. Accordingly, for the United States it is unnecessary to qualify the types or forms of government actions that are susceptible to being deemed "laws, regulations and requirements". A Member should bear responsibility, if its governmental action accords less favourable treatment to imported products than to domestic products, regardless of the method used by the Member to achieve this result. The question thus becomes whether any such less favourable treatment may be attributed to the actions of a WTO Member, as opposed to non-governmental entities. In the US view, no single or set of criteria should be dispositive, an approach that comports with the Appellate Body's preference for case-specific, fact-intensive inquiries as reflected in its admonition in *Japan - Alcoholic Beverages* to refrain from applying WTO rules in a way that ignores "real facts and real cases in the real world".[1059]

7.19 **Japan** submits that, for a party to be subject to a government requirement, it must either (1) be legally obligated to carry out the request, or (2) receive some advantage from the government in exchange for compliance. Thus there must be either a government sanction or the withholding of a government benefit that is attached, formally or substantively, to non-compliance. In this regard, Japan notes that the panel report on *EEC - Regulation on Imports of Parts and Components ("EEC - Parts and Components")* found that undertakings in anti-circumvention proceedings under the EC antidumping law could be considered "requirements" within the meaning of Article III even though the undertakings were voluntarily accepted because the government made the granting of an advantage, i.e., the suspension of the anti-circumvention proceedings dependent on the acceptance of the undertakings.[1060]

7.20 The **United States** notes that the panel on *EEC - Parts and Components* found that the EC's acceptance of "undertakings" by private parties fell within the scope of Article III:4,[1061] even though the government action in question was an informal one, derived from no formal legislation or regulatory code specifically authorizing or requiring the acceptance of such "undertakings".[1062] That panel noted

[1059]*Japan - Taxes on Alcoholic Beverages,* op. cit., p. 31.

[1060]Panel Report on *European Economic Community - Regulation of Imports of Parts and Components,* adopted on 16 May 1990, BISD 37S/132, 197, para. 5.21.

[1061]Ibid.

[1062]Ibid., pp. 134-135, paras. 2.3-2.7; p. 197, para. 5.20.

that there was "no obligation under the EEC's anti-dumping regulation to offer parts undertakings, to accept suggestions by the EEC Commission to offer such undertakings and to maintain the parts undertakings given".[1063]

7.21 According to **Japan** MITI's 1970 Guidelines are clearly distinguishable from the undertakings in *EEC - Parts and Components* because compliance with these non-binding recommendations was a matter of purely voluntary decision and no government sanction or withholding of a government-provided benefit was attached, either formally or substantively, to non-compliance.

7.22 The **United States** points out that nowhere in GATT jurisprudence has a panel ever articulated a definition of the phrase "laws, regulations and requirements" to be applied in all Article III:4 cases. This would be inappropriate since each WTO Member has a unique form of government and legal system and no one definition could adequately encapsulate "all laws, regulations and requirements" as those terms relate to the WTO's more than 120 Members. In this respect, the United States points out that prior panels have looked at a variety of factors in examining whether government action may be deemed a law, regulation or requirement under Article III:4. These factors include, i.e., whether a Member threatened punishment or offered an inducement, but also other considerations. Moreover, the panel report on *Canada - Administration of the Foreign Investment Review Act ("Canada - FIRA")*, found "undertakings," or contractual commitments, made by private investors with the Canadian Government to be "requirements"[1064] and expressly rejected Canada's argument that a "requirement" could not be found where the contractual relationship involved was essentially a private one.[1065] The panel on *Canada - FIRA* explained that it did not feel constrained to limit the types of measures that could be deemed "laws, regulations and requirements" to those previously recognized as such by other panels: "Any interpretation which would exclude case-by-case action would, in the view of the Panel, defeat the purposes of Article III:4".[1066] Therefore, the United States emphasizes, the panels in these cases in no way suggested that they had formulated or were following any set of generally applicable criteria.

(ii) Japan's "administrative guidance" in the light of GATT precedents

7.23 The United States submits that the need for case-by-case review of whether government action has occurred is particularly strong in this dispute because Japan carries out its policies through a complex, opaque system in which traditional legal measures are interwoven with administrative guidance and other informal measures. Given its unusual character, the Japanese regime is not easily compared to those found in other nations. The United States quotes one of Japan's leading trade scholars who defined that "administrative guidance is a *de facto*, rather than a *de jure*, directive issued by government officials … In a broad sense, administrative guidance is a form of government regulation which imposes some kinds of rules of conduct on private individuals or enterprises".[1067] Noting the peculiarity of the Japanese system, the trade scholar also stated that "the degree of pervasiveness and the importance of administrative guidance in the Japanese governmental process is probably unique to Japan".[1068]

7.24 The United States points out that the *Japan - Semiconductors* panel found Japan's regime of formal and informal measures to be "prohibitions or restrictions" for purposes of Article XI of GATT

[1063]Ibid., p. 54, para. 5.20.
[1064]*Canada - FIRA*, adopted on 7 February 1984, BISD 30S/140, 159, para.5.6.
[1065]Ibid.
[1066]Ibid., p. 159, para. 5.5.
[1067]Matsushita Mitsuo, International Trade and Competition Law in Japan, 1993, p. 60, US Ex. 93-1.
[1068]Ibid.

even though no formally binding or mandatory measures had been imposed.[1069] The panel relied upon the following analysis in reaching this conclusion:

> "Government-industry relations varied from country to country, from industry to industry, and from case to case and were influenced by many factors. There was thus a wide spectrum of government involvement ranging from, for instance, direct government orders to occasional government consultations with advisory committees. The task of the Panel was to determine whether the measures taken in this case would be such as to constitute a [violation]".[1070]

> "The Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. However, the Panel concluded that this amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements … ".[1071]

7.25 The United States explains that the conclusion of the *Semiconductors* panel comports with those of the panel on *Japan - Certain Agricultural Products* which found that "the practice of 'administrative guidance' played an important role" in the enforcement of the Japanese supply restrictions, that this practice was "a traditional tool of Japanese government policy based on consensus and peer pressure" and that administrative guidance in the special circumstances prevailing in Japan could therefore be regarded as a governmental measure.[1072] In that case, Japan had taken the position that while "it was irrelevant whether or not [its] measures were mandatory and statutory," it was significant whether the measures "were effectively enforced by detailed directives and instructions to local governments and/or … organizations". Japan had explained that "such centralised and mutually collaborative structure of policy implementation was the crux of government enforcement in Japan".[1073]

7.26 **Japan** responds that the *Japan - Semiconductors* panel noted explicitly that "Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures"[1074] and thereby established strict criteria for when Japanese administrative guidance constitutes a "measure".[1075] Items which do not qualify even as "measures" in the context of Article XI:1 are not "requirements" within the meaning of Article III because "requirements" must satisfy a stricter test than "measures". In Japan's view, the EC supports this interpretation in its third party submission.

7.27 The **United States** explains that in the present case Japan resorted to a variety of measures such as administrative guidance, coupled with more formal measures, in accomplishing the "systemization" and "rationalization" of distribution in the photographic materials sector. Japan attempts to minimize the importance of any administrative guidance in this context claiming it was just "promotional" or merely advisory. The United States requests the Panel not to accept such labels or technical distinctions but to scrutinize the Japanese Government's actions in the totality of the circumstances in which they occurred. The government planned, promoted and facilitated the consolidation of the primary distribution channels in the photographic materials market. The

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[1069]Panel on *Japan - Trade in Semiconductors ("Japan - Semiconductors")*, adopted on 4 May 1988, BISD 35S/116, 157-158, para. 117.

[1070]*Japan - Semiconductors*, pp. 154-155, para. 108.

[1071]Ibid., p. 155, para. 109.

[1072]*Japan - Restrictions on Imports of Certain Agricultural Products ("Japan - Certain Agricultural Products")*, adopted 22 March 1988, BISD 35S/163.

[1073]*Japan - Semiconductors*, p. 154, para. 107, citing Panel on *Japan - Certain Agricultural Products*.

[1074]Ibid., pp. 153-154, para. 106.

[1075]Ibid., p. 155, para. 109.

government's actions viewed collectively or individually constitute "laws, regulations and requirements" as those terms are used in Article III:4. The United States emphasizes that Japan should bear responsibility for the actions of its government.

(iii) Are specific distribution measures "laws, regulations and requirements"?

7.28 **Japan** takes the position that an examination of the list of "distribution countermeasures" challenged by the United States reveals that most of the cited items do not constitute a "law" or a "regulation", nor do they qualify as "requirements" within the meaning of Article III. In Japan's view, the United States has only broadly claimed that the alleged distribution countermeasures are within the scope of that provision without being precise in identifying any "law", "regulation" or "requirement" in a manner that gives, in its interpretation, proper weight to the terms of Article III.[1076]

7.29 The **United States** considers some of the Japanese Government's actions have been formal, others not. The formal measures bear the typical characteristics of "laws, regulations and requirements":

(1) The 1967 Cabinet Decision;
(2) the international contract notification provision of Japan's Antimonopoly Law;
(3) JFTC Notification 17 of 1967; and
(4) loans to the domestic photographic industry by the Japan Development Bank (JDB) and the Small and Medium Enterprise Agency (SMEA).

are, in the US view, conventional legal measures. They were promulgated with all of the procedures traditionally associated with conventional legal measures. Although the United States does not subscribe to the criteria proposed by Japan, these measures would satisfy those criteria because each is (i) mandatory, (ii) imposes obligations or (iii) involves the grant of a government benefit.

7.30 The United States emphasizes that the distribution countermeasures emanated from a formal policy of the Japanese Government, as established by a decision of the Japanese Cabinet, and they are embodied in a series of concrete actions taken by MITI and its committees to carry out the government's policy as reflected in their reports and guidelines. The restructuring of Japan's photospecialty distribution system emanated directly from the 1967 Cabinet Decision to establish a framework of "countermeasures to be taken by the Government" to offset the effects of trade liberalization and to prevent foreign manufacturers from penetrating the Japanese market through its distribution system. To implement this policy in the photographic sector, the United States contends, MITI created a host of joint government-industry committees dedicated to establishing standardized transaction terms designed to cement exclusive relationships between domestic producers and wholesalers and retailers. To ensure compliance from the private sector, the government monitored the implementation of such standardized transaction terms, revised those terms and other methodologies over time, and contributed technical expertise and financing. The government, through the JDB and SMEA, gave financial support for domestic manufacturers, wholesalers and photo finishing laboratories to achieve "systemization".

7.31 **Japan** responds that there was nothing in MITI's distribution modernization policies that amounted to a "law", "regulation" or "requirement" in the meaning of Article III because they were not enacted by the Diet as a "law", nor were they promulgated as "regulations" under the relevant administrative procedures, nor do not qualify as "requirements" given that the ordinary meaning of a government "requirement" refers clearly to some form of government mandate. In Japan's view, since the 1970 Guidelines do not meet criteria set out in the panel report on *Japan - Semiconductors*,

[1076]Japan only concedes that (1) the international contract notification requirement, and (2) SMEA financing and the JDB loan to Konica, are "measures" for purposes of Article XXIII:1(b), but not for purposes of Article III:4. Japan further recalls that it has raised procedural objections against these items.

and since the criteria for when administrative guidance constitutes a "law" "regulation" or "requirement" for purposes of Article III are, if anything, stricter than those for "measures" in the context of Article XI:1, it follows that the policies in question fall outside the scope of Article III. Moreover, in Japan's view, several items raised by the United States such as advisory council and public reports, are not even official statements of government policy. Japan argues that for the same reasons that such reports cannot constitute "measures" for purposes of non-violation complaints, they cannot be considered "laws, regulations, or requirements" within the meaning of Article III.

7.32 The **United States** responds that the informal measures used by Japan to institute the restructuring of distribution were equally important as formal measures in fulfilling the government's objectives given that MITI and its committees steered the industry through years of complicated problems on how to reform distribution operations. Under MITI supervision, the committees observed practices in the industry, enforced compliance with government-industry recommendations and refined strategy over time. Prior panel decisions such as the panel reports on *Japan - Semiconductors* and *Japan - Certain Agricultural Products*, have discussed the Japanese system of administrative guidance in ways that prove illuminating in this case. The same reasoning should be applied to Japan's use of "concerted adjustment" in the photographic materials sector in which the government formulates and monitors the alteration of fundamental aspects of an industry and which involved official action on the part of the Japanese Government and the execution of definitive government policies. For the United States, through MITI and other government agencies, "the government acts as the formulator of a master plan within which private enterprises make specific business decisions".[1077] The United States maintains that this informal guidance had the force and effect of laws, regulations, or requirements.

(iv) Measures "no longer in effect"

7.33 In the alternative, **Japan** argues that on the assumption that the alleged "distribution countermeasures" would ever have constituted "laws, regulations, or requirements" within the scope of Article III, they are no longer in effect and therefore cannot be found to violate Article III. Each and every one of MITI's alleged distribution policies of the 1960s and '70s occurred decades ago and has been superseded by more recent policies and industry actions. In particular, MITI's 1990 Guidelines target many of the same "irrational" distribution practices (e.g., rebates, returns, dispatching of sales employees to customers), as were addressed in the 1970 Guidelines. However, Japan contends that now the MITI's recommendations are explicitly identified by the United States as improving market access. According to Japan, the United States recently urged the Japanese industry to follow the recommendations of the 1990 Guidelines.

7.34 Japan takes the view that since virtually all of the items and policies included in the United States claims under Article III are no longer in effect[1078], it appears that the United States claims boil down to the argument that the continuing effects of the "distribution countermeasures", i.e., the current market structure for the distribution of film and paper, are "laws", "regulations" or "requirements" capable of violating Article III. Japan requests the Panel to reject this argument based on its reasoning

[1077]The United States points out that to the extent MITI or another relevant regulatory agency is dissatisfied with private sector intentions or performance, the government may recommend modification of an industry's plan. MITI has many tools at its disposal to strengthen a domestic industry. It may aid in the creation of a cartel, regulate price or production, promote mergers and acquisitions among competitors and create joint buying or selling agencies. Coercive measures are rarely necessary because, at the heart of MITI's reorganization efforts, is a diminution in competition that is likely to benefit participating enterprises. Whereas government scrutiny likely would be an impediment if private actors were to attempt to effectuate such a plan on their own, MITI's role all but ensures that no enforcement action will be taken by the JFTC or other government agencies.

[1078]Japan notes that Notification 17 was repealed in April 1996. Furthermore, Japan submits that a bill to repeal the International Contract Notification requirement has been introduced to the Diet, in light of the globalization of the Japanese economy and for the reduction of the administrative burden. The bill to repeal the international contract notification requirement was passed in June 1997. Simultaneously, JFTC Rule No. 1 under Article 6 of the Antimonopoly Law was abolished.

presented in relation to the US non-violation claims against the above-mentioned "measures" which, in Japan's view, applies with equal if not greater force in respect of a violation claim under Article III. Moreover, Japan notes that the United States concedes that "MITI's systemization program was largely complete" by 1975[1079], and explicitly acknowledges that market structure is not even a "measure" within the meaning of Article XXIII:1(b).

7.35 The **United States** emphasizes that it alleged at no point during this proceeding that the market structure was a "law, regulation or requirement". To the extent that the United States referred to private sector activities, it did so only to demonstrate how the private sector acted in the manner planned and orchestrated by the Japanese Government. The United States, however, regards Japan's bottle-necked distribution system to be compelling evidence of the Japanese Government's systematic efforts to erect a bulwark against foreign competitors. In the US view, that market structure is the direct result of numerous actions by the Japanese Government to strengthen ties between domestic manufacturers and the primary photospecialty wholesalers.

7.36 **Japan** recalls that Article XXIII:1(a) authorizes dispute settlement in violation cases only when a benefit "is being nullified or impaired" by "the failure of another contracting party to carry out its obligations under this Agreement". The use of the present tense indicates that, in the context of Article III, some present and ongoing law, regulation, or requirement must be at issue. Specifically, Article 3.7 of the DSU contemplates three possible outcomes in the absence of a negotiated settlement: (1) withdrawal of the offending measure, which is explicitly the preferred alternative[1080]; (2) provision of compensation as a temporary measure pending withdrawal of the offending measure; and (3) suspension of concessions or other obligations by the aggrieved Member if the offending measure is not withdrawn. Article 19.1 of the DSU further confirms that withdrawal of the offending measure is the primary remedy: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". In Japan's view, this language supports the conclusion that only measures that are currently in effect are properly before the Panel, since only measures that are currently in effect can be brought into conformity with the relevant agreement. Japan emphasizes that the latter two options presuppose the unavoidable continuation of the offending measure and that, accordingly, - if the measure in question is no longer in effect -, the complaining party has its remedy and the most that dispute settlement could accomplish has already happened. Japan further points out that even if the Panel were to find past violations, there would be no viable remedy available under the DSU. Japan maintains that it is beyond the scope of WTO dispute settlement to punish parties for alleged transgressions of the past, or to order "affirmative action" in an attempt to undo the past.

7.37 In responding to Japan's argument on measures no longer in effect, the **United States** relies upon its position, described above in Part VI.C.1. on "Governmental Measures", in particular on section (d), entitled "Measures applied and measures in effect".[1081]

7.38 **Japan** notes that Notification 17 was repealed in April 1996. Therefore, Japan argues that it should not be the subject of the present proceeding. Nor will the general designation of unfair trade practices under the Antimonopoly Law operate to continue the content of the regulation. The JFTC will not act automatically against the premium offers in excess of 100,000 yen; it will take measures only when specific harm to fair competition is proven. "Normal business practice" refers not to 100,000 yen, but to the practice acceptable from the point of fair competition. Furthermore, Japan submits that a bill to repeal the International Contract Notification requirement has been introduced in March

[1079]Japan notes that the United States uses the term "systemization" to cover both rationalization policies (the 1970 Guidelines) and systemization policies (reflected by the 1975 Manual).

[1080]Article 3.7 of the DSU specifies that the primary remedy in violation cases is withdrawal of the offending measure.

[1081]See paras. 6.119-6.126 above.

1997 to the Diet. The bill was enacted in June 1997, and thus this requirement has been abolished. Simultaneously, JFTC Rule No. 1 under Article 6 of the Antimonopoly Law was abolished.

(b) "Less favourable treatment" in the meaning of Article III:4

(i) The legal test

7.39 The **United States** argues that the requirement in Article III:4 that imports are to receive "treatment no less favourable than that accorded to like products of national origin" has been construed to mean that, at a minimum, government actions affecting the distribution or sale of goods must apply to imports in the same way that they apply to like domestic products. "[T]he intention of the drafters … was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given".[1082] Though different treatment may in some instances afford equal or better conditions for imports, and thus may be permissible under Article III:4[1083], any narrowing of trade opportunities or the imposition of additional burdens for imports runs afoul of the national treatment principle.[1084] A WTO Member may not improperly "tip the balance" of competitive conditions in favour of domestic products.[1085] Article III:4 serves to protect "expectations on the competitive relationship between imported and domestic products."[1086] The extent to which restrictions have impaired actual trade flows are unimportant.[1087]

7.40 **Japan** notes that the proper limits of the requirement to accord "no less favourable" treatment are framed by the *language* of Article III:4 which concerns governmental measures. Therefore, the "treatment no less favourable" must flow from the "laws", "regulations" or "requirements" in dispute, not from acts of private parties or other general circumstances. The plain meaning of the provision thus demands that the focus of Article III analysis be on the provisions of government measures, not on the happenstance of market conditions.[1088]

7.41 Japan further responds that the element of "no less favourable" treatment should be interpreted in view of the general *purpose* of Article III to protect the equal competitive relationship between imported and domestic products by preventing discriminatory treatment by governments, and not to guarantee any particular results in the marketplace. The Appellate Body report on *Japan - Taxes on Alcoholic Beverages* recently reconfirmed that "Article III protects expectations not of any particular trade volume, but rather of the equal competitive relationship between imported and domestic products".[1089]

7.42 Japan submits that the phrase "no less favourable" must be read in the *context* of the general principle contained in Article III:1 that government measures should not be applied "so as to afford protection to domestic production". The Appellate Body report in *Japan - Taxes on Alcoholic Beverages*

[1082]Panel Report on *Italian Discrimination against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, 63-64, para. 11.

[1083]See Panel Report on *United States - Section 337 of the Tariff Act of 1930 ("United States - Section 337")*, adopted on 7 November 1989, BISD 36S/345, p. 386, para. 5.11.

[1084]See Panel Report on *United States - Imports of Certain Automotive Spring Assemblies*, adopted on 26 May 1983, BISD 30S/107.

[1085]Panel Report on *Canada - FIRA*, adopted on 7 February 1984, BISD 30S/140, 166, para. 6.3.

[1086]*United States - Section 337*, BISD 36S/345, 387, para. 5.13, citing *Panel* Report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, 34S/136, 158-159, para. 5.1.9.

[1087]*United States - Section 337*, op. cit. p. 387, para. 5.13.

[1088]As Japan discussed in relation to the US non-violation claims, whether a particular government policy accords "no less favourable treatment" to imports than to a domestic like product is to be judged based on the law, regulation, or requirement itself, and not on the alleged consequences, i.e., the allegedly "closed" distribution network in the Japanese film market today.

[1089]*Japan - Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, AB-1996-2, p. 16.

recently affirmed that "[t]his general principle informs the rest of Article III".[1090] The focus of Article III:1 on protectionism confirms that Article III:4 is concerned with discriminatory treatment, not incidental burdens unrelated to the actual provisions of the measures in dispute.

7.43 The **United States** emphasizes that Article III:4 makes clear that Members may not accord less favourable treatment in respect of "all laws, regulations and requirements … affecting … distribution" and, therefore, does not permit WTO Members to deny foreign manufacturers access to distribution channels that are available to domestic manufacturers. Prior panels have found that government measures limiting distribution opportunities for imports violated Article III:4. In particular, this was made clear in two panel reports that previously addressed limitations applied on the distribution and sale of imported alcoholic beverages: *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies ("Canada - Alcoholic Drinks")*[1091] and *United States - Measures Affecting Alcoholic and Malt Beverages ("United States - Alcoholic Beverages").*[1092]

7.44 **Japan** distinguishes the panel reports on *Canada - Alcoholic Drinks* and *United States - Alcoholic Beverages* from the present case on the grounds that in those cases, imports were legally forbidden from using certain distribution channels that were open to domestic products.

7.45 The **United States** rejects Japan's argument because it goes to the nature of the measures underlying the disputes, i.e., whether the governmental action constitutes a law, regulation or requirement. The United States maintains that these cases stand for the proposition that government action resulting in a diminution of distribution opportunities for imported products constitutes less favourable treatment under Article III.

7.46 In the US view, in *Canada - Alcoholic Drinks* the panel examined whether provincial liquor-board restrictions on access for imported beer to certain points of sale were consistent with the national treatment principle of Article III:4. The panel concluded that imported beer had not been afforded less favourable treatment because it did not have access to the same distribution channels as domestic beer. In reaching this outcome, the panel rejected an argument proffered by Canada that was in certain respects similar to the one currently being made by Japan. Canada maintained that many of the points of sale denied to foreign beer were controlled by private businesses and that any hardship befalling imports was the result of private conduct.[1093] The panel, however, did not find persuasive Canada's contention that private distribution systems were free to carry foreign beer and, thus, the government should not be held responsible for private business decisions to refrain from doing so. The panel decided that "imported beer had access to fewer points of sale than domestic beer because domestic brewers were authorized to establish private retail stores or had access to retail outlets in which imported beer could not be sold".[1094]

7.47 In reaching this conclusion, the panel relied on the standard set forth by the panel on *United States - Section 337* which explained that "the words 'treatment no less favourable' call for "effective equality of opportunities for imported products in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[1095] In particular, the panel reasoned that whether imports enjoy "equal opportunities" turns "on the distinctions

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[1090]Ibid., p. 18.

[1091]Panel on *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies ("Canada - Alcoholic Drinks")*, DS21/R, adopted on 18 February 1992, BISD 39S/27.

[1092]Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages ("United States - Alcoholic Beverages")*, DS23/R, adopted on 19 June 1992, BISD 39S/206.

[1093]*Canada - Alcoholic Drinks*, op. cit., pp. 44-45, para. 4.9.

[1094]Ibid., p. 75, para. 5.5.

[1095]*United States - Section 337*, BISD 36S/345, 386, para. 5.11.

made by the laws, regulations, or requirements themselves and on their potential impact, rather than on the actual consequences for specific imported products".[1096]

7.48 The United States further refers to the panel on *United States - Alcoholic Beverages* which concerned state laws requiring imported beer and wine to be sold only through wholesalers while some in-state like products were permitted to be sold directly to retailers. The panel found that establishing different distribution channels for imported and domestic beer and wine constituted less favourable treatment of imported products within the meaning of Article III:4.[1097] The panel "considered as irrelevant … that many - or even most - in-state beer and wine producers preferred to use wholesalers rather than market their products directly to retailers …". The panel explained that, unlike imported beer, certain domestic producers located in the states in question "have the opportunity to choose their preferred method of marketing. The panel considered that it is the very denial of this opportunity in the case of imported products which constitutes less favourable treatment".[1098]

(ii) "Less favourable treatment" based on product origin or product characteristics

7.49 **Japan** explains that there have been only two kinds of cases in which laws, regulations, or requirements have ever been found to violate national treatment. The first type of case involves laws, regulations, or requirements in which different treatment was accorded to similar or "like" products explicitly based on their origin. In these cases, the question before the panel was whether imported products were treated any less favourably than domestic products due to differences in the legal provisions.[1099] Japan underlines that the distribution measures at issue do not make any distinctions between goods based on country of origin. According to Japan, this line of cases does not support the US claims.

7.50 The second type of case in Japan's understanding involves laws, regulations or requirements in which different treatment was accorded to products based on characteristics other than origin. In these cases, certain measures apply to one product and not another, even though the products may be considered as similar or "like" products. When such measures are deemed to accord less favourable treatment to imported products, these measures may be found to violate Article III.[1100] However, Japan emphasizes that the alleged Japanese distribution measures do not draw any line at all between products based on any product characteristics.

7.51 The **United States** responds that if in Japan's view GATT precedent confines "treatment less favourable" to mean either overt discrimination based on the country of origin of products or discrimination based on artificial or immaterial distinctions between products, Japan in effect argues that only cases of *de jure* discrimination fall within the prohibition of Article III:4. In the US view,

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[1096]Ibid., pp. 386-387, paras. 5.11 and 5.13.

[1097]*United States - Alcoholic Beverages*, op.cit., p. 279-281, para. 5.31-5.32, 5.35, citing Panel Report on *Canada - FIRA*, BISD 30S/140, 160-61.

[1098]*United States - Alcoholic Beverages*, op. cit., p. 279, para. 5.31.

[1099]See e.g., *United States - Standards for Reformulated and Conventional Gasoline*, adopted on 21 May 1996, WT/DS2/8; *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted on 4 October 1994, DS44/R; *United States - Taxes on Automobiles*, dated 29 September 1994, (unadopted); *United States - Alcoholic Beverages*, adopted on 19 June 1992, BISD 39S/206; *Canada - Alcoholic Drinks*, op. cit.; *United States - Section* 337, adopted on 7 November 1989, BISD 36S/345; *Canada - FIRA*, adopted on 7 February 1984, BISD 30S/140; *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49; and *Italian Discrimination against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60.

[1100]See e.g., *Japan - Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/R; *United States - Alcoholic Beverages*, op. cit.; *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136; *Japan - Customs Duties, Taxes, and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted on 10 November 1987, BISD 34S/83. Japan notes that most Article III "like product" cases involve taxes under Article III:2 rather than regulations under Article III:4. The general principles are the same, however, regardless of whether taxes or regulations are at issue.

Japan articulates an unduly narrow construction of Article III that is not supported by the language of the article, prior GATT cases or the general principle of Article III:1. Given that Article III:4 makes clear that "all" laws, regulations and requirements resulting in "treatment less favourable" to imported products than domestic products are impermissible, the United States maintains that this provision contains no limitation in this regard and cannot be said to indicate a requirement that a measure be discriminatory on its face.

7.52 The United States contends that, while many GATT cases have involved overt discrimination, these cases in no way suggest that a dispute must fall into one of the two categories described by Japan. Panels have articulated the expansive nature of Article III:4 by recognizing correctly that Article III:4, "informed" by Article III:1, must be sufficiently flexible to reach the vast array of situations in which WTO Members may attempt to afford protection to domestic production by according imports less favourable treatment.[1101] The United States points out that the panel on *United States - Section 337* made precisely this point in stating that "the 'no less favourable' treatment requirement set out in Article III:4, is unqualified".[1102] That panel went on to explain that the presence of facial discrimination or overtly different treatment, while an important consideration, is not in and of itself dispositive of the question of whether less favourable treatment has been accorded. The panel stated that "it has to be recognized that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products".[1103] Only by looking to how measures actually apply "in practice" will a panel be able to determine whether imported goods receive "effective equality of opportunities".[1104]

7.53 In this light, the United States submits that panels have gone beyond the face of measures, examining the practical competitive opportunities available in the market, to determine whether measures in dispute accord less favourable treatment.[1105] The panel on *Canada - Alcoholic Drinks* addressed seemingly even-handed minimum price provisions,[1106] which applied both to foreign and domestic beer and stated that the national treatment requirement "was normally met by applying to imported products legal provisions identical to those applied to domestic products, but that there may be cases where the application of formally identical legal provisions would in practice accord less favourable treatment".[1107] That panel found:

> "that minimum prices applied equally to imported beer did not necessarily accord equal conditions of competition to imported and domestic beer; whenever they prevented imported beer from being supplied at a price below that of domestic beer, they accorded in fact treatment to imported beer less favourable than that accorded to domestic beer; when they were set at the level at which domestic breweries supplied beer … they did not change the competitive opportunities for domestic beer but did affect the competitive opportunities of imported beer which could otherwise be supplied below the minimum price".[1108]

[1101]These cases make plain that Article III:4 requires Members to "treat the imported products in the same way as the like domestic products once they had been cleared through customs." Appellate Body Report on *Japan - Alcoholic Beverages*, p. 16.

[1102]*United States - Section 337*, op.cit., p. 386, para. 5.11.

[1103]Ibid.

[1104]The US emphasizes that the panel made clear that the analysis of whether a measure accords less favourable treatment is prospective, looking at whether the provision in question "may lead" to less favourable treatment (Ibid., para 5.13). That no harm had yet been shown on market access for imports did not necessarily effect the outcome of the panel's review.

[1105]Ibid., p. 394, para. 5.30.

[1106]"The panel took note of the fact that the minimum price was set at the lowest price at which certain domestic beers were sold." *Canada - Alcoholic Drinks*, BISD 39S/27, 83-84, para 5.27.

[1107]Ibid., p. 84, para. 5.29.

[1108]Ibid., pp. 84-85, para. 5.30.

(iii) Impact on competitive conditions for imported film and paper

7.54 **Japan** argues that - even if the Panel accepts the US argument that the so-called "distribution countermeasures" constitute laws, regulations, or requirements within the meaning of Article III -, it must still determine whether those laws, regulations or requirements accord less favourable treatment to imports than to like domestic products.

7.55 The **United States** alleges that by promoting the restructuring of the photographic materials distribution system, the Japanese Government modified the conditions of competition in the industry. Whereas the majority of photospecialty wholesalers formerly carried multiple brands of film, not one of these wholesalers continued to handle foreign film after Japan implemented the distribution countermeasures. The United States explains that, in cooperation with the domestic industry, MITI used three methods to tie wholesalers to individual domestic manufacturers of photographic materials. MITI instructed the latter to use:[1109]

(1) standardized transaction terms, such as volume discounts, rebates and common credit terms;
(2) joint activities between domestic manufacturers and wholesalers, including joint warehouses and distribution routes; and
(3) mutual computer links, data bases and commercial orders.

In the view of the United States, each of these policies was intended to minimize competition among domestic manufacturers and to make wholesalers more dependent on the domestic manufacturer with which it primarily did business.

7.56 The United States alleges that the rationale underlying the *Canada - Alcoholic Drinks* and *United States - Alcoholic Beverages* panel reports applies with equal force in the present circumstances. Due to Japan's restructuring of the distribution system and the creation of exclusive arrangements among domestic photographic materials manufacturers and primary photospecialty wholesalers, domestic manufacturers have access to a significant method of distribution that has been denied to foreign manufacturers. It is irrelevant whether some alternative distribution channels may be available for foreign producers because primary wholesalers have considerable advantages with respect to infrastructure and ties to retailers. Distribution opportunities have been denied to foreign producers as a result of its policies and actions because Japan may not create a system in which domestic producers are given greater avenues of distribution than their foreign competitors. Accordingly, Japan's restructuring of the distribution system for photographic materials in effect denies access to *any* distribution channel - let alone the most valuable one in the market as in this case - and amounts to less favourable treatment in violation of Article III:4.

7.57 **Japan** submits that the panel reports cited by the United States are not applicable to the circumstances of the present case because in those cases, imports were legally forbidden from using certain distribution channels that were open to domestic products. In response to the US argument that imported film and paper have likewise been excluded from distribution channels, and thus have been denied "effective equality of opportunities" required by Article III, Japan argues that even if the domestic manufacturers' primary wholesalers were to be defined as a separate distribution channel,

[1109]According to the United States, MITI established committees comprised of government and industry officials dedicated to forming vertical distribution channels in order to implement its plans. MITI and its committees issued many reports urging photographic materials industry to accept "systemization". These documents repeatedly called for use of standardized practices to act as liberalization countermeasures combating foreign competition. To ensure compliance from the private sector, the government coordinated the efforts of various participants and contributed expertise and financing. In particular, the United States describes that the government, through JDB and SMEA, gave financial support for domestic manufacturers, wholesalers, and photo finishing laboratories to achieve systemization.

imports are not legally excluded from it. Japan asserts that the United States has not pointed to any governmental prohibition that prevents those wholesalers from carrying other brands of film if they so choose.

7.58 With respect to *film*, Japan stresses that foreign brands are not prohibited from using any distribution channel. The major foreign brand, Kodak, uses exactly the same three basic channels of distribution through which domestic film brands are sold. Japan explains that Kodak sells all its product to a primary single-brand national wholesaler (i.e., Kodak Japan, formerly Nagase and then Kodak-Nagase), which then sells (1) directly to large retailers, (2) through secondary wholesalers, and (3) through affiliated photofinishing laboratories. Given that Kodak, Fujifilm, and Konica all sell through *single-brand* primary wholesalers, it is necessarily the case that they do not sell through the same particular primary wholesalers because, by definition, a single-brand wholesaler is only carrying the products of a single manufacturer at a particular point in time. This does not mean, though, that imports have been excluded from a distribution channel.

7.59 With respect to *paper*, Japan contends that imported paper is sold through the same distribution channels as domestic paper.[1110] Since paper customers only use one brand of paper at a time, for Japan it follows of necessity that foreign and domestic paper producers do not share the same customers at any given time; nevertheless, they all use the same basic channels of distribution. In Japan's view, there has been no exclusion. In the alternative, even if the specific customers of the domestic paper manufacturers are defined as constituting a separate distribution channel, Japan argues that there is no governmental prohibition that prevents those customers from switching paper brands if they so choose.

7.60 The **United States** responds that Kodak Japan, which was created through a merger with a division of a Japanese import-export company, is not a "primary photospecialty wholesaler." Kodak Japan is the local subsidiary that Eastman Kodak established to distribute its products after the company lost access to all main photospecialty wholesalers in Japan.[1111] Unlike the primary photospecialty wholesalers, Kodak Japan does not have longstanding relationships with customers nationwide, does not carry a wide array of photospecialty products such as cameras and accessories, does not have a large nation-wide sales force, and therefore does not have the same economies of scale and scope as the primary photospecialty wholesalers. The United States also notes that the Japanese photographic industry does not consider Kodak Japan to be a wholesaler, as reflected in the standard industry diagram of film distribution in Japan.[1112] Fuji, by contrast, has exclusive access to all of the primary wholesalers. Simply allowing a foreign manufacturer to establish a local subsidiary does not mean that the foreign manufacturer has equivalent access to the country's domestic distribution system. With regard to photographic *paper*, foreign and domestic firms market directly to photographic laboratories which the United States argues were induced to affiliate with Fuji through SMEA programs explicitly identified as "liberalization countermeasures.[1113]

(iv) Causal connection

7.61 The United States emphasizes that the less favourable treatment afforded by the closing of the primary distribution system to imports is manifest because the Japanese Government's role in fundamentally altering the way photographic materials are sold decisively tips the balance of competitive conditions in favour of domestic producers. While foreign manufacturers may resort to smaller wholesalers or direct sales to retailers, these alternatives are wholly inadequate. Smaller wholesalers offer a narrow customer base and tend to be dominated by primary wholesalers and Japanese

[1110]Japan elaborates that paper is sold through an affiliated sales company to (1) affiliated photofinishing laboratories, (2) a small amount to multibrand secondary wholesalers, and (3) directly to retail minilaboratories.

[1111]US Ex. 89-2 and US Ex. 97-1 and 2.

[1112]Second US Submission, Figure 3, referenced, p. 85, para. 240.

[1113]See section VI.D.3.(e)(ii) on "SMEA loans to photoprocessing laboratories" above, in particular paras. 6.368- 6.369.

manufacturers. Moreover, even if the alternatives were equally desirable, domestic manufacturers would continue to have a broader range of distribution channels. Not only do domestic manufacturers have access to the alternate routes available to foreign producers, but they alone have access to the primary distribution network.

7.62 **Japan** submits that apart from the fact that any alleged "less favourable treatment" does not flow from "laws," "regulations" or "requirements," an examination of the alleged measures at issue shows that none of them makes any distinction between imported and domestic products on the basis of their origin, either explicitly or implicitly. More significantly, they do not distinguish products based on any characteristics at all:

(i) MITI recommendations contained in the 1970 Guidelines apply equally to wholesalers and retailers regardless of what brand of film they sell.

(ii) Similarly, JDB loans and SMEA financing do not distinguish between businesses that sell domestic products and those that sell imported products.[1114] Therefore, Japan concludes that these provisions establish "equal competitive opportunities" for imported and domestic film and paper.

(iii) With respect to JFTC Notification No. 17,[1115] Japan claims that it accorded "treatment no less favourable than that accorded to like products of national origin": First, imported products and domestic products are not categorized separately. Second, the concept of "premium offers to business entrepreneurs" is neither inherently related to domestic products nor to imported products. Restriction of such offers is, therefore, in Japan's view, not inherently less restrictive for domestic products than for imported products.

(iv) Japan explains that the International Contract Notification is also consistent with Article III:4 because: First, the same procedure under the Antimonopoly Law applies to enforcement actions against these contracts and to actions against domestic contracts. Second, the JFTC has not enforced, and will not enforce, MITI's policy through administrative guidance under the notification requirement.[1116]

7.63 The **United States** does not accept that none of the alleged measures of Japan makes any distinction between products, either explicitly or implicitly, based on their country of origin. It argues that Japan studied the Japanese distribution sector and designed and implemented the liberalization countermeasures to protect domestic manufacturers from increased foreign competition, i.e., making domestic manufacturers more resistant to and competitive with foreign competition, as Japan liberalized its tariffs, import quotas, and investments restrictions.

7.64 The United States further argues that irrespective of the facial neutrality[1117] of Japan's distribution countermeasures the true significance of these measures can be assessed only in the context of the Japanese photographic materials market at the time they were imposed and have been applied since.

[1114]According to Japan, photofinishing laboratories affiliated with Kodak receive SMEA financing, just like Fujifilm- and Konica-affiliated laboratories. JDB Annual Report, 1995, pp. 26-27.

[1115]Japan states that Notification 17 was repealed in April 1996. Therefore, Japan argues that it should not be the subject of the present proceeding. Nor will the general designation of unfair trade practices under the Antimonopoly Law operate to continue the content of the regulation.

[1116]A bill to repeal the International Contract Notification requirement has been introduced to the Diet, in light of the globalization of the Japanese economy and for the reduction of the administrative burden.

[1117]The United States notes that the panel on *Thailand - Cigarettes* acknowledged the argument that a facially neutral ban on advertising could violate Article III:4 in that such a restriction might preserve the market superiority of a dominant domestic supplier. *Thailand - Importation of and Internal Taxes on Cigarettes*, adopted 7 November 1990, BISD 37S/200, 224, para. 78.

Prior to the implementation of the countermeasures, foreign photographic materials were distributed through primary wholesalers largely in the same way as domestic photographic materials. However, after the government intervened in the market, primary wholesalers no longer handled foreign film and paper but instead exclusively handled the products of domestic manufacturers and foreign film remains cut off from all of the primary wholesalers and, as a result, more than half of all retailers selling film.

7.65 **Japan** maintains that the US claim of an Article III violation before this Panel is utterly novel and has no precedent. In Japan's view, the burden is on the United States to demonstrate that application of the alleged measures, which do not distinguish between imports and domestic products, constitutes less favourable treatment for imports. Japan emphasizes that there is nothing inherently unfavourable to imports about encouraging more rational transaction terms, or promoting computerization. In the alternative, even if the MITI's distribution policies sought to encourage single-brand wholesale distribution of film and affiliations between domestic manufacturers and photofinishing laboratories, there is nothing inherently discriminatory against imported products in promoting vertical integration[1118] because imports are fully capable of competing through single-brand distribution channels.[1119]

7.66 The **United States** insists that whenever imported products are subject to less favourable treatment pursuant to government action, the national treatment obligation is violated. The United States contends that according to Japan's interpretation Article III is applicable only in the event that a WTO Member overtly discriminates against the products of other Members through highly formalized legal activity. Such an interpretation would permit less favourable treatment to be accorded as long as it is done in a subtle manner or through informal methods. In the US view, if the Panel accepted Japan's argument this would mean that Article III:4 does little or nothing to guard against hidden trade barriers.

7.67 **Japan** asserts that the current market structures for photographic film and paper do not result from any government action, and cannot be considered "laws", "regulations" or "requirements." Japan recalls that Article III applies only to government actions, and not private conduct. It quotes from the panel report on *United States - Alcoholic Beverages* which states that "[t]he Article III:4 requirement is one addressed to relative competitive opportunities created by the government in the market, not to the actual choices made by enterprises in that market".[1120] Japan concedes that the United States may allege that the distribution arrangements in the Japanese film and paper markets constitute restrictive business practices but maintains that such private practices are outside the scope of current WTO rules.

(c) Causation of market structure by governmental measures or private practices

7.68 Japan submits that the Article III argument of the United States collapses due to fundamental factual inaccuracies. In Japan's view, a careful analysis of the "distribution countermeasures" during the 1960s and '70s and the allegedly exclusionary market structures for imports of film and paper imports shows that there is no causal connection between the one and the other. For Japan, single-brand wholesale distribution of film is the standard practice throughout the world. Japan explains that the various alleged distribution measures did not create single-brand distribution. In the Japanese market, single-brand distribution resulted from private business decisions and not from governmental actions because it evolved naturally due to the fact that the production sector developed more rapidly than

[1118]As Japan discusses in relation to the United States non-violation claims, vertical integration may be procompetitive or anticompetitive, depending on the unique circumstances of each particular case.

[1119]Japan refers to Kodak's success in the Japanese market with respect to x-ray film, motion picture film and microfilm, and Polaroid's success in the instant film market despite the fact that these products are sold through the same kinds of single-brand distribution channels as consumer photographic film.

[1120]*United States - Alcoholic Beverages*, BISD 39S/206, 279-280, para. 5.31. See also *Review Pursuant to Article XVI:5*, adopted on 24 May 1960, BISD 9S/188, 192, para. 12 ("the GATT does not concern itself with such action by private persons acting independently of their governments").

the distribution sector. To compensate for the inefficiencies in the distribution sector, Japanese manufacturers, following the lead of manufacturers in other advanced countries such as the US, decided to integrate forward into distribution to promote the efficient distribution and marketing of their products. Given that single-brand distribution emerged as a predominant industry trend already in the mid 1960s and was virtually complete by 1968 before virtually all of the alleged "distribution countermeasures" were implemented, it would be logically impossible for subsequent government actions to be the cause of single-brand distribution. Therefore, in Japan's view, the current market structure is the result of private business decisions and thus not within the scope of Article III.

7.69 The **United States** responds that it does not predicate its claim under Article III on the notion that Japan's market structure for photographic materials is a "law, regulation or requirement", nor does the United States contend that purely private conduct may trigger a violation of Article III. The United States emphasizes that its claims are based solely on the fact that the Japanese Government intervened in the market to aid its domestic industry in excluding foreign competitors from the most desirable distribution channels which falls squarely within the purview of Article III.

7.70 **Japan** argues that there are absolutely no governmental or legal obstacles that prevent the primary wholesalers of the domestic manufacturers from carrying multiple brands of film,[1121] or that prevent photofinishing laboratories from switching brands of paper.[1122] Japan concludes that thus there is no causal connection between the current market structure and the alleged measures. In Japan's view, what the United States complains about is the divergent competitive impact between a new brand against a dominant brand, and not that between imported products and domestic products.[1123] Japan alleges that the United States has not identified any governmental or legal obstacles, nor has the United States identified any ongoing active government involvement in allegedly encouraging the maintenance of these market structures.[1124]

7.71 Japan also emphasizes that ample evidence demonstrates that imported film and paper enjoy unimpeded access to the Japanese market. Foreign manufacturers are not only allowed to sell through, but in fact do sell through, the same distribution channels used by domestic manufacturers. While the United States argues that these routes are "not viable alternatives", according to Japan, the empirical reality shows widespread availability of Kodak brand film. In Japan's view, Kodak Japan *currently functions as a primary wholesaler* because Kodak Japan sells Kodak brand film to secondary wholesalers and retailers, just like the other primary wholesalers do for other brands. Japan also points out that Asanuma abandoned its dealing with Kodak film in 1975 because Kodak required Asanuma, one of Fuji's current primary wholesalers, to deal with Nagase, Kodak's agent and primary wholesaler then, and Asanuma's competitor.[1125]

[1121]Japan claims that independent primary wholesalers carrying Fuji brand film are free to carry other brands. Their choice to handle only Fuji brand film is a purely voluntary private business decision. Affidavit of Kaoru Konno, Japan Ex. A-15. Affidavit of Yukiyoshi Noro, Japan Ex. A-14. Affidavit of Takenosuke Katsuoka, Japan Ex. A-11. Affidavit of Tomihiko Asada, Japan Ex. A-12.

[1122]Japan claims that their choice to affiliate with a particular manufacturer is a purely voluntary private business decision.

[1123]In Japan's view, relaxation of the regulations would not necessarily have operated to the advantage of a new brand, because of the readiness of a dominant brand to counter.

[1124]Japan points out that in the context of its non-violation claims, the United States does not mention any "distribution countermeasures" occurring after the conclusion of the Tokyo Round in 1979. Although the United States does refer to the "ongoing application of distribution countermeasures" after the end of the Uruguay Round in 1994, the only elaboration is a reference to "foreclosure from the primary wholesale channels of distribution" which for Japan does not amount to the mentioning of any government action.

[1125]Japan argues that Asanuma could not buy *from* Nagase, and then compete *with* Nagase for the same customers. Today, as Kodak Japan has succeeded Nagase's business to wholesale Kodak film, other primary wholesalers choose not to buy from Kodak Japan, with which they would have to compete for the same customers. Fuji only sells to the primary wholesalers and does not compete with them. Competition among the four primary wholesalers carrying Fuji brand film is at the same level, they all buy from Fuji, and compete with each other on equal terms.

7.72 The **United States** notes its earlier responses to Japan's erroneous claims that Kodak has access to the Japanese market on the grounds that Kodak Japan "currently functions as a primary wholesaler."[1126] The United States further asserts that Japan tries to attribute impeded access to the distribution channels exclusively to private conduct by arguing that the move to single-brand distribution was beginning to occur and would have occurred regardless of the government's measures. If the Panel were to endorse such a rationale, it would signal that WTO Members may aid and abet the development of market forces disadvantaging imported products. In the view of the United States, this result would run counter to the purpose of Article III.

(d) Conclusions

7.73 In summary, the United States alleges that Japan implemented the distribution countermeasures to accord less favourable treatment to imported photographic materials. The 1967 Cabinet Decision and numerous other documents reflect a concern that Japanese manufacturers were particularly vulnerable to inroads by foreign producers making effective use of Japanese wholesalers to distribute their products. As a consequence, the Japanese Government adopted a series of measures specifically designed to consolidate the primary distribution channels under the control of Japanese film and paper manufacturers, and thereby severely restricted the opportunities for foreign manufacturers to distribute and sell their products in Japan. Such actions constitute improper protection of domestic products and less favourable treatments of imports in violation of Article III.

7.74 The United States points out that in determining whether Japan's distribution countermeasures violate Article III:4, the Panel need find only that these measures "tend to tip the balance in favour of" Japanese producers of film and paper," whereas in this case, Japan's laws, regulations and requirements have done far more. As a result of Japan's actions, imported photographic materials have been excluded from the primary distribution system and thus have been substantially impaired in their ability to reach a broad segment of retail outlets.

7.75 **Japan** responds that the United States has failed to identify any "laws, "regulations", or "requirements" that would serve as the appropriate subject matter for a claim under Article III, since it identifies only the continued existence of single-brand wholesale distribution for film and affiliations between domestic paper manufacturers and photofinishing laboratories as "distribution countermeasures". Japan's recalls that purely private conduct is outside the scope of Article III. As to the MITI distribution modernization policies of the 1960s and '70s, Japan emphasizes that the administrative guidance subject to US challenge is not within the scope of Article III. Furthermore, given that none of the specific distribution policies from that period is still in effect, Japan contends that they are not properly before this Panel.

7.76 In the alternative, assuming that there "laws", "regulations" or "requirements" in the meaning of Article III at issue, Japan argues that the United States has failed to show that the alleged measures in dispute extend "less favourable treatment" to imported film and paper. Japan emphasizes that the general purpose of this phrase is to protect the equal competitive relationship between imported and domestic products and that Article III:4 does not require any particular results in the marketplace. Furthermore, none of the policies of the Japanese Government was applied so as to afford protection to domestic production within the meaning of Article III:1. Therefore, Japan requests the Panel to reject the claims raised by the United States under Article III.

[1126]See para. 7.60 above.

B. ARTICLE X OF GATT

1. INTRODUCTION

7.77 According to the **United States**, in devising and implementing its broad set of liberalization countermeasures to protect its market from foreign competition, Japan followed the approach of "concerted adjustment" between government and industry. The Japanese Government acted behind a shield of opacity, deputizing or instructing industry to carry out policies, with incentives and leverage from the government standing behind private industry behaviour. In this context, foreign film and paper manufacturers encountered impenetrable market restrictions of imperceptible origin. In the US view, the restrictions originated with government policy and actions, and the Japanese Government bears responsibility for preventing its trading partners and private businesses attempting to compete in Japan's market from understanding the precise nature of the Government's actions and their consequences. These informal, non-transparent practices remain in place and continue to restrict market access for foreign firms.

7.78 The US claims focus essentially on the following specific measures:

(1) In the context of the Premiums Law and relevant fair competition codes, Japan's failure to publish the JFTC's and the fair trade councils' enforcement actions that establish or modify criteria applicable in future cases violates Article X:1.

(2) In the context of the Large Stores Law and relevant local regulations, Japan's failure to publish guidance through which regional MITI offices, prefectural governments and local authorities make applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review, and continue to impose a "prior explanation" requirement, violates Article X:1.

7.79 As a preliminary matter, **Japan** notes that, while the US request for the establishment of the Panel mentioned violations of Article X:3 of GATT,[1127] the United States has made no legal claims under Article X:3 in its submissions to the Panel. Accordingly, Japan requests the Panel to evaluate the US claims under Article X with exclusive reference to Article X:1 of GATT.

7.80 Japan further responds that the obligations of Article X:1 do not apply to fair trade councils' and JFTC enforcement actions because these are not measures of "general application," but only applications of legal principles to specific factual circumstances which do not establish or modify criteria applicable to future cases. Thus, in Japan's view, the practices alleged by the United States does not exist.

7.81 Further, Japan contends that none of the MITI branches, prefectural governments, or other local governments may either require or recommend that store openers provide prior explanations to, or hold prior consultations with, local retailers. Japan emphasizes that it has corrected and is prepared to correct any such practice upon discovery.

[1127]Letter from US Ambassador Booth Gardner to WTO Dispute Settlement Body Chairman H.E. Mr. Celso Lafer Requesting the Establishment of a Panel on 20 September 1996.

2. THE LEGAL TEST

7.82 Article X:1 provides in the relevant part as follows:

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [WTO Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfers of payments therefore, or affecting the sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use shall be published promptly in such a manner as to enable governments and traders to become acquainted with them".

7.83 The **United States** submits that the purpose of this provision is to ensure a degree of transparency in the imposition of governmental measures that may affect the competitive opportunities of WTO members. Such measures must be "published promptly" in order "to enable governments and traders to become acquainted with them".[1128] The United States explains that, when a WTO Member fails to fulfil its obligations under Article X:1, foreign firms and their governments are unable to understand the "rules of the road" in that market and are impeded in their ability to assess whether fundamental GATT rights, e.g., the right to no less favourable treatment under Article III and the right to benefits arising out of tariff concessions in accordance with Articles II and XXIII:1(b), are being nullified or impaired by that WTO Member.

7.84 **Japan** explains that in order to prove a violation of Article X:1, the United States has to establish the existence of the following elements:

(i) There is a law, regulation, judicial decision or *administrative ruling*
(ii) of *general application*,
(iii) *made effective* by any [WTO Members],
(iv) pertaining to … requirements, restrictions or prohibitions on imports, … or affecting their sale, distribution [of products] …
(v) [that] has not been published promptly in such a manner as to enable governments and traders to become acquainted with them.

Only when a measure meets all of these elements stipulated in the provision, does a government owe an obligation to publish under Article X:1.

(a) "Laws, regulations, judicial decisions or administrative rulings"

7.85 In Japan's view, it is clear that none of the alleged measures in dispute amounts to a "law" or "regulation" since none of them was enacted by the Diet, or was promulgated as a regulation under the relevant administrative procedures. Likewise, for Japan it is obvious that none of the alleged measures qualifies as a "judicial decision".

7.86 With respect to "administrative rulings", Japan underscores that it is critical to remember that Article X:1 requires publication only of administrative rulings of "general application". This requirement is crucial especially in evaluating the US claims under Article X relating to the Premiums Law. In Japan's view, the US allegation lacks specificity, and it is difficult to discern by what criteria the United States concludes that certain enforcement actions are administrative rulings of "general application" to be published under Article X:1. Thus Japan claims that the United States has failed to identify any

[1128]See Panel Report on *EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile*, adopted on 22 June 1989, 36S/93, 133, paras. 12.29-12.30.

appropriate subject matter to be published under Article X:1. Although, the US claim is based on "administrative rulings", the United States fails to specify which administrative rulings are in violation of Article X.

7.87 The **United States** confirms that its Article X:1 claims are based on administrative rulings and not on "laws, regulations, or judicial decisions. The United States agrees that the obligations of Article X:1 apply only to administrative rulings of *general* application. It asserts that Japan enforced the Premiums Law and the Retailers Fair Competition Code as well as the Large Stores Law primarily through informal, unpublished enforcement actions in a manner inconsistent with Article X.

7.88 **Japan** notes that the panel report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* interpreted the phrase "general application" as meaning that "[i]f, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application".[1129] From that Japan concludes that the informal actions concerning the Premiums Law and the Retailers Code are not of "general application".

7.89 The **United States** maintains that Japan's failure to publish notice of "administrative rulings of general application" runs counter to Article X:1. Although, no GATT or WTO precedent squarely addresses the issue, the United States submits that Japan has previously taken the position that the publication requirement of Article X:1 extends to the disposition of individual matters by an administrative agency, especially where principles applicable to future decisions are established. In the 1990 panel report on *EEC - Regulation on Imports of Parts and Components*, Japan challenged the EEC's practices regarding the acceptance of undertakings pursuant to the EEC's anti-dumping regulation and the determination of the origin of parts used in assembly operations. Japan argued that:

> "[t]he EEC had not made public the criteria used in the consideration of offers of undertakings … . While the conditions under which duties could be imposed were defined … the only available information regarding the conditions under which the EEC would consider undertakings acceptable consisted of letters and oral explanations by the EEC officials to companies involved in proceedings".[1130]

> "[T]he issue of the determination of the origin of parts or materials used in assembly operations in the EEC had led to difficulties … . It was only after an investigation … started that companies engaged in assembly operations within the EEC were in a position to ascertain how the EEC Commission would determine the origin of the parts used in these operations … [I]n practice, there existed the possibility of changes in the criteria to determine origin … This had led to problems for certain Japanese producers".[1131]

7.90 The United States notes that because the panel in *EEC - Parts and Components* resolved the matter on other grounds, it chose not to address Japan's Article X argument. Nonetheless, the United States suggests that Japan's previous articulation before that panel of the type of administrative rulings that are subject to Article X should govern in the present case. The United States explains that it does not contend that Article X requires all enforcement actions, no matter how limited in scope or insignificant in developing new doctrine, be made public. However, Article X:1 mandates the publication

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[1129]Panel Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwea*r, WT/DS24/R, adopted on 25 February 1997, para. 7.65. This finding is upheld by the Report of the Appellate Body. Appellate Body Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted on 25 February 1997.

[1130]Panel Report on *EEC - Regulation of Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132, 155, para. 3.53.

[1131]Ibid., p. 156, para. 3.54.

of administrative rulings that establish or substantially revise criteria which subsequently may be applied in other cases in the future, recognizing of course that all disputes should be analyzed on a case-by-case, fact-specific basis. This is particularly significant in the present instance because of the multiple enforcement bodies involved, each of which may follow criteria differing from the others. Thus, the United States claims that Japan's lack of transparency in the frequent use of unpublished enforcement actions fails to make public applicable criteria and guidance that may be relied upon as precedent in future cases. Japan's complaint about the EC' measures in *EEC - Parts and Components* applies with equal force in the present dispute and thus Japan should be instructed to publish Premiums Law and Large Retail Store enforcement actions of general applicability so that traders and WTO Members may become acquainted with them.

7.91 While **Japan** maintains the position it took in *EEC - Parts and Components*, i.e., that Article X:1 mandates the publication of administrative rulings that establish or substantially revise criteria which subsequently may be applied in other cases[1132], it emphasizes that its position does not apply to the present case. Japan considers that it has duly published all laws, regulations, judicial decisions or administrative rulings of general application relating to the Premiums Law or Large Retail Stores Law in a manner that enables governments and traders to become acquainted with them. Japan maintains that the United States fails to identify any particular unpublished enforcement actions that fall in the definition of "general application" and, therefore, has failed to discharge its burden of proof in this regard. Therefore, the United States has failed to identify any proper subject matter for an Article X:1 claim, and it is thus irrelevant whether any of these alleged measures have been published in accordance with Article X:1.

3. MEASURES TAKEN IN THE CONTEXT OF THE PREMIUMS LAW

(a) Premiums Law enforcement actions

7.92 The **United States** alleges that Japan contravenes the publication requirement of Article X:1 because Japan's enforcement of its premium and representation provisions is shrouded in secrecy resulting from the use of informal mechanisms. Accordingly, Japan is alleged of having established a complex, multi-tiered enforcement system for its premium and representation restrictions. Under the Premiums Law, the JFTC, the prefectures and deputized private sector councils have authority to enforce the law. The number of entities involved in policing promotional activities results in substantial confusion for enterprises doing business in Japan. Not only are regulated businesses at times unsure as to which enforcement body is likely to take action on a particular matter, but those subject to the restrictions have access to little or no public record reflecting how the JFTC, a prefecture or a council may have addressed similar facts in the past and, thus, how it is apt to rule in the future. This confusion principally arises from Japan's failure to publish a large percentage of administrative rulings and enforcement actions taken and the difficulty in obtaining what little information may be available. Therefore, the United States alleges that Japan's practice of failing to publish enforcement actions of general application concerning premiums and representations violates Article X:1.

7.93 **Japan** contends that the enforcement system of the Premiums Law is sufficiently transparent and consistent with Article X:1.[1133] Enforcement regulations for the Premiums Law are published and readily available, and the Premiums Law itself as well as numerous general and specific notifications

[1132]Ibid.

[1133]According to Japan, one scholar notes that "[i]n the United States, Federal, State and even local governments independently regulate advertising. Each level of government enacts its own legislation and had its own separate administration to carry out this legislation." James R. Maxeiner and Peter Schotthöfer (eds.), Advertising Law in Europe and North America (1992), p. 317. It was also noted that "[s]elf-regulation is an important source of advertising regulation, especially for national advertising." Ibid., p. 321, Japan Ex. E-13.

interpreting it have also been published.[1134] Japan further responds that there is an ample public record from which one can discern how the Premiums Law will be applied. Specific enforcement actions simply apply general norms to the facts of a particular case.

7.94 Japan points that the United States itself specifically identifies and refers to numerous JFTC notifications which explain how the Premiums Law is applied: (i) Notification 17, identified by the United States as "[o]ne of [the JFTC's] most significant restriction on premiums."[1135]; (ii) Notification 34, which allegedly reflected "a distinctly new way" of applying the Premiums Law; (iii) Notification 5, which allegedly "tightened [JFTC] control on the use of premiums offered to consumers".[1136] The JFTC has also published detailed notifications whenever it has announced "significant restrictions", "a distinctly new way," or "tightened" control. In addition, recent decisions by the JFTC to revise and clarify the regulations on excessive premiums have also been published.

7.95 In response, the **United States** submits that since the Premium Law was enacted in 1962, the JFTC has initiated relatively few formal enforcement actions, but it has issued many "administrative guidances" or warnings. Japan has failed to publish the overwhelming majority of its enforcement actions under the Premiums Law. By one estimate,[1137] between 1962 and 1994, the JFTC issued warnings or administrative guidances in 11,362 cases, as opposed to 683 formal cease and desist orders. The JFTC has handled a large number of Premiums Law cases through informal means, presumably resulting in unpublished findings in almost every instance.[1138] This lack of transparency is compounded by the fact that Japan's 47 prefectural governments take thousands of informal enforcement actions, for which the United States has been unable to find a publication or written description.[1139]

7.96 **Japan** replies that almost 700 cease and desist orders have been published and have further clarified the general principles behind the enforcement of the Premiums Law. The relevant issue under Article X:1 is not whether informal action is ever taken. The only issue is whether any new policy is being applied without adequate disclosure. These case discussions are also included in the JFTC's annual reports since 1967. Furthermore, since 1985 the JFTC has published the outlines of major cases where warnings were given, which is another source of information concerning how the Premiums Law is applied in specific factual situations. Finally, the JFTC answers questions posed by interested enterprises concerning the interpretation of the Premiums Law. The record of important questions and answers, which may be of some use to businesses, are published as "Actual Examples of

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[1134]Kanpo, 15 May 1962. The law and its notifications are published not only in Kanpo, but also in the Genkou Houki Souran. Enforcement standards are published in the Keihin-koukoku Housei Binran.

[1135]Japan states that Notification 17 has been abolished.

[1136]Japan underscores that the US Appendix provides extensive documentation of JFTC notifications and other explanations of Premiums Law enforcement.

[1137]20 Years of Promulgation of the Act Against Unjustifiable Premiums and Misleading Representations, Kosei Torihiki Joho, 30 August 1982, pp. 14-17, US Ex. 82-10. If two other categories of JFTC action - "cautions" and "instructions" - are included, the total number of informal actions rises to 120,000. 1992 JFTC Annual Report, pp. 84-85, US Ex. 73; 1995 JFTC Annual Report, p. 242, US Ex. 85. There appear to be only two sources, *ad hoc* press releases and the Annual Compilation of Major Requests and Warnings, that carry discussions of warnings, the most formal of administrative guidance measures. However, the selection of which actions are covered seems to be random.

[1138]The United States quotes from a former senior JFTC official's statement who explained that:
"Informal ways of enforcement had the problem of lack of transparency. By making the FTC "warning" public, effectiveness of the warning as an informal way of enforcement would increase. It should be remembered that public announcements or disclosure has an aspect of an effective remedy in such a country as Japan where bad publicity is a very serious concern to business". "Too much reliance on informal enforcement could produce a lack-of-transparency problem. Sometimes, non-disclosure becomes an important component of informal enforcement, that is, non-disclosure makes it easy to get the compliance of the related entrepreneurs. On the other hand, non-disclosure has a problem of its own, namely, it does not educate other businessmen who engage in the same conduct, and the general public will not have sufficient information concerning enforcement of the [Antimonopoly Law] Act." Iyori Hiroshi and Uesugi Akinori, The Antimonopoly Laws and Policies of Japan, 1994, pp. 213-214, 216-217, US Ex. 94-1.

[1139]According to the United States, more than 85 percent of all informal actions taken are cautions issued by prefectural governments.

Consultations Regarding Premiums and Representations". Japan claims that the JFTC has thus consistently published all administrative rulings of "general application". Japan considers as significant that the United States does not make a single specific allegation of any JFTC enforcement action at odds with already published policies.

7.97 The **United States** responds that while Japan maintains that the JFTC has met the obligations of Article X:1 by publishing cease and desist orders and other formal actions taken under the Premiums Law, it offered no explanation as to why it has not published thousands of the JFTC's informal enforcement actions. Japan alleged that none of the unpublished enforcement actions involves the establishment or modification of criteria that may be applied in future cases. In the US view, it is not credible that more than 90 percent of the JFTC's enforcement actions have no effect on the shaping of doctrine or the case law subsequently to be applied. In this regard, the United States recalls that Japan took the position that the publication requirement of Article X:1 should be applied "not only to mandatory laws, but also provisions of laws that have the character of a recommendation or exhortation."

(b) Actions under "Fair Competition Codes"

7.98 The United States reports that none of the four private sector surrogate enforcement bodies to which the JFTC has delegated authority, i.e., (1) the Retailers Fair Trade Council, (2) the Promotion Council, (3) the Manufacturers Fair Trade Council and (4) the Wholesalers Fair Trade Council, publishes its enforcement actions so that traders and governments may become familiar with them. The Promotion Council's rules on dispatched employees and representations, as well as both the camera Manufacturers and Wholesalers Codes, contain no requirement that enforcement actions be recorded, let alone published. Only the Retailers Code requires that a written record be made of enforcement actions but publication is not mandatory.[1140]

7.99 **Japan** pointed out that fair competition codes and fair trade councils are irrelevant because no codes or councils cover photographic film and paper. Japan responds that the private sector "fair trade councils" have no power as an enforcement body. Therefore, Japan takes the position that the industry self-regulation codes in dispute are purely private action and that no government action is required or even authorized to make it public. Moreover, fair competition codes are published in the Official Gazette when the JFTC approves them, although they fall, in Japan's view, outside the scope of Article X.

7.100 Japan explains that the "fair competition codes" reflect the general norms of the Premiums Law, not some illicit, collusive purpose. Although the codes are initially drafted by industry groups, no code comes into effect until it has received official review and approval from the JFTC in accordance with Article 10 of the Premiums Law. The general principles to be applied are all clearly stated in the codes themselves, which are published in the Official Gazette. In Japan's view, the United States has not even alleged any action taken that was at odds with basic principles set for in the codes.

7.101 In the view of the **United States**, Japan did not contest that enforcement actions taken by "fair trade councils" are unpublished. In response to Japan's argument that the actions of these councils are purely private conduct and thus outside the scope of Article X, the United States emphasizes that the "fair trade councils" and "fair competition codes" are creations of Japanese law, in particular section 10 of the Premiums Law, and they remain under the supervision of the JFTC. The United States urges Japan to accept responsibility for the actions of these councils in this matter just as it did in 1987 before the panel on *Japan - Liquor Taxes and Labelling Practices*, where Japan referred to its system of "fair competition codes" under the Premiums Law as a form of "legal regulation".

[1140]The Retailers Council informed the US Government that it does not publish a monthly magazine, but referred the United States to the Zenren Tsuho, the official publication of the photographic retailers association.

7.102 The United States also rejects Japan's alternative argument, that the published "fair competition codes" specify all generally applicable criteria and that, accordingly, the publication of enforcement actions taken under these codes is unnecessary. In the US view, Japan's position seems to be that publication of a set of rules negates any obligation under Article X:1 to publish subsequent interpretations and actions taken pursuant to those rules. The United States emphasizes that Article X:1 requires not only initial publication of a law or regulation, but also the publication of any subsequent actions taken under such provisions. Otherwise, the term "administrative rulings" in Article X:1 would remain devoid of meaning.[1141]

7.103 **Japan** emphasizes that no fair competition code is covering film products, and that no code in a somewhat related field, such as that covering cameras, has ever been extended to apply to film. Thus, in Japan's view, there are no codes for photographic film or paper that must meet Article X:1 transparency requirements.

(c) Requests for information and disclosure of confidential information

7.104 The **United States** explains that the problems inhering in Japan's failure to publish the results of these enforcement activities are exacerbated by the difficulty of obtaining information about them. The United States has made repeated requests to receive such information from the Japanese Government, the respective enforcement councils and relevant photographic trade associations.[1142] Almost without exception, these requests for information were denied.

7.105 **Japan** responds that in 1996 the JFTC received requests from the US Embassy in Tokyo for information on certain matters related to the regulations on excessive premiums and misleading representations, with the explanation that it was being sought in connection with the WTO proceedings. The JFTC provided the Embassy with the information that had been made available to the public, but declined to provide non-public information. It is the JFTC's understanding that the kind of information the JFTC did not provide to the US Embassy is outside the scope of the obligations under Article X:1.

7.106 Japan notes that as a general matter, requests for information are granted as long as there are no concerns about disclosure of confidential information. However, Article X:1 sets out a specific exception under which this Article will "not require any [WTO Member] to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private".[1143]

7.107 With respect to the specific exception in Article X:1, the **United States** responds that the types of information that Japan should be disclosing in the context of the Premiums Law do not implicate confidentiality concerns. The United States explains that other countries publish information concerning specific enforcement actions and that company-specific commercial information which deserves protection can be protected on a case-by-case basis by redacting the critical information from the public version of the document without withholding the entire document.

[1141]For the United States, it bears noting that Article X:1 distinguishes between "administrative rulings" and "regulations".

[1142]The United States elaborates that between July 1996 and November 1996, an official at the US Embassy in Tokyo sent five letters to the JFTC, four letters to individuals and entities associated with the Retailers Council, and one letter to the Promotion Council. The letters asked for information about implementation and enforcement of the Premiums Law, and related matters. None of the responses provided the requested information.

[1143]Japan points out that under US law there is a specific exception to the Freedom of Information Act to allow authorities to refuse such disclosure.

4. MEASURES TAKEN IN THE CONTEXT OF THE LARGE STORES LAW

(a) MITI's "prior explanation" procedures

7.108 The United States submits that from the inception of the Large Stores Law, MITI has increasingly expanded the role and leverage of local retailer interests in reviewing the proposed opening or expansion of a large store. As their opportunities to influence the large store adjustment process increased, local retailers increasingly employed their influence to impose delays, floor space reductions, and other "adjustments" on large stores. The United States describes that in 1982, Japan formally required the builder of a large store to consult with local retailers and seek their agreement for a new or expanded store even before the builder or retailer had formally notified the government of its intention to build or expand a large store. This "prior adjustment" process became a very powerful means for the local retailers to wield influence over large stores because the formal large store review procedures accord decisive weight to the views of local business interests in determining whether a new or expanded large store will be forced to "adjust" its plans (e.g., reduce its floor space or hours operation).

7.109 According to **Japan**, the United States limits its claims under Article X regarding the Large Stores Law to an allegedly unpublished policy of requiring new store openers to make prior explanation or consultation. Japan points out that in 1992 MITI formally eliminated the requirement under the Large Stores Law that large store planners provide a prior explanation to local retailers before the initial notification that commences the law's formal review and adjustment process. Procedural requirements for notifications of new stores were published, e.g., in the 1992 Public Briefing Circulars and the 1994 Public Briefing Circulars. They describe in detail what is expected of large store planners under the law and reflect the 1992 policy decision to abolish the previous "prior explanation" procedures[1144] Japan contends that none of the MITI branches, prefectural governments, or other local governments may either require or recommend that store openers provide prior explanations to or prior consultations with local retailers. Japan emphasizes that it has corrected and is prepared to correct any such practice upon discovery.

7.110 The **United States** confirms that an administrative directive from MITI of 29 January 1992 addresses the elimination of the prior explanation requirement under the Large Stores Law. In the US view, MITI formally revoked this prior adjustment requirement in response to pressure from foreign governments to liberalize large store restrictions. However, the United States contends that the circulation of pamphlets does not amount to a publication "in a manner as to enable governments and traders to become acquainted with [legal requirements]" within the meaning of Article X:1.[1145]

(b) "Local explanation" procedures

7.111 According to the United States, studies by the Japanese Government[1146] document that in practice MITI regional offices and prefectural and local governments continue in many cases to require, urge, advise or request large stores pursuant to informal administrative guidance to consult and undertake prior consultation and effectively to make adjustments with local retailers and small stores competitors before submitting their formal notification under Article 3 of the Large Stores Law to the government. In numerous cases, retailers proposing to open or expand large stores continue to feel compelled to

[1144]Japan submits that one of the 1992 Public Briefing Circulars explicitly abolished the authority of any MITI official to require a prior explanation to local retailers. Similarly, the other abolished this same authority with respect to the prefectural governors. MITI, Public Briefing Nos. 25 and 26, Japan Ex. C-17.

[1145]The United States points out that the authorities themselves did not admit in the survey by Japan's Management and Coordination Agency that they had such pamphlets.

[1146]In support of its argument, the United States refers to studies by the JFTC and Management and Coordination Agency (MCA) indicating that the authorities continue to guide large retailers to consult with local business interests before filing an Article 3 notification.

negotiate with small retailers because the law and MITI guidance give the local retailers ample opportunity and power to force severe adjustments on large retailers who do not negotiate with them in advance. Local retailers continue to succeed in extracting restrictive agreements from large stores as a condition for allowing the formal new store opening procedures to proceed "smoothly".[1147] Japan is alleged not to have published the instances in which it has imposed the requirement. Therefore, Japan's continued application of the "prior explanation" requirement is unpublished, leaving foreign traders and WTO Members uncertain as to the relevant criteria government entities rely upon in imposing it in a given case.

7.112 **Japan** responds that neither MITI nor any local government maintains any rule which "requires or recommends" that store openers provide prior explanations of store opening plans to local retailers or undertake prior consultations. As a deregulation measure to shorten the examination period under the Large Stores Law, and to clarify when that period officially began, MITI explicitly repealed the practice of prior explanation and prior consultation and affirmatively promulgated this repeal among the regional MITI branches and the prefectural governments.[1148] MITI has also specifically encouraged the prefectural governments to ensure that the municipalities within their jurisdiction comply with these deregulation measures.[1149] In addition, based on its authority under Article 15(5) of the Large Stores Law, Japan has explicitly prohibited all prefectural and local governments from requiring or recommending prior explanation through additional local regulations based upon their regulatory authority delegated by the Local Autonomy Law.[1150] Accordingly, Japan ordered that corrective action be taken against "excessive local regulations," including any rules for prior explanation, and that by 1993, such local regulations be brought into conformity with the national law.

7.113 In the view of the **United States**, Japan merely argues that the Large Stores Law itself does not require prior consultation. That the practice is no longer required under the law does not mean that Japanese officials are not imposing it. The United States underlines that the prior consultation requirement appears not in the text of the law but in the practice of numerous MITI regional offices and prefectural and local governments. The requirement has never been written in the text of the law. While from 1982 to 1992 it at least was written with transparency in a MITI directive, the requirement has now become a non-transparent burden on large stores. The United States emphasizes that Japanese Government studies amply document the continuation of an effective prior consultation requirement.

7.114 **Japan** concludes that where store planners are still offering a prior explanation to local retailers, the decision to do so is based not upon any government requirement, but upon the store planners' own and purely private business decision,[1151] such as the need to obtain information that might help the store planner to develop business from local retailers or the wish to accelerate the completion of public briefing procedures under the law. Japan explains that upon receipt of Article 3 Notifications, a relevant MITI branch or prefectural government has to select consumers and local retailers (or other associations)

[1147]"Concerning the Reevaluation of Government Regulations in the Distribution Sector," Government Regulation and Competition Policy Research Council, JFTC, June 1995, pp. 22-23, US Ex. 95-11.

[1148]In 1982, MITI issued circulars guiding MITI branches and prefectural governments to request that store openers would give prior explanation to "municipal governments, etc. governing planned sites" (subsequent circulars specified "municipal governments, Chambers of Commerce and Industry, small and medium-sized retailers, and consumers"). Immediate Measures Regarding Notification to Establish Large Scale Retail Stores, Sankyoku, No. 36, issued by Director-General for Commerce and Distribution Policy [hereinafter "Director-General"], 30 MITI January 1982, Japan Ex. C-16. However, in 1992, MITI issued circulars instructing both MITI branches and prefectural governments (1) to abolish any proceedings prior to Article 3 Notifications, and (2) to request that store openers give public briefings, similar proceedings, however, subsequent to Article 3 Notifications. Instructing Parties Filing Notifications of New Type-I Large Scale Retail Stores etc. to Hold Public Briefing, Sankyoku, Nos. 25 and 26, issued by Director-General, MITI April 1, 1992, Section 1, Japan Ex. C-17.

[1149]The Circulars issued by MITI instruct both MITI branches and prefectural governments to abolish any proceedings prior to Article 3 Notification. 1990 Prior Explanation Circular, Japan Ex. F-11.

[1150]See Additional Local Regulations on New Store Openings, etc. by Local Governments, Sankyoku, No. 24, issued by Director-General, MITI, January 29, 1992, Section III, Japan Ex. C-13.

[1151]MCA Report, pp. 13-14, US Ex. 95-15.

who are to receive public briefings after consulting with relevant Chambers of Commerce and related local governments, if necessary.[1152] The fact that store planners offer prior explanation to local retailers does not in any way mean that government entities "request or recommend" prior explanation as a matter of general policy.

(c) Specific examples: The MCA and JFTC studies

7.115 The **United States** elaborates that according to the 1995 survey by Japan's Management and Coordination Agency (MCA), several MITI regional offices and prefectural governments require or recommend such prior explanations as a matter of general policy.[1153] For example, in 1995, the MCA surveyed the prior consultation practices at six MITI regional offices and six prefectural or local governments. Nine of the twelve jurisdictions regularly required or urged large stores to undertake prior consultation and adjustment. The United States identified seven specific instances in which the "prior explanation" was imposed after it had purportedly been revoked:

> (i) The Tokyo Municipal government published two pamphlets regarding the Large Stores Law process which "direct retailers to provide the MITI regional office, the prefecture, the local town and ward governments and the Chamber of Commerce with an explanatory outline of their plans".
>
> (ii) The Osaka Prefectural government "requires prospective applicant retailers to provide concerned town governments and ward councils with a pre-notification explanation of its application and to obtain a stamp as a proof that it had provided such explanation. Some cities and chambers of commerce [in the prefecture] indicate that providing local retailers' associations with a pre-notification explanation is a condition for accepting the application".
>
> (iii) The Chugoku regional office of MITI has published a manual that "directs prospective retailers to provide pre-notification explanation to concerned local and ward governments and Chambers of Commerce".
>
> (iv) The Kinki regional office of MITI "directs applicants to provide pre-notification explanation to concerned local parties in order to make the process go smoother".
>
> (v) The Kanto regional office of MITI (Tokyo area) "instructs" retailers "to consider the advantages of meeting with local retailers' associations in order to make the process go smoothly".
>
> (vi) The Tohoku regional office of MITI and the Miyazaki prefectural government advise large stores that "prior explanation would make the process go more smoothly".
>
> (vii) The Hiroshima prefectural government orally requests "that the office, prefecture, town and ward governments and Chambers of Commerce be provided with pre-notification Article 3 explanation".

7.116 With respect to the MCA Report, **Japan** explains that all MITI branches and prefectural governments subject to the report responded that they did not instruct store planners to provide a prior explanation.[1154] The discussion of prior explanation procedures in the MCA Report is based on the

[1152]1994 Public Briefing Circulars, Japan Ex. C-18, Section VI.

[1153]Results of the Survey Regarding the Liberalization of Regulations: Application of Laws Dealing with Adjustment of Retail Business Activities in the Area of Large Scale Retail Stores, Management and Coordination Agency, October 1995, pp. 11-12, US Ex. 95-15.

[1154]MCA Report, p. 11, US Ex. 95-15.

limited responses of only 11 large stores that primarily offered prior explanations based on their own private business decisions.[1155] Specifically, of the 11 large stores that responded, 8 replied that they conducted prior explanation at their own choosing. The remaining three explained that their decision to provide prior explanation stemmed primarily from some undefined form of "administrative guidance" or "local custom". It is Japan's understanding that the three cases described loosely as "administrative guidance" are actually instances in which officers in the relevant authority, in response to store planners' specific inquiries for consultation on this point, simply responded with the suggestion that it might be beneficial for them to contact with, e.g., relevant local governments, as early as possible in the process. Moreover, the Report never suggests that any local customs that may exist are at the behest of a government entity. Japan stresses that nothing in the MCA Report suggests that any MITI branch or prefectural government suggests either prior explanation or prior consultation as a general policy.

7.117 According to Japan, the MCA survey indicates that guidance by MITI branches and local governments to provide "prior explanations" occurred only in exceptional cases when the survey was conducted in 1995. Japan has recently taken corrective measures against all inappropriate practices identified in the MCA Report. For example, when MITI learned in 1995 that the Chugoku MITI branch[1156] and Hiroshima prefecture[1157] were issuing guidance for large store planners to provide "prior explanation," MITI ordered that these authorities cease issuing such guidance, and the situation has been redressed. Moreover, as of 31 March 1997, the Osaka Prefectural Government[1158] no longer requires the receipt of seal impressions from concerned municipal governments and Chambers of Commerce as a condition for the acceptance of Article 3 Notifications. In addition, the Chugoku MITI Branch no longer provides store openers with the pamphlets described in the MCA Report.[1159] Japan has been making a continued effort to find and correct any such excessive local regulations and practices. To facilitate this effort, Japan has established ombudsman's offices in MITI and MITI branches since April 1994 to deal with problems that store planners encounter in the context of the administration of the Large Stores Law.

7.118 According to the **United States**, a 1995 Ad Hoc Study Group Report from the JFTC's Government Regulation and Competition Policy Research Council further confirms that "some local offices of MITI have orally demanded that they [stores] lay the ground work following local rules or customs, and they have been forced into what amounts to an adjustment process due to demands from existing local retailers". According to the United States, the JFTC report found that MITI regional offices "orally demand" that new large stores consult with local retailers. The MCA survey identified several MITI regional offices or prefectural or local authorities who admitted to at least suggesting or advising large retailers to consult with local retailers. When MCA in turn asked large retailers for their experiences regarding such authorities, in some cases the retailers were able to produce pamphlets from the authorities directing large retailers to consult with local business interests.[1160]

7.119 **Japan** contends that the JFTC Ad Hoc Study Group Report does not substantiate the US arguments that local government entities are requiring store planners to provide prior explanations to local retailers. Like the MCA Report discussed above, the JFTC Report is limited in scope and presents no concrete example of a prior explanation or consultation offered to local retailers at the request of a government entity. Japan notes that the US citation from this Report addresses only consultations requested by local Chambers of Commerce and local retailers at the public briefing stage,

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[1155]Ibid., pp. 11-14.

[1156]See US example (iii) in para. 7.113 above.

[1157]See US example (vii) above.

[1158]See US example (ii) above.

[1159]See US example (iii) above.

[1160]Results of the Survey Regarding the Liberalization of Regulations: Application of Laws Dealing with Adjustment of Retail Business Activities in the Area of Large Scale Retail Stores, Management and Coordination Agency, October 1995, pp. 11-12, US Ex. 95-15.

subsequent to Article 3 Notifications.[1161] Hence, Japan argues that the JFTC Report does not document any instances of prior explanation requested by a MITI branch, a prefectural or local government.[1162]

7.120 The **United States** maintains that the MCA and JFTC studies indicate that such recent application of the prior consultation/adjustment requirements or recommendations are not isolated incidents, but are widely and consistently applied measures cutting across many, if not a majority of jurisdictions in Japan. In the US view, this requirement, urging or request to large stores is a law, regulation, or administrative ruling of general application within the meaning of Article X:1. The basis of the US claim under Article X:1 regarding the Large Stores Law is precisely the fact that Japan continues to require informally and non-transparently what it previously required formally.

(d) Administrative rulings "made effective"

7.121 **Japan** submits that the US claims fail to meet the textual requirements of Article X:1 because it does not point to any administrative ruling of general application which has yet to be published. In particular, as the central government has either corrected or will correct local policies that deviate, these policies do not constitute general rules "made effective" by the government as required by Article X:1. Since the text of Article X:1 focuses on measures "made effective" by any [WTO Member]", it is a central government's action that determines whether or not the trade regulations within the meaning of Article X:1 have been "made effective". The only rule promulgated by Japan is that set forth in the relevant MITI circulars explicitly abolishing any prior explanation procedures and instructing MITI branches and local governments not to guide for prior explanation. In Japan's view, given that the alleged administrative guidance does not even exist, there is no administrative ruling that has been "made effective" and thus there is nothing that must be published under Article X:1.

7.122 The **United States** accepts that the term "made effective" is part of the text of Article X:1, but contends that the measures subject to US allegations under Article X are measures that have been made effective by Japan.

(e) "Affecting the sale or distribution of imports"

7.123 The United States notes that Article X:1 requires a Member to publish its laws, regulations, judicial decisions and administrative rulings of general application that "affect" the "sale" or "distribution" of imports. The United States contends the term "affecting", as it was intended by the drafters of Article X:1, and as it has been repeatedly applied by panels in the context of Article III, means "not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market".[1163]

7.124 More specifically, the United States argues that Japan's measures governing the opening or expansion of large stores, i.e., the prior consultation process under the Large Stores Law, clearly affect the sale and distribution of imported photographic film within the meaning of Article X:1 because this process often results in a large store feeling compelled to make downward adjustments in its operating plans. These downward adjustments limit the scope and operation of large stores in Japan which in turn reduce the opportunity for foreign products to reach the market in Japan, given that large stores are more likely to deal in foreign products than small stores because large stores (a) have more shelf

[1161]JFTC Ad Hoc Study Group Report, Concerning the Reevaluation of Government Regulations in the Distribution Sector, June 1995, p. 18, US Ex. 95-11.

[1162]For any governmental body to request this consultation is directly contrary to the explicit Japanese Government policy that a public briefing held after an Article 3 notification is explicitly *not* to be used as a mechanism for prior consultations with approval from local retailers. 1992 Public Briefings Circular, Japan Ex. C-17.

[1163]Panel on *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, 64, para.12.

space to devote to multiple brands of a product, and (b) are more likely to deal directly with manufacturers, including foreign manufacturers, by-passing the wholesalers which tend not to deal in foreign film. Moreover, large stores are more likely to price lower than small retailers. According to the United States, the Japanese Government itself has concluded that large stores generally increase competition in the distribution sector in Japan and are a challenge to the exclusive distribution structures fostered by Japanese government policy. By restricting the most favourable channel for distribution and sales of imported film, Japan's restrictions on large stores "affect" the sale and distribution of film within the meaning of Article X:1. Therefore, the United States claims that Japan's failure to publish such requirements in a manner as to enable governments and traders to become acquainted with them is inconsistent with Japan's obligations under Article X:1.

7.125 **Japan** submits that the Large Stores Law, and consequently, any of its enforcement actions, including the previously existing practice of "prior explanation," do not affect the sale and distribution of film in the way alleged by the United States. Japan contends that the provisions of the Large Stores Law do not draw distinctions between imported and domestic products. Determinations whether and how to apply the law's four adjustment factors are in no way based on the origin of products carried or not carried by a large retailer. Likewise, Japan emphasizes that none of the adjustment factors has any necessary relation to decisions by large retailers as to which products to carry.

7.126 Japan also states that these general conclusions with respect to the Large Stores Law apply with added force to any alleged administrative guidance. Japan cannot conceive of any connection between whether or not large store planners must conduct "prior explanation" and competitive conditions for imported film. In Japan's view, the alleged administrative guidance does not change the competitive relationship between domestic and imported film, and therefore does not "affect" the sale and distribution of film in violation of Article X:1.

5. *CONCLUSIONS*

7.127 The **United States** concludes that "fair competition codes", respective enforcement actions and "prior explanation" practices have created an opaque enforcement system pursuant to the Premiums Law and have made it impossible for foreign firms and their governments to "become acquainted" with relevant procedures under the Large Stores Law. Consequently, the United States claims that Japan's Premiums Law enforcement system and continuing application of the Large Stores Law's "prior explanation" requirement are inconsistent with Japan's obligations under Article X:1.

7.128 **Japan** continues to maintain that the JFTC and MITI have published all laws, regulations and administrative rulings of general application in an appropriate form[1164] and Japan believes to be in full compliance with the requirement of Article X:1.

[1164]Japan notes that important enforcement actions are reported in leading legal periodicals, but claims that they fall outside the scope of Article X.

VIII. ARGUMENTS OF THIRD PARTIES

A. THE EUROPEAN COMMUNITIES

8.1 The European Communities (EC) attaches great economic and political importance to maintaining conditions of fair and transparent market access conditions around the world. The EC is a major player in the photographic film and paper business and EC-origin products constitute from 5 percent (film) to 8 percent (photographic paper) of the Japanese market and over 20 percent of the rest of the world film market. EC companies face difficulties of access to distribution channels for imported film and paper products in Japan, whereas Japanese companies do not face any of these problems when importing Japanese origin products into Europe. The EC alleges that some measures adopted by Japan could affect the balance in the competitive opportunities between imported film and paper products and domestic film and paper products and therefore be in breach of WTO rules and in particular of Article III:4 of GATT.

8.2 The EC emphasizes that this case raises important issues including the scope and applicability of several key WTO and GATT 1994 provisions. It requires the Panel to achieve "a proper balance between rights and obligations of Members" in accordance with Article 3.3 of the DSU. In the view of the EC, the following aspects should be carefully considered:

i. The notion of "treatment no less favourable than that accorded to domestic products", on the one hand, and the notion of "upsetting the competitive position" or of "restrictive business practices", on the other hand, cannot operate simultaneously.

ii. The first has been consistently interpreted by different panels in the past as concerning "competitive opportunities between imported products and domestic products". The second suggests the possible violation of internal rules concerning competition between undertakings or of general domestic policies as implemented by a WTO Member.

iii. Article III is not directed against any "impediment" or "narrowing of trade opportunities" which might affect imports of any kind but only against internal measures affecting the internal sale of imported goods "so as to afford protection to domestic production"[1165]. A Member's internal measure is relevant in the context of Article III only in so far as it accords treatment that is less favourable to imported than to domestic goods. In the EC's view, the Panel should be concerned with the protection of domestic production which infringes GATT and WTO rules, and not with any other general governmental measure which is aimed at limiting or regulating, at the same time and in the same way, the marketing of both domestic and imported products.[1166]

iv. Some aspects of this dispute such as the effects of anti-competitive behaviour and practices, confirm the need for an international framework of competition rules within the WTO system.

v. The dispute settlement procedures have been conceived and structured to provide "security and predictability to the multilateral trading system"[1167] and not to compare or harmonise different legal or economic systems applied by WTO Members. Therefore, it is

[1165]Article III:1 of GATT.

[1166]The EC relies on panel reports on *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, 65, para. 18 and on *United States - Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, 387, para. 5.13.

[1167]Article 3.2 of the DSU.

paramount for a consistent analysis by the Panel that a clear and direct relation between the products whose importation is hindered and the contested governmental measures be established before any finding of an infringement of GATT rules by a Member is made.

1. FACTUAL ASPECTS

8.3 The EC submits that access to the Japanese market for imported film and paper has proven to be difficult for European producers. European film and paper has not been accepted for distribution by the four leading Japanese wholesalers (*tokuyakuten*), which, due to the distribution structure of the Japanese film and paper market is a key element in market access. This has contributed to the difficulties, despite intensive efforts, for European film and photographic products to acquire a market share in Japan which corresponds to their actual overall world market share.

8.4 According to the EC, the impressive volume of information provided by the United States demonstrates that Japan, during the period from 1960 to 1975 and up to the present day, worked on strengthening the economic and financial ties between the Japanese photographic wholesalers and the Japanese producers of film and paper to the detriment of imported film and paper.

8.5 The EC can confirm that it is impossible to have adequate access to retailers in Japan if the main wholesalers (*tokuyakuten*) are out of reach. While access to small retailers and small shops is not completely barred by Japan's measures, the commercial position of the products not sold through the *tokuyakuten* is particularly weak, notably because of the lack of brand awareness of the Japanese public. In order to overcome this important commercial weakness, only strong media advertising and costly store promotions could help. However, these costs inevitably raise the already high distribution costs of overseas products, affecting therefore either the capability of attaining a reasonable profitability or to compete in price with the major competing film and paper products on that market, or both. These additional burdens do not affect domestically produced film and paper.

8.6 Against this background, the EC notes that since 1970 the Japanese Government implemented a series of actions to guide the distribution sector of Japan, and in particular the *tokuyakuten*, to strengthen the links between the domestic film and paper producers and the *tokuyakuten*. The result of this policy has been the exclusion of all imported film and paper products from the major wholesale distribution channels.

8.7 The EC notes that Japan objects to the existence of any relation between the 1970 Guidelines and the actual so-called "verticalisation" of the distribution system. According to Japan, the restructuring of the Japanese *tokuyakuten* and their reverting to the single-brand distribution mode was already on-going before that date. In Japan's view, therefore, there cannot be a causal link between the governmental action and the restructuring of the *tokuyakuten* that led to the exclusion from that distribution channel of the imported film and paper products because the effect was supposedly happening before the alleged cause.

8.8 The EC is not convinced by the Japanese rebuttal for two main reasons: *First*, for the EC it is apparent that there was, and to a certain extent there still is, an expressed worry on the side of the Japanese Government concerning the state of its internal distribution system, in particular in the film sector. Allegedly in order to streamline the internal distribution system, Japan established the Distribution Systemization Promotion Council (1970), which published its Basic Plan for the Systemization of Distribution (1971). The MITI Distribution Systemization Development Centre (1972), in executing the Basic Plan, issued the Manual for Systemization of Distribution by Industry - Camera and Film (1975). The MITI-sponsored creation of a "Natural Colour Photography Promotion Council" (1963) and the "Photosensitive Materials Committee of the Distribution Systemization Promotion Council" (1975) also responded directly to the need of representing joint government/private sector co-operation in order to formulate standardised transaction terms and narrow lines of distribution. The "Business

Reform Law" (1995) established a broad legal framework for MITI to continue its intervention to strengthen and protect domestic industry, including film and paper materials.

8.9 The EC further notes that MITI's "Guidelines for Standardisation of Transaction Terms for Photographic Film" of 1970 were substantially maintained in force in 1990. The implementation of those guidelines was monitored by the Japanese Government. Japan also provided funding through the Japan Development Bank (JDB) to domestic producers in order to support the implementation of MITI's industrial policy. The EC concludes that, against this background, it is not credible that the Japanese Government was intervening only at a time when the whole restructuring of the distribution system around the relation between the domestic producers (Fuji and Konica) and the four major *tokuyakuten* had already taken place.

8.10 *Second*, the EC argues that beyond the objective of restructuring the Japanese film and paper, and camera distribution chain towards an improved efficiency, a link was created between the four major wholesalers and the domestic film and paper producers, in particular Fuji. The result of that action, according to the EC, is clearly perceivable by the interconnection between Fuji and all four *tokuyakuten:*

> i. Fuji has a substantial equity participation in Misuzu and Kashimura (15 percent and 17.8 percent according to the latest figures). This is not a limited investment in an otherwise profitable business by a flourishing company but represents a very substantial participation in those companies. In both cases, Fuji is the largest outside owner;
>
> ii. Fuji is part of the Mitsui Keiretsu: this implies that a cross-shareholding is in place between the two major banks of Mitsui Group (Mitsui Trust and Sakura Bank) and Fuji. The banks are the largest Fuji shareholders and Fuji has its largest equity holding in the two Mitsui banks;
>
> iii. The two Mitsui financial institutions are the main banks and largest creditors of three of the four *tokuyakuten* (Misuzu and Kashimura plus Asanuma). Omiya, the fourth major distributor, is linked strongly to Fuji through both Sakura bank and Sumitomo bank, the other major shareholders of Fuji.

8.11 The EC contends that Fuji's links with the *tokuyakuten* amount to considerably more than an arms-length business relationship. The *tokuyakuten* are in a state of financial dependency from Fuji. In intervening legally, financially and by control through MITI, the Japanese Government must have been aware that the result of its action would be to upset the competitive opportunities in favour of the film and paper domestic production by preventing the imported film and paper products to have access to the most important distribution channel, the four main wholesalers.

8.12 According to the EC, it is standard practice all over the world, including in Europe, that photographic producers have one subsidiary per country representing their interests in selling their products to wholesalers, retailers, dealers or end users in dependence of the products and situation. The extraordinary situation in Japan, however, is the existence of four *tokuyakuten* distributing exclusively or close to exclusively the same products of only one company, the major domestic producer. A subsidiary of a European company in Japan is in the same situation as the Japanese producers themselves. It has to find means to enter into the market which includes the four *tokuyakuten* already serving the large majority of retailers, wholesalers etc. As long as the four major wholesalers refuse to purchase any film other than the one domestically produced by Fuji, the market access for imported film will continue to be impaired.

8.13 In the EC's view, within the framework of the potentially legitimate goal to support the restructuring of the Japanese internal distribution system while the liberalisation under the auspices

of the GATT and the WTO was under way, a less legitimate action was in fact implemented, allowing the creation of a complex structure around the main domestic film and paper producer that tied up completely the most important and profitable distribution channels in the country**,** which, in view of the particular distribution structure in the Japanese film and paper market, is essential. The EC concludes that the result of that action is the exclusion of imported film and paper from the best way to reach the Japanese customers and, more important, the consolidation of the domestic production which is now virtually impossible to overcome in terms of market share.

2. LEGAL ASPECTS

8.14 The EC focuses on the part that it considers to be at the heart of the present case, namely whether the Japanese Government has taken measures that afford less favourable treatment to imported products than to like domestic products in violation of Article III:4 of GATT 1994.

8.15 The EC notes that in past GATT practice the examination of violation cases has always preceded the non-violation cases. The latter are in fact used to remedy to nullification and impairment of benefits caused by the adoption of a GATT-legal measure as opposed to the violation cases where the issue is the nullification and impairment caused by a GATT-illegal measure.

8.16 Moreover, in view of the fact that film and paper are bulk products, there is no need to enter into an analysis whether or not domestic and imported film and paper are "like", since this would be the case under any of the generally accepted possible interpretations of the word "like" under Article III.

8.17 The EC has analyzed the situation in Japan concerning film and paper on the assumption that certain Japanese Government actions are measures having *de facto* a binding effect. The EC recalls the findings of the panel on *Japan - Trade in Semiconductors*:

> "All these factors led the Panel to conclude that an administrative structure had been created by the Government of Japan which operated to exert the maximum pressure on the private sector to cease exporting at prices below company-specific costs. This was exercised through such measures as repeated direct requests by MITI, combined with the statutory requirement for exporters to submit information on export prices, the systematic monitoring of company and product-specific costs and export prices and the institution of the supply and demand forecasts mechanism and its utilisation in a manner to directly influence the behaviour of private companies. These measures operated furthermore strong peer pressure to comply with requests by MITI and at the same time to foster a climate of uncertainty as to the circumstances under which the exports could take place. The Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. However, the Panel concluded that this amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements. The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other that the United States, inconsistent with Article XI.1".[1168]

8.18 The EC notes that Japan, based on an analysis of the different language used in Article XI and Article III, refutes the applicability of the *Semiconductors* precedent to this case. In particular,

[1168]Adopted on 4 May 1988, BISD 35S/116, 157-158, para. 117.

Japan draws on the fact that Article XI:1 refers to "other measures", while Article III:4 contains the words "laws, regulations and requirements". In Japan's view, the comparison of the two texts makes it clear that the language in Article XI:1 is broader than that contained in Article III:4 and therefore the same reasoning that is found in *Semiconductors* cannot be extended *per se* to the present procedure where the complaining party should demonstrate the existence of at least "requirements" and not only "other measures".

8.19 While the EC does not disagree with the basis of the Japanese legal analysis, it cannot agree with the conclusions drawn. According to the EC, the above quotation shows that *Semiconductors* was considering not only the formality but the reality of a very peculiar system, the Japanese interconnection between government and industry. This particular situation is characterised by a significant capability of the Government to directly influence the behaviour of private companies through the traditional peer structure of the society and the strong pressure that it can produce without the need of adopting legally binding instruments. For the EC, it is striking to note the perfect parallelism, *mutatis mutandis*, between the description of Government intervention in the *Semiconductors* case quoted above and the one that occurred in the present case. The EC concludes that the actions are very similar, the monitoring activities are similar, the governmental means used are even identical (i.e., MITI structure), and the results are strikingly close.

8.20 For the EC, it is not surprising that the *Semiconductors* panel report when referring to the Japanese Government's practices instead of using the definition of "measures" reverted more specifically to the notion of "requirements". The EC is of the view that in this specific case, the reality shows that the Japanese Government's action amount to a "requirement" as defined under Article III:4 of GATT.

8.21 The EC further notes that Japan also contests the existence of these measures at present. The EC agrees that a violation claim can only be based on measures that are operating, *de facto* or *de jure*, at the time of the establishment of the Panel or are entering into effect shortly afterwards. In that regard, the EC recalls that the 1970 Guidelines for the restructuring of the distribution system have allegedly been replaced by the 1990 Guidelines and the other governmental interventions have apparently never been officially repealed. However, the EC considers that the 1990 Guidelines and their application have not had the effect to eliminate the measures concerned by this case. On the contrary, the impression is given that those measures have been confirmed and are still in place.

8.22 The EC suggests to read the terms "no less favourable treatment" in Article III as referring to the competitive opportunities but not to the actual economic impact of the measure. This implies in turn that Article III is applicable whether imports from other contracting parties were substantial, small or non-existent.[1169]

8.23 The EC also emphasizes that Article III:4 should not be read as affecting the distinction between trade policies and general domestic policies (e.g., competition policy, labour policy, environmental policy, monetary policy, immigration policy, consumers' protection policy, etc.), given that the former are subject to WTO rules and scrutiny while the latter are not. Nevertheless, WTO rules should be deemed to cover Member's trade laws and regulations (even when they are taken in the form of general internal measures) in cases like the present one where evidence has been provided showing that the Japanese internal policies concerning film and paper products were in fact designed to afford protection to domestic products on top and independently from their facial objective of pursuing general internal policies under their jurisdiction and thereby violate Article III:1, read in conjunction with Article III:4.

[1169]Panel Report on *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345.

8.24 The EC refers to the Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*[1170], which addresses this issue by affirming that the "issue is how the measure in question is applied" in order to determine the existence of "protective taxation" "in the light of the particular circumstances of each case". In the EC's view, the Panel should examine whether:

i. In the particular circumstances of this case there is a less favourable treatment of imported products when compared to domestic products;

ii. there is a governmental requirement (measure) creating such less favourable treatment;

iii. the measure is applied in such a way as to create distortions in the conditions of competition between domestic and imported like products;

iv. there is a direct causal link between the application of that measure to those specific products under those specific circumstances and the distortion in the conditions of competition between domestic and imported products. By contrast, a simple side-effect resulting from the implementation of a general measure pursuing a general internal policy, and which affects the conditions of competition, should not be considered to infringe Article III:4 unless a clear evidence is provided that this general policy measure was designed to afford protection to domestic products.

8.25 The EC, therefore, argues that, based on the relevant facts, it appears that the "objective intent" of Japan's action was to afford protection to domestic film and paper through the creation of a complex structure that is the result of the systemization aimed at preventing imported film and paper from benefitting from the major and most profitable distribution channels in the country. The Japanese Government could not ignore that by acting in that particular way it would objectively create a system which apparently is still in place due to the persistent pressure exerted by the Government through MITI.

8.26 However, the EC does not agree to any interpretation of the "protectionist intent" purely on the basis of an assessment of the political views expressed in a particular country to achieve a political result ("subjective intent"). Apart from the almost impossible task of determining the real intentions of the legislator in countries where the legislative power is constitutionally not submitted to any obligation of explicit motivation, a legislative measure can be implemented for many years and be applied in a manner which has only a remote link with the initial intent of the legislator.

8.27 The EC concludes that the evidence before the Panel demonstrates that a number of Japanese Government measures were adopted with the objective intent to afford protection to domestically produced film and paper and, therefore, that a violation of Article III:4 has been committed. The EC believes that a *prima facie* case has been objectively demonstrated by the United States and, therefore, that under the current Panel practice in the WTO, the burden of proof to show the contrary has shifted to Japan. The EC is not convinced by arguments put forward by Japan that the alleged violation does not exist. A violation of a WTO provision amounts *per se* to a presumption of a nullification and impairment of rights and benefits accruing under those agreements[1171]. Therefore, the EC sees no reason to enter into any development of the non-violation claims case raised by the United States.

[1170]Adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R.
[1171]Article 8 of the DSU.

3. ARGUMENTS IN REPLY BY JAPAN

8.28 In response to the EC third party submission, Japan contests that the alleged connection between Fuji and its primary wholesalers amounts to "considerably more than an arms-length business relationship" and that this amounts to an Article III violation. Japan argues that even if one were to assume that the primary wholesalers were subsidiaries of Fuji, the fact remains that imported film is not prohibited from using the same type and the same level of distribution channels. All other film manufacturers - both foreign and domestic - sell through their own single-brand primary wholesalers.

8.29 Japan claims that of all the major film manufacturers selling in the Japanese market, the link between Fuji and its primary wholesalers is the weakest. Kodak and Konica each sell through their wholly-owned subsidiaries. Fuji's primary wholesalers are independent companies and are not even under contractual obligation to deal exclusively with Fuji.[1172] In Japan, foreign manufacturers are at least free to make an offer to Fuji's primary wholesalers, or even to acquire one or more of the wholesalers. However, for Japan it is inconceivable that in the United States any Japanese manufacturer could utilize Kodak's internal sales staff that handle the direct-to-retailer sales, the functional counterpart to the primary wholesalers that sell to retail customers. Japan also points out that a major part of Kodak's "distribution channel" is based on exclusive relationships between Kodak and retailers.[1173]

8.30 According to Japan, the EC acknowledges that single-brand distribution is the "standard practice all over the world, including in Europe". Nevertheless, the EC notes that in most countries manufacturers sell through a single subsidiary but that in Japan Fuji sells through four primary wholesalers. While Japan accepts this distinction is factually true, it considers it as logically irrelevant because selling through four wholesalers simply preserves the benefits of intra-brand competition.[1174] Japan argues that other manufacturers made a business decision to merge the wholesalers they acquired into single entities, whereas Fuji made a different business decision.

8.31 In Japan's view, the EC appears to argue that four independent primary wholesalers should not be allowed to maintain single-brand relationships with Fuji, and that the government measures are somehow responsible for this. Japan points out, however, that the EC provides no evidence of any government measures that either created the relationship between Fuji and its primary wholesalers or which prevent other manufacturers from developing a relationship with one or more of those primary wholesalers.

8.32 According to Japan, the EC overlooks a public statement made by Agfa emphasizing the difficulty it faces in both the United States and Japanese markets, due to its position as a new entrant facing well-established rivals: "It cannot be disputed that the photomarkets in the United States, as well as Japan, are dominated by their respective domestic companies. This means considerable barriers for outsiders such as ourselves". Japan underscores that there is nothing unusual about the Japanese market and that new entrants always face obstacles becoming established in a market.[1175]

[1172]Japan indicates that some of Fuji's primary wholesalers handle Kodak's products other than film.

[1173]Japan notes that Kodak also uses a variety of techniques, including cash payments, to ensure retail exclusivity.

[1174]Japan emphasizes that intra-brand competition may actually reduce Fujifilm's effectiveness as an interbrand competitor. As a result, Fujifilm's use of multiple wholesalers could actually benefit competing manufacturers like Kodak. W. Kip Viscusi, John M. Vernon, Joseph E. Harrington, Jr., Economics of Regulation and Antitrust, 1992, p. 237, noting that reduced *intra-brand* competition could make a manufacturer a more effective *interbrand* competitor, Japan Ex. F-8; see generally, E. Thomas Sullivan, Jeffrey L. Harrison, Understanding Antitrust and its Economic Implications, 1988, pp. 147-177, Japan Ex. F-9, discussing the free rider problems caused by intra-brand competition.

[1175]A public statement made by Agfa, Film Dispute Before the WTO, October 17, 1996, Japan Ex. F-10.

B. MEXICO

8.33 Mexico states that this particular case deals with the relationship between the measures introduced by the Japanese Government and access to its market for imports of photographic paper and film.

8.34 According to Mexico, three types of measures which the Japanese Government has implemented since the 1960's have affected access of imports to Japan:

(a) measures that impede the distribution of imported photographic film and paper;

(b) measures that limit the establishment of large retail stores, which constitute an alternative system for the distribution of such imports;

(c) measures involving the imposition of restrictions on sales-price and advertising campaigns for such products.

8.35 With regard to the *distribution* of imported photographic paper and film, the Japanese Government adopted a number of measures through MITI's fostering the integration of manufacturers and distributors at the end of the 1960's and beginning of the 1970's. Japan promoted the adoption of common transaction terms between all manufacturers and distributors, which encourage their integration. These terms relate to discounts, rebates and payment terms applicable to distributors, for imported goods as well.

8.36 At the same time steps were taken to promote the use by manufacturers and distributors of shared infrastructure, e.g. warehouses and distribution routes, thereby strengthening their ties. This was achieved, inter alia, through subsidized financing of photographic laboratories, from which those laboratories in which there was foreign participation were excluded.

8.37 Moreover, efforts were made to strengthen information links between domestic manufacturers and distributors through government agencies. This integration has affected the access of imports of such goods to the Japanese market.

8.38 With respect to *large retail stores*, Mexico notes that a law was enacted in 1973 permitting MITI to limit the establishment, operation and expansion of such stores in order to protect small business. Notwithstanding its general character, this law has affected access of imports by restricting an alternative channel for the distribution of photographic paper and film.

8.39 Finally, as regards measures relating to *promotions*, Mexico notes that, on the basis of the Anti-Monopoly Law of 1947 and the Premiums Law of 1962, the Japanese authorities, starting at the end of 1960's, imposed limitations on discounts and advertising by large- and small-scale distributors of photographic paper and film. These limitations affected the access of imported goods.

8.40 Mexico emphasizes that tariff reduction, national treatment and non-discrimination are fundamental to the achievement of the WTO's objectives. Accordingly, the continued consistency of any measures adopted by WTO Members has to be ensured, in particular with:

(a) Article III which stipulates that products imported from a Member country shall be accorded treatment no less favourable than that accorded to domestic products;

(b) Article XXIII which establishes the legal safety that must be a feature of any advantage enjoyed by a Member as a direct or indirect result of GATT 1994;

(c) Article X which provides that all provisions of general application shall be brought to the knowledge of both governments and traders.

8.41 Finally, Mexico requests the Panel to:

(i) conduct its examination in keeping with the terms of reference established by the DSB;

(ii) base its findings and recommendations on such relevant provisions of the covered Agreement as have been invoked by the parties to the dispute;

(iii) avoid the creation of new disciplines through interpretations that could go further than what was agreed by the Members of the WTO; and

(iv) ensure full implementation of the concessions under the terms and conditions in which they were agreed and in conformity with the relevant provisions of the WTO.

IX. INTERIM REVIEW

9.1 On 19 December 1997, the United States and Japan requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report that had been issued to the parties on 5 December 1997. Neither the United States nor Japan requested that a further meeting of the Panel with the parties be held. In a letter dated 12 January 1998, the United States submitted a response to certain of Japan's comments on the interim report. In a letter dated 21 January 1998, Japan responded to some of the US comments on its comments.

9.2 Following comments by Japan on the descriptive part, we modified paras. 2.5, 2.9, 2.14, 2.226, 5.412, 6.309, 6.334, 6.441 and 6.466.

9.3 The United States expresses its strong disagreement with the Panel's legal findings and conclusions. The United States reiterates that the Japanese Government undermined the benefits the United States legitimately expected would flow from a series of tariff concessions it bargained for in good faith over a period of more than 30 years. Japan is further charged with having frustrated the intent of the GATT negotiation process by enacting a series of measures that allegedly have created an interlocking web of protection that has been difficult to detect and understand even after three years of intensive investigation and research. In light of the comprehensive nature of its objections, the United States deems it impossible to comment on a paragraph-by-paragraph basis and rather elaborates on some of the major deficiencies that, in its view, pervade the interim report.

9.4 First, the United States criticizes that the Panel failed to acknowledge the combined operation and effects of the liberalization countermeasures which, in the US view, directly affected the findings on Article XXIII:1(b) and Article III. The United States alleges that as a result of the combination of measures, rather than of any single measure, Japan created a market structure and maintained it until today that keeps foreign photographic materials out of the Japanese market. In our view, this criticism is unfounded, as we considered the evidence and arguments of the parties on combined effects of the measures in paras. 10.350-10.367 of the findings.

9.5 Second, the United States argues that the interim report construes the "detailed justification" requirement as imposing a heightened evidentiary standard in non-violation cases, while for the United States it is rather a pleading requirement, i.e., a screen to dismiss inadequately articulated non-violation claims from a panel's consideration. The United States emphasizes that the fact that Article XXIII:1(b) provides for an exceptional remedy does not justify requiring a quantum of proof that is higher than the one applied under other GATT articles. We recall that in para. 10.84 we stated that "at this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a *de minimis* contribution to nullification or impairment." In our view, we did not apply the "detailed justification" requirement as a heightened evidentiary standard. In response to the US comments we modified, *inter alia*, the language of paras. 10.50, 10.60, 10.61, 10.80, 10.111, 10.126, 10.140, 10.153, 10.166, 10.184, 10.198, 10.219, 10.232, 10.258, 10.271, 10.286, 10.303, 10.308, 10.309, 10.317, 10.319, 10.331, 10.338, 10.346, 10.357 and 10.363 in order to make this clearer.

9.6 Third, in the US view, many of the Panel's factual findings ignore evidence that the United States deems substantial. In particular, the United States denies that Japan's interference in the distribution system was for the purpose of modernization. The United States claims to have provided the Panel with a substantial quantity of evidence concerning protectionist intent, the effects of the unique circumstances of the government-industry concerted adjustment system, and the peculiarities of the Japanese distribution system in the film sector. We reject the US characterization of our findings on this issue as ignoring substantial evidence.

9.7 Fourth, the United States submits that, while it was aware of the Large Stores Law, Premiums Law and Antimonopoly Law at the time of the Tokyo and Uruguay Rounds, it could not and did not know the extent to which Japan's closed distribution system for photographic materials was the result of the combined effect of the distribution measures, or that the distribution countermeasures, the Large Stores Law, and the promotion countermeasures worked together to impede market access, and to prevent price and other types of competition in the market. The United States emphasizes that notice of the existence of these laws and their essential provisions was not tantamount to notice of the actual operation of the measures. While we explicitly accepted that a Member might not appreciate the effect of the application of a measure at the time of its publication, in our view, the United States in general failed to demonstrate that it should not be charged with such knowledge in this case.

9.8 Fifth, the United States argues that the Panel's ruling that a complaining party is charged with knowledge of the responding government's measures as of the date of their publication suggests a rule of *caveat emptor* which would operate as a deterrent to concluding tariff negotiations in the future. In the US view, this would imply for countries' negotiators the need to undertake a sector-by-sector investigation of great magnitude before accepting any concession, lest they be charged with "anticipation" of non-transparent administrative measures that could potentially impair the benefits of that concession. The United States believes that no country is capable of such a massive effort in the course of comprehensive multilateral negotiations because countries would face serious difficulties detecting the many measures that may nullify or impair tariff concessions for the hundreds of products under consideration. We reject the US characterization of the test we developed in this area. It is accurate that we operated on the presumption that in general a Member's knowledge of a measure shall be assumed as of the date of its publication. Additionally, however, we also explicitly accepted that this presumption could be overcome if a Member demonstrates that for specific reasons it could not have reasonably anticipated a measure. In contrast, the latitude to show otherwise in the approach suggested by the United States could, in our view, lead to conclusions that might undermine the security and predictability of the multilateral trading system.

9.9 Finally, the United States agrees with the Panel that a measure need not provide for benefits or impose legally binding obligations or the substantive equivalent for purposes of non-violation complaints, and that the "incentives/disincentives test" developed by the panel on *Japan - Semiconductors* is not the exclusive test or outer limit of what may constitute a measure under Article XXIII:1(b). The United States further requests the Panel to make clear that the binding nature of a measure is a relevant - albeit not dispositive - factor in an analysis of whether something is a measure. We agree with the United States that the test is not exclusive and where appropriate we have clarified our position in the general part of the findings and in our examination of specific "measures" at issue.

9.10 Japan emphasizes that its comments were in general designed to further improve the factual findings and the legal reasoning in support of the conclusions reached by the Panel in its interim report.

9.11 Most of Japan's specific comments concern the Panel's discussion of which items complained against are to be considered to be measures within the meaning of Article XXIII:1(b). In particular, Japan requests the Panel to explain what tests other than the "incentive/disincentive test" suggested by the panel on *Japan - Semiconductors* are relevant in this respect. In Japan's view, there is no substantial difference between the tests developed by the panel on *Japan - Semiconductors* and the panel on *Japan - Agricultural Products* because the former is the mere elaboration of the latter. Japan further proposes clarification that the Panel's test(s) focus on the alleged measures themselves and how these measures operate, not on the alleged consequences of the measures, i.e., actions taken by private parties or trade flows. Specifically, in Japan's view, the *Japan - Semiconductors* case did not deal with private actions that were deemed to be governmental, but with measures which were actually taken by the Japanese Government. We adjusted paras. 10.49 and 10.50 to make our reading of the panel reports on *Japan - Semiconductors* and *Japan - Agricultural Products* on the issue of what constitutes a governmental measure clearer.

9.12 Japan deems it inappropriate to characterize the government-business relationship in Japan as one of a high degree of cooperation and collaboration. In particular, it objects to the Panel using such a "simplification" in the context of a generally applicable test to determine what constitutes a measure. Rather, Japan proposes that the Panel discuss such specific circumstances only when the general test is applied to individual cases. We modified the reasoning in para. 10.49 without changing our basic approach of discussing the government-business relationship in both the general part of the findings as well as in the context of our examination of the specific "measures" in dispute.

9.13 Furthermore, Japan proposes clarification that it is "continuing administrative guidance" issued to perpetuate the underlying policies which is actionable as a measure, not a revoked government action *per se* which ceases to exist and thus cannot be in effect. We clarified para. 10.59 accordingly.

9.14 In principle, Japan favours the Panel's approach of making affirmative assumptions with respect to some elements and then proceeding to consider other elements in order to complete the examination of all the other elements that arise in the context of a non-violation claim. However, in Japan's view, this approach does not require the Panel to make any findings on those elements which involve insufficient or conflicting evidence. In such cases, Japan argues, the doubt should go against the party that bears the burden of proof. Consequently, the Panel is called on to limit itself to stating its assumption without making a finding on whether an item constitutes a measure within the ambit of Article XXIII:1(b). In response, we modified para. 10.60 to read "we will take an expansive view of what constitutes a measure …". However, where we considered the evidence to be sufficient, we have made findings as to which of the specific measures in dispute constitute measures within the meaning of Article XXIII:1(b), rather than limiting ourselves to stating assumptions as suggested by Japan.

9.15 Moreover, Japan requests the Panel to modify its finding that reasonable expectations may in principle continue to exist in respect of tariff concessions in successive rounds of Article XXVIIIbis negotiations. Japan reiterates its position that only benefits accruing from the Uruguay Round tariff concessions are relevant in this case because the latest tariff negotiation should be deemed to have created a new expectation concerning the balance of tariff concessions, and to have replaced any reasonable expectation that arose under a prior tariff negotiation. In Japan's view, the panel on *EEC - Oilseeds* focused on the issue of whether or not a new balance of concessions (i.e. a global reassessment of the value of all the EEC's concessions) was created, and not on the issue of the procedures and formalities under which the tariff negotiation was carried out. We added language to para. 10.68, reflecting the *EEC - Oilseeds* panel's finding that "the balance of concessions negotiated in 1962 … was not altered" in that case. However, this argument is not determinative for our finding in para. 10.70. Thus, we continue to consider that reasonable expectations may co-exist in respect of tariff concessions in successive rounds of Article XXVIIIbis negotiations.

9.16 Further Japanese comments refer to the issue of the causation of nullification or impairment of benefits accruing from tariff concessions by a measure within the meaning of Article XXIII:1(b). Japan points out that it does not advocate and has not advocated a "but for" standard of causation. Rather, in Japan's view, a clear linkage between the measure at issue and the alleged nullification or impairment must be proven with a "detailed justification" in order to establish the necessary causal connection. In response to Japan's comment, we adjusted para. 10.84. Finally, Japan advocates a higher standard of causation than the Panel's standard of a "more than a *de minimis* contribution" which, in Japan's view, understates the requisite degree of causal connection under Article XXIII:1(b). We disagree with Japan's position and, accordingly, have not altered the text on this point.

9.17 As regards the distribution measures at issue, Japan urges the Panel to make clear that both the characterization of the 1967 Cabinet Decision, the Sixth and Seventh Interim Reports and the 1969 Survey as measures within the meaning of Article XXIII:1(b), and its statement that the alleged measures are still in effect, are assumptions, not findings. We carefully reviewed our reasoning and

have made appropriate modifications to make clearer where we made findings and where we proceeded on assumptions.

9.18 Japan emphasizes that the 1967 Cabinet Decision was published in Kampo (i.e. the Japanese Government's Official Gazette) on 21 June 1967, prior to the conclusion of the Kennedy Round on 30 June 1967. Accordingly, in Japan's view, the United States should have reasonably anticipated the 1967 Cabinet Decision prior to the Kennedy Round. The United States responds that it did not have the opportunity or foresight to re-open the negotiations on individual products nine days prior to the conclusion of the Kennedy Round on the basis of the publication of this measure in Japanese. Accordingly, the United States requests the Panel to maintain its finding that the United States could not have reasonably anticipated the 1967 Cabinet Decision because of the proximity in time of that measure's publication to the conclusion of the round of multilateral tariff negotiations. In view of the parties' comments and in applying the test developed in paras. 10.79-10.81, we modified paras. 10.103, 10.106, 10.247 and 10.251.

9.19 Japan disagrees with the Panel's findings concerning the governmental attributability of the 1970 Guidelines and the 1971 Basic Plan. In the alternative, Japan contends that non-binding suggestions could have a *similar* effect at best - but not the *same* effect - as legally binding measures. We maintain our findings that the two above-mentioned items are to be considered measures within the meaning of Article XXIII:1(b). However, we accepted Japan's alternative proposal and clarified that non-binding suggestions could have a *similar* effect to legally binding measures. Consequently, we modified paras. 10.49, 10.161 and 10.180.

9.20 Further, Japan makes detailed proposals on how to make the Panel's reasoning with regard to the alleged "continuing effect" of certain "measures" (i.e., the 1967 Cabinet Decision, the Sixth and Seventh Interim Reports, the 1969 Survey, the 1970 Guidelines, the 1971 Basic Plan and the 1975 Manual) more uniform. We largely accepted these suggestions and harmonized the language of paras. 10.123, 10.137, 10.150, 10.163, 10.181 and 10.195.

9.21 As to the impact of the Large Stores Law on the competitive relationship between domestic and imported products, it is Japan's position that benefits of tariff concessions accruing under Article II consist of the legitimate expectation that market access opportunities, or improved competitive conditions, for imports created by the tariff concessions will not be frustrated as a result of any government measure. In Japan's view, however, the benefits under Article II do not include expectations concerning market evolution, because changes in the marketplace situation can result from various factors such as market forces and private practices, regardless of the existence of alleged governmental measures. We modified para. 10.232 in order to clarify our reasoning on this point.

9.22 With respect to the establishment of the Fair Trade *Promotion* Council in 1982, Japan continues to deny that the Promotion Council constitutes a fair trade council established under a fair competition code with the approval of the JFTC pursuant to Article 10 of the Premiums Law. According to Japan, the Fair Trade *Promotion* Council was established by private businesses having no connection with Japanese governmental entities. We emphasize that our finding was not based on whether the creation of the Promotion Council was approved by the JFTC, but on our assessment that in certain cases the relationship between the Promotion Council and the JFTC was sufficiently close for a finding that actions of the Promotion Council are to be deemed attributable to the Japanese Government.

9.23 In regard of the 1982 Self-Regulating Measures on Fairness in Trade and the 1984 Self-Regulating Standards, Japan reiterates its argument that these "measures" have not been approved by the JFTC as fair competition codes. In Japan's view, especially the "measures" relating to dispatched employees lie outside the scope of regulations on premiums and misleading representations. Japan further argues that the interaction between the JFTC and the industry during the formation of the 1982 Self-Regulating Measures was not intensive. Consequently, Japan contends that these "measures" are too tangentially

connected to the JFTC to attribute them to the Japanese Government within the meaning of Article XXIII:1(b). Moreover, even assuming that a sufficient connection to the Japanese Government is proven, Japan points out that the 1982 Self-Regulating Measures are not viewed by private parties as legally binding. To the extent that private parties are not free to demand the dispatch of employees from suppliers, Japan submits that this is a direct result of the application of the Antimonopoly Law itself, and not because the 1982 Self-Regulating Measures could be assimilated to a government measure. In respect of the 1984 Self-Regulating Standards, the JFTC merely responded to the Fair Trade Promotion Council's inquiry as to the lawfulness of these Standards under the Antimonopoly and Premiums Laws. Thus, in Japan's view, the 1984 Self-Regulating Standards are not attributable to the Japanese Government because the JFTC's relation to these Standards is too remote. We carefully reviewed our findings on this issue in light of the arguments raised, but were not persuaded of a need to modify them in line with Japan's position.

9.24 Japan generally objects to the Panel's conclusion that fair competition codes and individual activities of fair trade councils constitute governmental measures within the ambit of Article XXIII:1(b). In particular, Japan points out that the approval of a fair competition code by the JFTC does not imply any delegation of quasi-governmental authority to a private body such as a fair trade council. Moreover, according to Japan, JFTC approval does not grant immunity from the substantive provisions of the Antimonopoly Law, and, if individual actions fall outside the code, they are fully actionable under that Law. Japan also reiterates its argument that a fair trade council does not have any authority over non-members who are not obligated to join the council. In Japan's view, a government should not be held responsible for any action of private associations merely because it gives approval in certain aspects. Having reviewed our analysis of this issue, we see no reason to modify our reasoning on these points.

9.25 In addition, Japan requests the Panel to make an explicit finding that the 1987 Retailers Fair Competition Code only covers cameras and related products but does not apply to photographic film and paper. Japan notes that - regardless of whether or not a fair competition code is to be assimilated to a government measure - the JFTC has the authority to interpret the scope of approval under the Premiums Law and has never allowed and has no intention to allow the application of the Retailers Code to film or paper. Moreover, Japan submits that an industry member's statement quoted in Zenren Tsuho ("… I will endeavour to make both photosensitive materials and development and printing fall under the code") proves that the Retailers Code did not apply to photographic film or paper. However, we considered that the evidence before us was not conclusive and decided to merely assume that the Retailers Code might also apply to photographic film and paper.

9.26 In our examination of the claims raised under Article III, we reasoned that the terms *laws, regulations and requirements* in that article should be interpreted as encompassing a similarly broad range of government action, and action by private parties that may be assimilated to government action, as those actions covered by the term *measure* in Article XXIII:1(b). In Japan's view, the term *requirement* must mean something different from *measure*, the former being probably narrower than the latter. The Panel is requested to explain the difference between these two terms in more detail, especially with respect to the 1967 Cabinet Decision, the 1971 Basic Plan and the 1970 Guidelines, and to limit itself to merely assuming that these items are *requirements* in the meaning of Article III. In response to Japan's comment, we modified paras. 10.376 and 10.377.

9.27 Finally, Japan suggests that the discussion of whether the "measures" in dispute accord less favourable treatment to imported products in contravention of Article III be elaborated. In Japan's view, this could be done by repeating, or referring to, the Panel's examination of whether vertical integration and single-brand distribution in general, and the 1970 Guidelines and the 1971 Basic Plan in particular, have caused an upsetting of the competitive relationship between domestic and foreign products in the meaning of Article XXIII:1(b). In line with Japan's comment, we decided to expand our reasoning in para. 10.381, in particular with respect to the two specific measures mentioned above.

9.28 In response to other comments by Japan, we corrected factual inadequacies, especially in paras. 10.103, 10.104, 10.106, 10.128, 10.146, 10.160, 10.207, 10.208, 10.211, 10.247, 10.249 and 10.296. In addition, where we found merit in specific suggestions made by Japan, we adjusted paras. 10.87, 10.148, 10.194, 10.205. 10.298, 10.299, 10.302, 10.316, 10.345, 10.353.

X. FINDINGS

A. PRELIMINARY ISSUES

10.1 As a preliminary matter, Japan requests the Panel to exclude from consideration eight[1176] separate "measures"[1177] which Japan believes are outside the terms of reference of the Panel as not having been identified specifically in the US request for the Panel's establishment. The eight "measures" are the following:

(1) 1968 Sixth Interim Report of Industrial Structure Council, "Distribution Modernization Outlook and Issues";
(2) 1976 JDB financing to Konica for joint distribution facilities;
(3) 1967/1977 SMEA financing to photofinishing laboratories (to enable them to buy new equipment for colour photofinishing);
(4) 1971 JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (International Contract Notification Requirement);
(5) 1967 JFTC Notification No. 17 on premiums to businesses;
(6) 1967 JFTC Notification No. 34 on open lotteries;
(7) 1977 JFTC Notification No. 5 on premiums to customers; and
(8) 1983 JFTC guidance on the establishment of rules on loss-leader advertising and dumping.

10.2 Japan claims that these "measures" were mentioned for the first time by the United States in its initial submission to the Panel and were neither raised by the United States during consultations under Article 4.4 of the DSU nor identified specifically in the US request for the establishment of the panel under Article 6.2 of the DSU. We note in this regard that although Japan makes arguments about the alleged US failure to consult on the eight "measures" that Japan wishes to exclude from consideration in this proceeding, the ruling requested by Japan relates solely to the alleged US failure to identify specifically these same eight "measures" in the US request for the establishment of this Panel. Accordingly, we shall forego examination of the conformity of US actions with the consultation requirements of Article 4.4 of the DSU, concentrating instead on Japan's claim pursuant to Article 6.2 of the DSU.

10.3 The United States counters that it fulfilled the requirements of Article 6.2 and that these "measures" are therefore within the Panel's terms of reference. Specifically, the United States argues that: (1) Japan was on adequate notice of the "measures" implicated in the US request for the establishment of the panel; (2) Japan has not complained that any of the "measures" are not related to "measures" that were discussed in the consultations and identified in the panel request; and (3) the means selected by it to describe these "measures" are necessitated by the nature of the "measures" themselves. Japan contests each of these US arguments.

[1176]In its request for a preliminary ruling, Japan objected to nine of the "measures" discussed in the first US written submission to the Panel. After the US response to a panel question, in which the United States specified the measures subject to its claims, Japan objected to one additional measure, but dropped its objections in respect of two measures not specified in the US response.

[1177]In our findings, one of the central issues is whether or not certain governmental actions or policies cited by the United States are measures within the meaning of GATT Article XXIII:1(b). Where dealing with the parties' allegations and arguments, we put the term "measure" within quotation marks. Only where we refer to the term more generally or where we have decided or assumed that such governmental actions or policies are measures within the meaning of Article XXIII:1(b) do we use the term without quotation marks.

1. SPECIFICITY OF THE "MEASURES" IDENTIFIED IN THE PANEL REQUEST

(a) Article 6.2 and the request for establishment of the Panel

10.4 The starting point for our analysis is Article 6.2 of the DSU, which provides in relevant part as follows:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. … " (emphasis added).

10.5 The relevant part of the US request for the establishment of this Panel reads as follows:

> "The Government of Japan has implemented and maintains laws, regulations, requirements and measures (collectively "measures") affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper, including: liberalization countermeasures; distribution measures, such as, but not limited to, the cabinet decision, administrative guidance, and other measures listed in Attachment A; the Law Pertaining to the Adjustment of Business Activities of the Retail Industry for Large Scale Retail Stores, No. 109 of 1973 (*Daiten Ho);* Special Measures for the Adjustment of Retail Business; No. 155 of 1959 (*Shocho Ho*); the Law Against Unjustifiable Premiums and Misleading Representations, No. 134 of 1962; measures regarding dispatched employees pursuant to the Law Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade, No. 54 of 1947; the Law Concerning Enterprise Reform for Specified Industries, No. 61 of 1995; the Ministry of International Trade and Industry Establishment Law, No. 275 of 1952; and related measures.
>
> The United States considers that such measures nullify or impair benefits accruing to it, within the meaning of Articles XXIII:1(a), as a result of the failure of the Government of Japan to carry out its obligations under Article III and X of the General Agreement on Tariffs and Trade 1994 (GATT). More specifically, the Japanese Government measures:
>
> - were implemented and maintained so as to afford protection to domestic production of consumer photographic film and paper within the meaning of GATT Article III:1;
>
> - conflict with GATT Article III:4 by affecting the conditions of competition for the distribution, offering for sale, and internal sale of consumer photographic film and paper in a manner that accords less favourable treatment to imported film and paper than to comparable products of national origin; and
>
> - conflict with GATT Articles X:1 and X:3 because the measures lack transparency in that they were not promptly published and were not administered in a uniform, impartial and reasonable manner.
>
> In addition, the application of these measures by the Government of Japan nullifies or impairs, within the meaning of GATT Article XXIII:1(b), the tariff concessions that the Government of Japan made on black and white and colour consumer photographic film and paper in the Kennedy Round, Tokyo Round, and Uruguay Round multilateral tariff negotiations.

[Description of consultations omitted]

Accordingly, pursuant to Articles 4 and 6 of the DSU, the United States respectfully requests the establishment of a panel with standard terms of reference as set out in Article 7 of the DSU.

[Request for special meeting of DSB omitted]

ATTACHMENT A

- MITI, "Administrative Guidance to Promote Rationalization of Distribution System", 1966
- Cabinet Decision, "Liberalization of Foreign Investment", 6 June 1967.
- MITI Industrial Structure Council Distribution Subcommittee, "Distribution Systemization", 1969. (*Tsusansho Koho,* 13 and 14 August 1969).
- MITI Preparatory Survey, "The Actual State of Trade Practices in Photo Film", 1969.
- MITI, "Film Trade Normalization Guidelines", 1970.
- MITI, "Business Bureau Report on Film Prices", 1970.
- MITI, "Basic Plan for Distribution Systemization", 1971.
- MITI, "Manual for Systemization of Distribution", 1975.
- MITI, "Guidelines for Improving Business Practices", 1990.
- MITI and the Small and Medium Enterprises Agency, "Distribution Vision for the 21st Century", 1995 (and earlier versions for the 1970s, 1980s, and 1990s).
- Photo Industry Distribution Information Systemization Council [Kyogikai], "Comprehensive Manual for Photo Distribution Industry Distribution Information Systemization", 1996 (and 1989, 1990, 1991, and 1992 versions).
- Other related measures, including guidelines."[1178]

(b) Analysis of Article 6.2

10.6 We shall proceed with our analysis of the Japanese procedural objection in light of the interpretative rules of the Vienna Convention[1179] and Article XVI of the WTO Agreement.[1180] In this connection, we examine, as appropriate, (i) the ordinary meaning of the terms of Article 6.2; (ii) the context and the object and purpose of Article 6.2; and (iii) past practice under Article 6.2 and its predecessor provision.[1181]

[1178]WT/DS44/2.

[1179]The Appellate Body made clear in its first two decisions that under Article 3.2 of the DSU the starting point for the interpretation of WTO provisions is the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention provides in relevant part as follows: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". See Appellate Body Report on *Japan - Taxes on Alcoholic Beverages* ("*Japan - Alcoholic Beverages*"), adopted on 1 November 1996, WT/DS8, 10 and 11/AB/R, pp. 10-12; Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline* ("*US - Gasoline*"), adopted on 20 May 1996, WT/DS2/AB/R, pp. 16-17.

[1180]Article XVI provides: "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

[1181]In the case of adopted panel reports, the Appellate Body has stated: "Adopted panel reports are important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among WTO Members, and, therefore should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute". *Japan - Alcoholic Beverages*, WT/DS8/AB/R, p. 14.

10.7 The portion of Article 6.2 relevant to the Japanese objection provides that "[t]he request for the establishment of a panel shall … identify the specific measures at issue …". Both parties agree, and our reading of the US panel request confirms, that this panel request does not explicitly identify the eight "measures" which are the subject of Japan's objection.

10.8 The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that "the specific measures at issue" be identified in the panel request, can be met if a "measure" is not explicitly described in the request. To fall within the terms of Article 6.2, it seems clear that a "measure" not explicitly described in a panel request must have a clear relationship to a "measure" that is specifically described therein, so that it can be said to be "included" in the specified "measure". In our view, the requirements of Article 6.2 would be met in the case of a "measure" that is subsidiary or so closely related to a "measure" specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements -- close relationship and notice -- are inter-related: only if a "measure" is subsidiary or closely related to a specifically identified "measure" will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing "measures" is specified in a panel request, implementing "measures" might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing "measures". As explained below, this interpretation of Article 6.2 is consistent with the context and the object and purpose of Article 6.2, as well as past panel practice.

10.9 The *Bananas III* panel found that the object and purpose of Article 6.2's specificity requirement is to ensure clarity of panels' terms of reference, which pursuant to Article 7 of the DSU are typically determined by the panel request, and to inform the respondent and potential third parties of the scope of the complaining party's claims (i.e., the "measures" challenged and the WTO provisions invoked by the complaining party).[1182] So long as Article 6.2 is interpreted to require any "measure" challenged to be specified in the panel request or to be subsidiary or closely related to the specified "measures", the object and purpose of Article 6.2 are satisfied.

10.10 The proposed interpretation is also consistent with past WTO and GATT panel practice. The *Bananas III* panel is the only WTO panel to have interpreted the aspect of Article 6.2 at issue in this case, i.e., the definition of the "measures" to be deemed covered by a panel request. In the *Bananas III* panel request, the "basic EC regulation at issue" had been identified by place and date of publication. In addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures … which implement, supplement and amend [the EC banana] regime". The *Bananas III* panel found that this reference was sufficient for the specificity requirement of Article 6.2 because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.[1183] The Appellate Body agreed that the panel request "contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2".[1184] In our view, "measures" that are subsidiary or closely related to specified "measures" can be found to be "adequately identified" as that concept was applied in the *Bananas III* case.

[1182]Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas* ("*Bananas III*"), adopted on 25 September 1997, WT/DS27/R, para. 7.35, modified on other grounds by the Appellate Body in WT/DS27/AB/R, adopted on 25 September 1997. See also Appellate Body Report on *Bananas III*, WT/DS27/AB/R, para. 142; Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut* ("*Brazil - Desiccated Coconut*"), adopted on 20 March 1997, WT/DS22/AB/R, p. 22.

[1183]*Bananas III*, WT/DS27/R, para. 7.27.

[1184]*Bananas III*, WT/DS27/AB/R, para. 140.

10.11 The proposed interpretation is also consistent with other WTO/GATT cases dealing with terms-of-reference issues. In one such WTO case, a measure was found to be outside the terms of reference when it had not been mentioned at all in the panel request.[1185] In a 1984 GATT case, a panel declined to examine any measures related to "manufacture" of goods in view of its terms of reference which "only refer to the purchase of goods in Canada and/or the export of goods from Canada".[1186] Similarly, claims based on provisions of GATT or other agreements not mentioned in the panel request have also been found to be outside the terms of reference of the panel concerned.[1187]

(c) The eight "measures" in light of Article 6.2

10.12 We will now analyze the eight "measures" which are the subject of Japan's objection under Article 6.2 of the DSU. Bearing in mind our analysis of the text of Article 6.2 in accordance with the rules of treaty interpretation of the Vienna Convention, we believe that the eight "measures" at issue may be usefully divided into four categories.

10.13 In the first category we would include two measures which, although not specifically identified in the request for the establishment of the panel can, in our view, be viewed as subsidiary or closely related to the Premiums Law, which is specifically identified in the US panel request. These two measures are JFTC Notification No. 17 on premiums to business and JFTC Notification No. 5 on premiums to customers, both of which were issued pursuant to the Premiums Law and implement its general provisions. The content of these notifications is generally predetermined by the Premiums Law, which is itself a relatively focused statute, dealing in detail with one rather narrow subject matter. Article 1 of the Premiums Law specifies its purpose:

> "This Law, in order to prevent inducement of customers by means of unjustifiable premiums and misleading representations in connection with transactions of a commodity or service … aims to secure fair competition and thereby to protect the interests of consumers in general".[1188]

Article 3 of the Law authorizes the JFTC:

> "when it finds it necessary to prevent unfair inducement of customers, [to] limit either the maximum value of a premium or the aggregate total amount of premiums, the kind of premiums or the method of offering of a premium or any other matter relating thereto, or [to] prohibit the offering of a premium".[1189]

The two notifications at issue establish limits on premiums in accordance with the Premiums Law. Given the close association of these JFTC notifications with the Premiums Law and in line with the reasoning in *Bananas III,* we consider that Japan had adequate notice that these notifications were within the scope of the US claims. Thus, we do not consider that Japan could be said to be prejudiced in any way by inclusion of these two measures in the matter before this Panel. We therefore find that

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[1185] *Japan - Alcoholic Beverages*, para. 6.5. The panel request mentioned the Japan Liquor Tax Law; the additional measure was the Taxation Special Measures Law.

[1186] Panel Report on *Canada - Administration of the Foreign Investment Review Act* ("*Canada - FIRA*"), adopted on 7 February 1984, BISD 30S/140, 158, para. 5.3. See also Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages* ("*US - Malt Beverages*"), adopted on 19 June 1992, BISD 39S/206, 226-228, paras. 3.1-3.5 (The panel did not consider unspecified "new measures which may come into effect during the Panel's deliberation".).

[1187] See, e.g., *Bananas III*, WT/DS27/R, para. 7.30; *Desiccated Coconut*, WT/DS22/R, para. 290; Panel Report on *United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128, 147-148, paras. 6.1-6.2.

[1188] Law Against Unjustifiable Premiums and Misleading Representations, Law No. 134 of 15 May 1962, Japan, Ex. D-1.

[1189] Ibid.

JFTC Notification No. 17 on premiums to business and JFTC Notification No. 5 on premiums to customers are within our terms of reference and properly before this Panel.

10.14 In the second category we would include a "measure", the Sixth Interim Report of the Industrial Structure Council's Distribution Committee, that is closely related, although not subsidiary, to a "measure" that is listed in the panel request. The Sixth Interim Report is not listed in the panel request, although it is part of a series of reports, another one of which (the Seventh Interim Report) is mentioned among the "measures" listed in the panel request. In that sense, one may view the Sixth Interim Report as being closely related to a "measure" that is listed in the panel request. We note in this regard that Japan was on notice that the US claims concerned the reports of the Industrial Structure Council's Distribution Committee. We see no reason to believe that our consideration of the report will cause prejudice to Japan or third parties in this case, given the similar nature and significant degree of overlap between the Sixth and Seventh Interim Reports. Accordingly, we find that there is a sufficiently close relationship between the Sixth Interim Report and the Seventh Interim Report, that the former is within our terms of reference and properly before this Panel.

10.15 In the third category we would include two measures which are only indirectly related to a measure mentioned in the panel request. These two measures are: JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (International Contract Notification Requirement) and JFTC Notification No. 34 on open lotteries (1971). JFTC Rule No. 1 and JFTC Notification No. 34 were issued pursuant to Articles 6 and 2(7), respectively, of the Antimonopoly Law, which is not listed separately as a measure challenged by the United States. However, the Antimonopoly Law is referred to in the panel request, in connection with the identification of a "measure" regarding dispatched employees.

10.16 In considering whether these two measures were adequately identified in the panel request, we note that in contrast to the Premiums Law, which has a relatively narrow focus (i.e., premiums), the Antimonopoly Law has a very broad scope and deals with a broad range of issues. As such, we would have some hesitation in saying that a reference to the Antimonopoly Law alone would be sufficient to bring all measures taken by Japan under that Law within the scope of the panel request. The text of Article 2(7), for example, does not clearly specify and predetermine the form, content and scope of subsidiary regulations. We need not decide that issue, however, because there was no such general reference made in this case. In this case, the reference in the panel request to the Antimonopoly Law was for the purpose of identifying a "measure" dealing with dispatched employees, an issue unrelated to the International Contract Notification Requirement or open lotteries. Such a reference would not normally be sufficient to put Japan on notice that these measures were a concern of the United States. In addition, we see no reason why, as suggested by the United States, the nature of these measures precluded their specification by the United States in the panel request. In our view, the International Contract Notification Requirement and JFTC Notification No. 34 on open lotteries (1971) are not subsidiary or closely related to a "measure" specified as being at issue in the panel request. Therefore, we find that these measures are not properly before this Panel.

10.17 In the fourth category we would place the three remaining "measures" which are the subject of Japan's procedural objection under Article 6.2 of the DSU. These three "measures" are clearly not related to any "measure" specifically identified in the panel request. This is the case for: JDB financing to Konica for joint distribution facilities; SMEA financing to photofinishing laboratories to enable them to buy new equipment for colour photofinishing; and the JFTC guidance on loss-leader advertising and dumping (1983).

10.18 In the case of the JDB and SMEA subsidies, the US position is that Japan had adequate notice of US claims relating to them because MITI's 1971 Basic Plan for the Systemization of Distribution, which was raised during consultations with Japan and figures in the "measures" listed in the panel request, makes reference to "positive support and guidance from the government" being necessary in relation to carrying out systemization. In our view, the relationship between these two "measures"

and the 1971 Basic Plan is too tenuous to find that they are covered by the panel request. The timing of the "measures", which range from 1967 to 1976[1190], does not seem connected to a 1971 plan. In addition, we agree with Japan that the phrase "positive support" in the Basic Plan does not necessarily refer to financial contributions and is too vague to constitute any meaningful notice to Japan that JDB and SMEA financing were covered by the panel request. Moreover, we see no reason why, as suggested by the United States, the nature of these "measures" precluded their specification by the United States. Therefore, we find that these "measures" are not properly before this Panel.

10.19 In respect of JFTC guidance on the establishment of rules on loss-leader advertising and dumping, we note that the procedural objection to this "measure" came in Japan's second submission, as a consequence of its inclusion in the US list of "measures" subject to claims, which was submitted by the United States following the first meeting in response to a panel question. It was therefore not the subject of detailed arguments by the parties, as were the other "measures". For our purposes, it is sufficient to note that this guidance, which is difficult to comprehend in any event and in part subject to a translation dispute, probably is not a measure for purposes of Article XXIII:1(b) and does not seem to be related at all to any "measure" listed in the panel request. Therefore, we find that this JFTC guidance is not properly before this Panel.

2. SUMMARY

10.20 To sum up, on the basis of our examination of Japan's procedural objection to inclusion of eight specific "measures" in the Panel's terms of reference, we find that the following "measures" are within our terms of reference:

1968 Sixth Interim Report of Industrial Structure Council, "Distribution Modernization Outlook and Issues";
1967 JFTC Notification No. 17 on premiums between businesses; and
1977 JFTC Notification No. 5 on premiums to customers.

10.21 We further find that the following "measures" fall outside our terms of reference and are not properly before this Panel:

1976 JDB financing to Konica for joint distribution facilities;
1967/1977 SMEA financing to photofinishing laboratories (to enable them to buy new equipment for colour photofinishing);
1971 JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (International Contract Notification Requirement);
1971 JFTC Notification No. 34 on open lotteries; and
1983 JFTC guidance on the establishment of rules on loss-leader advertising and dumping.

[1190]The JDB loan is dated 1976; the SMEA subsidies were given starting in 1967.

B. CLAIMS OF THE PARTIES

10.22 The United States claims that through the application of three broad categories of liberalization "countermeasures"[1191] the Japanese Government for more than 30 years has inhibited the distribution and sale of imported consumer photographic film and paper[1192] in Japan. These three categories of "measures" cover: (1) distribution "measures", which allegedly encourage and facilitate the creation of a market structure for photographic film and paper in which imports are excluded from traditional distribution channels; (2) restrictions on large retail stores, which allegedly restrict the growth of an alternative distribution channel for imported film; and (3) promotion "measures", which allegedly disadvantage imports by restricting the use of sales promotion techniques.

10.23 In light of the foregoing ruling on Japan's procedural objection, the specific "measures" which are the subject of the US claims are set out below. Detailed descriptions of these "measures" are found in Part II.

Distribution "countermeasures"

- 1967 JFTC Notification 17 on Premiums to Businesses;
- 1967 Cabinet Decision on Liberalization of of Inward Direct Investment;
- 1968 Sixth Interim Report on "Distribution Modernization Outlook and Issues";
- 1969 Seventh Interim Report on "Systemization of Distribution Activities";
- 1969 Survey Report regarding Transaction Terms;
- 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film;
- 1971 Basic Plan for the Systemization of Distribution;
- 1975 Manual for Systemization of Distribution by Industry: Camera and Film;

Restrictions on large retail stores

- 1974 Large Stores Law;
- 1979 Amendment to the Large Stores Law;

Promotion "countermeasures"

- 1967 JFTC Notification 17 on Premiums to Businesses;
- 1967 Cabinet Decision on Liberalization of of Inward Direct Investment;
- 1977 JFTC Notification 5 on Premiums to Consumers;
- 1981 JFTC Guidance on Dispatched Employees;
- 1982 Self-regulating Rules Concerning Fairness in Trade with Business;
- 1982 Establishment of Fair Trade Promotion Council;

[1191]We note that the parties disagree as to the correct translation of the Japanese word *taisaku*. The United States uses *countermeasure*, whereas Japan argues that *measure* or *policy in response to* are more appropriate translations. On this and other translation issues we refer, to the extent appropriate, to the opinions of two translation experts appointed by the Panel, Professor Zentaro Kitagawa and Professor Michael Young. See Part I and the "Annex on Translation Problems" in Part XI. The translation experts consider that *taisaku* can be translated as either *measure* or *countermeasure*, depending on the context. In our findings, we refer both to *measure* and *"countermeasure"*, but in the latter case the term is always written within quotation marks.

[1192]We note that the term "consumer photographic film" as used by the United States includes both colour and black and white film for use in still photography by consumers. It includes both negative (print) and reversal (slide) film, and includes film incorporated in so-called "single-use cameras". It excludes various specialized films used by professional photographers and various other specialty films (x-ray film, microfilm). We further note that the term "consumer photographic paper" as used by the United States refers to photosensitive paper used to make still colour and black and white photographic prints from consumer photographic film. Hereafter we refer to consumer photographic film and consumer photographic paper as "film" and "paper".

- 1984 Self-Regulating Standards Concerning Display of Processing Fees for Colour Negative Film;
- 1987 JFTC approval of the Retailers Fair Competition Code and its enforcement body, the Retailers Fair Trade Council.

10.24 The United States alleges that the above "measures", individually and collectively, nullify or impair benefits accruing to the United States within the meaning of GATT Article XXIII:1(b). In addition, it alleges that the above distribution "measures" are inconsistent with GATT Article III:4. It further alleges that (i) unpublished enforcement actions by the JFTC and fair trade councils under the Premiums Law and relevant fair competition codes that establish or modify criteria applicable in future cases, and (ii) unpublished guidance through which the Japanese authorities make applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review, are inconsistent with GATT Article X:1.

10.25 Japan denies all the claims of the United States.

C. SEQUENCE OF CLAIMS TO BE ADDRESSED

10.26 We note that traditionally in cases involving both violation and non-violation claims, panels first address claims of inconsistency with a covered agreement pursuant to Article XXIII:1(a), before moving on to consider claims of non-violation nullification or impairment under Article XXIII:1(b).[1193] We note, however, that whereas the US request for the establishment of this Panel[1194] first lists its violation claims, in the Panel proceedings the United States and Japan have first addressed the US claims of non-violation nullification or impairment under Article XXIII:1(b), followed by those dealing with inconsistency with Articles III:4 and X:1.

10.27 Even though there would appear to be merit in the traditional approach of first considering violation claims before moving to claims of non-violation, given that in the particular case before us the United States and Japan have begun with the non-violation claims in their written and oral presentations and have devoted the lion's share of their arguments to this portion of the case, we consider that it would be most efficient to also follow the sequence chosen by the parties in addressing the US claims. We shall therefore first address the US claims dealing with non-violation nullification or impairment under Article XXIII:1(b) and thereafter consider the US violation claims under Articles III:4 and X:1.

D. BURDEN OF PROOF

10.28 Given the nature of this factually complex dispute and particularly its claims of non-violation nullification or impairment in respect of 16 separate "measures", we consider that the resolution of issues relating to the proper allocation of the burden of proof is of particular importance.

10.29 We note that as in all cases under the WTO/GATT dispute settlement system - and, indeed, as the Appellate Body recently stated[1195], under most systems of jurisprudence - it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof. Once that party

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[1193]See, e.g., *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("*EEC - Oilseeds*"), adopted on 25 January 1990, BISD 37S/86, para.142. See also Working Party Report on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188, paras. 1, 12.

[1194]WT/DS44/2.

[1195]See Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US - Wool Shirts and Blouses*"), adopted on 23 May 1997, WT/DS33/AB/R, p. 14.

has put forward sufficient evidence to raise a presumption that what is claimed is true, the burden of producing evidence then shifts to the other party to rebut the presumption. The Appellate Body stated the principle succinctly as follows:

> "In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.
>
> In the context of the GATT 1994 and the WTO Agreement precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision and case to case".[1196]

Thus, in this case, it will be for the United States to bear the burden of proving its claims. Once it has raised a presumption that what it claims is true, it will be for Japan to adduce sufficient evidence to rebut any such presumption.

10.30 In a case of non-violation nullification or impairment pursuant to Article XXIII:1(b), Article 26.1(a) of the DSU and GATT jurisprudence confirm that this is an exceptional remedy for which the complaining party bears the burden of providing a *detailed justification* to back up its allegations. Specifically, Article 26.1 of the DSU provides in relevant part:

> "Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:
>
> (a) *the complaining party shall present a detailed justification* in support of any complaint relating to a measure which does not conflict with the relevant covered agreement …" (emphasis added).

10.31 This DSU requirement had previously been codified in the *Annex to the 1979 Understanding on Dispute Settlement* in a virtually identical form.[1197] This requirement has been recognized and applied by a number of GATT panels. For example, the panel on *Uruguayan Recourse to Article XXIII* noted that in cases

> "where there is no infringement of GATT provisions, it would be … incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its

[1196]Idem (footnotes omitted).

[1197]See *Annex* to the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* ("*Annex to the 1979 Understanding on Dispute Settlement*"), adopted on 28 November 1979, BISD 26S/210, 216.

> invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgement to be made under this Article".[1198]

And the panel on *US - Agricultural Waiver* noted, in applying the 1979 codification of this rule:

> "The party bringing a complaint under [Article XXIII:1(b)] would normally be expected to explain in detail that benefits accruing to it under a tariff concession have been nullified or impaired".[1199]

10.32 Consistent with the explicit terms of the DSU and established WTO/GATT jurisprudence, and recalling the Appellate Body ruling that "precisely how much and precisely what kind of evidence will be required to establish … a presumption [that what is claimed is true] will necessarily vary from … provision to provision", we thus consider that the United States, with respect to its claim of non-violation nullification or impairment under Article XXIII:1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true. It will be for Japan to rebut any such presumption.

E. ARTICLE XXIII:1(B) - NON-VIOLATION NULLIFICATION OR IMPAIRMENT

10.33 We recall the US claim under Article XXIII:1(b) that specific "measures" of the Government of Japan -- eight distribution "countermeasures", two restrictions on large retail stores, and eight promotion "countermeasures" -- individually and in combination nullify or impair benefits accruing to the United States stemming from tariff concessions made by Japan on black and white and colour photographic film and paper at the end of three successive multilateral rounds of trade negotiations -- the Kennedy Round, the Tokyo Round and the Uruguay Round.[1200]

10.34 We shall proceed with our analysis of this US claim, examining as appropriate the ordinary meaning of the terms of Article XXIII:1(b), their context and the object and purpose of Article XXIII:1(b), and past GATT practice under Article XXIII:1(b).[1201]

1. OVERVIEW OF THE NON-VIOLATION REMEDY

10.35 The underlying purpose of Article XXIII:1(b) was cogently explained by the panel on *EEC - Oilseeds*:

> "The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a

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[1198]Panel Report on *Uruguayan Recourse to Article XXIII* ("*Uruguayan Recourse*"), adopted on 16 November 1962, BISD 11S/95, 100, para. 15.

[1199]Panel Report on *United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions* ("*US - Agricultural Waiver*"), adopted on 7 November 1990, 37S/228, 261-262, paras. 5.20-5.23, quoting para. 5.21. See also *Japan - Trade in Semi-conductors* ("*Japan - Semi-conductors*"), adopted on 4 May 1988, BISD 35S/116, 161, para. 131.

[1200]There are only 16 distinct "measures" in total within the Panel's terms of reference, as two of the distribution "countermeasures" are also cited as promotion "countermeasures" (i.e., the 1967 Cabinet Decision and the 1967 JFTC Notification 17.

[1201]See Article 31 of the Vienna Convention.

> reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement".[1202]
> . . .
> "The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations".[1203]

Clearly, the safeguarding of the process and the results of negotiating reciprocal tariff concessions under Article II is fundamental to the balance of rights and obligations to which all WTO Members subscribe.

10.36 Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been "on the books" for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims.[1204] This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC - Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.[1205] The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.

10.37 While we consider that the non-violation remedy should be approached with caution and should remain an exceptional remedy, each case should be examined on its own merits, bearing in mind the above-mentioned need to safeguard the process of negotiating reciprocal tariff concessions. Our role as a panel charged with examining claims under Article XXIII:1(b) is, therefore, to make an objective assessment of whether, in light of all the relevant facts and circumstances in the matter before us, particular measures taken by Japan have nullified or impaired benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.38 In GATT jurisprudence, most of the cases of non-violation nullification or impairment have dealt with situations where a GATT-consistent domestic subsidy for the producer of a product has been

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[1202] *EEC - Oilseeds*, adopted on 25 January 1990, BISD 37S/86, 128-129, para.144.

[1203] Ibid, para.148.

[1204] Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188; Panel Report on *Treatment by Germany of Imports of Sardines* ("*Germany - Sardines*"), G/26, adopted on 31 October 1952, BISD 1S/53; *Uruguayan Recourse*, adopted on 16 November 1962, BISD 11S/95; Panel Report on *EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* ("*EC - Citrus Products*"), GATT Doc. L/5576, dated 7 February 1985 (unadopted); Panel Report on *EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes* ("*EEC - Canned Fruit*"), GATT Doc. L/5778, dated 20 February 1985 (unadopted); *Japan - Semi-conductors*, adopted on 4 May 1988, BISD 35S/116; *EEC - Oilseeds*, adopted on 25 January 1990, BISD 37S/86; *United States - Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228.

[1205] In *EEC - Oilseeds*, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept". *EEC - Oilseeds*, BISD 37S/86, 118, para. 114. The EEC in that case stated that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty". Ibid, para. 113.

introduced or modified following the grant of a tariff concession on that product.[1206] The instant case presents a different sort of non-violation claim. At the outset, however, we wish to make clear that we do not *a priori* consider it inappropriate to apply the Article XXIII:1(b) remedy to other governmental actions, such as those designed to strengthen the competitiveness of certain distribution or industrial sectors through non-financial assistance. Whether assistance is financial or non-financial, direct or indirect, does not determine whether its effect may offset the expected result of tariff negotiations. Thus, a Member's industrial policy, pursuing the goal of increasing efficiency in a sector, could in some circumstances upset the competitive relationship in the market place between domestic and imported products in a way that could give rise to a cause of action under Article XXIII:1(b). In the context of a Member's distribution system, for example, it is conceivable that measures that do not infringe GATT rules could be implemented in a manner that effectively results in a disproportionate impact on market conditions for imported products. In this regard, however, we must also bear in mind that tariff concessions have never been viewed as creating a guarantee of trade volumes, but rather, as explained below, as creating expectations as to competitive relationships.

10.39 The United States has presented much evidence on the structure of the Japanese market for film. In considering the US claims, we note that the issue is not whether or not the structure described by the United States in fact exists, but rather whether measures attributable to the Government of Japan have contributed to the creation or maintenance of that structure in a way that nullifies or impairs benefits accruing to the United States within the terms of Article XXIII:1(b).

10.40 While acknowledging the possible application of Article XXIII:1(b) in this context, we also note that there are some unusual features to the case before us. Many of the cited "measures" go back a long way in time and their current status is not always clear. Moreover, many of them are, on their face, neutral as to the origin of products. These features may make it more difficult to present a detailed justification in support of non-violation claims.

2. THREE REQUIRED ELEMENTS

10.41 We now return to our more detailed examination of the scope of Article XXIII:1(b). Article XXIII:1(b) provides in relevant part:

> "If any Member should consider that any *benefit* accruing to it directly or indirectly under this Agreement is being *nullified or impaired* … as the result of … (b) the *application* by another Member of any *measure*, whether or not it conflicts with the provisions of this Agreement … " (emphasis added).

The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.[1207] We shall proceed with our analysis by considering in turn each of these three elements.

[1206]See *Australian Subsidy on Ammonium Sulphate*, BISD II/188; Working Party Report on *Other Barriers to Trade*, adopted on 3 March 1955, BISD 3S/222, 224, para. 13; Report on *Operation of the Provisions of Article XVI*, adopted on 21 November 1961, BISD 10S/201, 209, para. 28; *EEC - Canned Fruit*, GATT Doc. L/5778 (unadopted); *EEC - Oilseeds*, BISD 37S/86.

[1207]See, e.g., *EEC - Oilseeds*, BISD 37S/86, paras. 142-152; *Australian Subsidy on Ammonium Sulphate*, BISD II/188, 192-193.

(a) Application of a measure

10.42 In analysing the elements of a non-violation claim, a logical starting point is the requirement that there be application of a measure by a WTO Member. In the first instance, it is necessary to define what is meant by the term *measure*. In this case, some of the items included by the United States in its list of "measures" at issue are laws or regulations. Others are less formal or less concrete forms of governmental action, such as general policy statements by government agencies and officials of various ranks. Yet others are governmental actions generally authorizing certain private activities, where the question is the extent to which such activities are attributable to the government. These last two kinds of alleged "measures" raise a number of general issues of a conceptual nature and specific issues in respect of the individual "measures". We explore in this section general issues related to the definition of *measure*.

(i) General considerations

10.43 The ordinary meaning of *measure* as it is used in Article XXIII:1(b) certainly encompasses a law or regulation enacted by a government. But in our view, it is broader than that and includes other governmental actions short of legally enforceable enactments.[1208] At the same time, it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government.

10.44 In Japan, it is accepted that the government sometimes acts through what is referred to as administrative guidance. In such a case, the company receiving guidance from the Government of Japan may not be legally bound to act in accordance with it, but compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy. As noted by the parties, administrative guidance in Japan takes various forms. Japan, for example, refers to what it calls "regulatory administrative guidance", which it concedes effectively substitutes for formal government action.[1209] It also refers to promotional administrative guidance, where companies are urged to do things that are in their interest to do in any event. In Japan's view, this sort of guidance should not be assimilated to a measure in the sense of Article XXIII:1(b). For our purposes, these categories inform, but do not determine the issue before us. Thus, it is not useful for us to try to place specific instances of administrative guidance into one general category or another. It will be necessary for us, as it has been for GATT panels in the past, to examine each alleged "measure" to see whether it has the particular attributes required of a measure for Article XXIII:1(b) purposes.

10.45 Our review of GATT jurisprudence, particularly the panel report on *Japan - Semi-conductors*, teaches that where administrative guidance creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner, it may be considered a governmental measure.[1210] In that case, the panel found that although a measure was not mandatory, it could be considered a *restriction* subject to Article XI:1 because

> "sufficient incentives or disincentives existed for non-mandatory measures to take effect … [and] the operation of the measures … was essentially dependent on Government action or intervention [because in such a case] the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the

[1208]The two definitions of *measure* relevant to our consideration in the *Concise Oxford Dictionary (Ninth Edition 1995)* are "legislative enactment" and "suitable action to achieve some end".

[1209]See para. 6.94.

[1210]*Japan - Semi-conductors*, BISD 35S/116, 154-55.

> measures and mandatory requirements was only one of form and not of substance ...".[1211]

10.46 Another panel, that on *Japan - Restrictions on Imports of Certain Agricultural Products*, found that the informal administrative guidance used by the Japanese Government to restrict production of certain agricultural products could be considered to be a governmental measure within the meaning of GATT Article XI:2 because it emanated from the government and was effective in the Japanese context.[1212] Specifically as regards the method used to enforce certain measures, the panel found that:

> "the practice of 'administrative guidance' played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgements on the *effectiveness of the measures* in spite of the initial lack of transparency".[1213]

In line with this observation of the *Japan - Agricultural Products* panel, we consider that our analysis of the alleged "measures" in this case must proceed in a manner that is sensitive to the context in which these governmental actions are taken and the effect they have on private actors.

10.47 In this case, Japan argues that measures for purposes of Article XXIII:1(b) must either provide benefits or impose obligations, and that to impose obligations the measure must be a government policy or action which imposes legally binding obligations or the substantive equivalent. The US position is that the term measure in Article XXIII:1(b) should not be limited to refer only to legally binding obligations or their substantive equivalent. It argues in favour of a more encompassing definition of the term.

10.48 Recalling the criteria applied in *Japan - Semi-conductors* for determining whether or not a formally non-binding measure should be assimilated to a governmental restriction under Article XI:1, i.e., that administrative guidance must create incentives or disincentives to act and compliance with the guidance must depend largely on governmental action, we consider that these criteria would certainly also lend themselves satisfactorily to the definition of the term *measure* under Article XXIII:1(b). However, we note that there is nothing in *Japan - Semi-conductors* suggesting that this incentives/disincentives test should be seen as the exclusive test for characterizing formally non-binding measures as governmental. We consider, therefore, that *Japan - Semi-conductors* should not be seen as setting forth the exclusive test or outer limit of what may be considered to constitute a measure under Article XXIII:1(b).

10.49 In particular, we are not persuaded that the definition proposed by Japan, i.e., that a measure must provide a benefit or impose a legally binding obligation or its substantive equivalent, should circumscribe what may constitute a measure within the meaning of Article XXIII:1(b). In our view, a government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access. For example, a number of non-violation cases have involved subsidies, receipt of which requires only voluntary compliance with eligibility criteria. Moreover, we also consider it conceivable, in cases where there is a high degree of cooperation and collaboration between government and business, e.g., where there is substantial reliance on administrative guidance and other more informal forms of government-business cooperation,

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[1211]Ibid, p. 155.

[1212]Panel Report on *Japan - Restrictions on Imports of Certain Agricultural Products* ("*Japan - Agricultural Products*"), adopted on 22 March 1988, BISD 35S/163, 242.

[1213]Ibid (emphasis added).

that even non-binding, hortatory wording in a government statement of policy could have a similar effect on private actors to a legally binding measure or what Japan refers to as regulatory administrative guidance. Consequently, we believe we should be open to a broad definition of the term *measure* for purposes of Article XXIII:1(b), which considers whether or not a non-binding government action has an effect similar to a binding one.

10.50 We reach this conclusion in considering the purpose of Article XXIII:1(b), which is to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member's legitimate expectations of benefits from tariff negotiations.[1214] To achieve this purpose, in our view, it is important that the kinds of government actions considered to be measures covered by Article XXIII:1(b) should not be defined in an unduly restrictive manner. Otherwise, there is the risk of cases, in which governments have been involved one way or another in the nullification or impairment of benefits, that will not be redressable under Article XXIII:1(b), thereby preventing the achievement of its purpose. We would stress, however, that giving a broad definition to *measure* does not expand the scope of the Article XXIII:1(b) remedy because it remains incumbent on the complaining Member to clearly demonstrate how the measure at issue results in or causes nullification or impairment of benefits, and as explained below, in the final analysis the responding Member's government is only responsible for what it has itself caused.

10.51 Finally on the subject of what may constitute a governmental measure, we note the analysis of several GATT panels dealing with the related issue of what may constitute "all laws, regulations and requirements affecting … internal sale, offering for sale, purchase, transportation, distribution or use" under GATT Article III:4. In these cases, the conclusion that there is a law, regulation or requirement that exists and violates GATT rules gives rise to a presumption of nullification or impairment. Even so, panels have taken a broad view of when a governmental action is a law, regulation or requirement. For example, in 1984 a panel examined written purchase and export undertakings under the Foreign Investment Review Act of Canada (FIRA), submitted by investors regarding the conduct of the business they were proposing to acquire or establish, conditional on approval by the Canadian government of the proposed acquisition or establishment. These written undertakings were considered legally binding under FIRA. The panel determined that the undertakings were to be considered "laws, regulations or requirements" within the meaning of Article III:4, even though FIRA did not make their submission obligatory.[1215] Similarly, the panel on *EEC -- Parts and Components* considered that the term "laws, regulations or requirements" included requirements "which an enterprise voluntarily accepts in order to obtain an advantage from the government.[1216] Given that the scope of the term *requirement* would seem to be narrower than that of *measure*, the broad reading given to the word *requirement* by the *Canada - FIRA* and *EEC - Parts and Components* panels supports an even broader reading of the word *measure* in Article XXIII:1(b).

(ii) Governmental versus private actions

10.52 As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But

[1214]*EEC - Oilseeds*, BISD 37S/86, para. 144.

[1215]*Canada -- FIRA*, BISD 30S/140, 158, para. 5.4.

[1216]Panel Report on *EEC -- Regulation on Imports of Parts and Components* ("*EEC -- Parts and Components*"), adopted on 16 May 1990, BISD 37S/132, 197, para. 5.21. See also Panel Report on *Bananas III*, WT/DS27/R, paras. 7.179-7.180. The Illustrative List of Trade-Related Investment Measures (TRIMs) contained in the Annex to the Agreement on TRIMs indicates that TRIMs inconsistent with Articles III:4 and XI:1 include those which are "mandatory or enforceable under domestic law or under administrative rulings, *or compliance with which is necessary to obtain an advantage*" (emphasis added).

while this "truth" may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.

10.53 One GATT study in 1960, examining the question of whether subsidies financed by non-governmental levy were notifiable under Article XVI, expressed the view that "the question … depends upon the source of the funds and the extent of government action, if any, in their collection".[1217]

10.54 In *Japan - Semi-conductors*, "Japan contended that there were no governmental measures limiting the right of Japanese producers and exporters to export semi-conductors at any price they wished. … Exports were limited by private enterprises in their own self-interest and such private action was outside the scope of Article XI:1".[1218] However, the panel found that

> " … an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs … the Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control".[1219]

10.55 And a 1989 panel on *EEC - Restrictions on Imports of Dessert Apples* noted that "the EEC internal regime for apples was a hybrid one, which combined elements of public and private responsibility. Legally there were two possible systems, direct buying-in of apples by Member State authorities and withdrawals by producer groups". That panel found that both the buying-in and withdrawal systems established for apples under the EEC regulation could be considered to be governmental measures for the purposes of Article XI:2(c)(i).[1220]

10.56 These past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.

(iii) Measure versus continuing effect

10.57 The text of Article XXIII:1(b) is written in the present tense, viz. "If any Member should consider that any benefit *accruing* to it directly or indirectly under this Agreement *is* being nullified or impaired … as the result of … (b) the application by another Member of any measure, whether or not it *conflicts* with the provisions of this Agreement". It thus stands to reason that, given that the text contemplates nullification or impairment in the present tense, caused by application of a measure, "whether or not it conflicts" (also in the present tense), the ordinary meaning of this provision limits the non-violation remedy to measures that are currently being applied.

10.58 Moreover, GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article XXIII:1(a), confirms that it is not the practice of GATT/WTO panels to rule on

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[1217]Report on *Review Pursuant to Article XVI:5*, adopted on 24 May 1960, BISD 9S/188, 192.

[1218]*Japan - Semi-conductors*, BISD 35S/116, para. 102.

[1219]Ibid, para. 117.

[1220]Panel Report on *EEC - Restrictions on Imports of Dessert Apples (Complaint by Chile*), adopted on 22 June 1989, BISD 36S/93, 126.

measures which have expired or which have been repealed or withdrawn.[1221] In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past.[1222]

10.59 We note that the parties to the dispute do not disagree on the fundamental point that only a measure that continues to be applied, and not the market structure which may or may not result from the application of such measure, may be the basis for a cognizable claim under GATT Article XXIII:1(b). On the other hand, we note that the parties disagree as to whether or not certain of the "measures" at issue are still in effect. Whereas Japan argues that most of the "measures" ended years ago and thus are not currently actionable, the United States contends that at most two "measures" were formally repealed and that, in any case, all the policies underlying the "measures" continue today in the form of "continuing administrative guidance". Given the significance of the principle of continued application of measures to the interpretation of Article XXIII:1(b), we shall need to give particularly careful analysis -- in examining the individual "measures" -- to the evidence relating to such alleged continuing administrative guidance. At this stage, suffice it to say that we do not rule out the possibility that *old* "measures" that were never officially revoked may continue to be applied through continuing administrative guidance. Similarly, even if measures were officially revoked, the underlying policies may continue to be applied through continuing administrative guidance. However, the burden is on the United States to demonstrate clearly that such guidance does in fact exist and that it is currently nullifying or impairing benefits.

(iv) Summary

10.60 In examining the non-violation claims in this case, we consider it important to approach the issue of whether the "measures" in dispute are private or attributable to the Government of Japan with particular care, especially in light of the strong disagreement between the parties as to the nature of certain of these "measures". We are also sensitive to the possibility that at times it may not be possible to distinguish with great precision a bright-line test of a measure. Recalling the considerations outlined in paragraphs 10.48 to 10.50 above, we will take an expansive view of what constitutes a measure, bearing in mind that the United States must, in any event, demonstrate that the measure does in fact result in nullification or impairment of expected benefits.

(b) Benefit accruing under the GATT

10.61 The second required element which must be considered to establish a case of non-violation nullification or impairment under Article XXIII:1(b) is the existence of a benefit accruing to a WTO Member under the relevant agreement (in this case, GATT 1994). In all but one of the past GATT cases dealing with Article XXIII:1(b) claims, the claimed benefit has been that of legitimate expectations

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[1221]See *US - Gasoline* WT/DS2/R, para. 6.19, where the panel observed that "it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective". See also Panel Report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, circulated on 25 November 1997, pp. 84-86.

[1222]See, e.g., Panel Report on *US - Wool Shirts and Blouses*, WT/DS33/R, upheld by the Appellate Body, WT/DS33/AB/R, where the panel ruled on a measure that was revoked after the interim review but before issuance of the final report to the parties; Panel Report on *EEC - Measure on Animal Feed Proteins*, adopted on 14 March 1992, BISD 25S/49, where the panel ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed; Panel Report on *United States - Prohibitions on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91, 106, para. 4.3., where the panel ruled on the GATT consistency of a withdrawn measure but only in light of the two parties' agreement to this procedure; Panel Report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, where the panel ruled on a measure which had terminated before agreement on the panel's terms of reference but where the terms of reference specifically included the terminated measure and, given its seasonal nature, there remained the prospect of its reintroduction.

of improved market-access opportunities arising out of relevant tariff concessions.[1223] This same set of GATT precedents suggests that for expectations to be legitimate, they must take into account all measures of the party making the concession that could have been reasonably anticipated at the time of the concession.[1224] Of course, as with the first element (application of a measure), the complaining party has the burden of demonstrating the "benefit accruing".

10.62 In the particular case before us, the question of legitimate expectations of benefits accruing to the United States is complicated by the fact that the United States is claiming to have had expectations of improved market access benefits in respect of four different products (each under a different tariff line), granted during three successive rounds of multilateral trade negotiations. This claim raises two general issues. First, may the benefits legitimately expected by a Member derive from successive rounds of tariff negotiations? Second, what factors should be considered to determine if a Member should have reasonably anticipated measures that it claims nullified or impaired benefits?

(i) Benefits under successive Rounds

10.63 The United States claims to have had reasonable expectations of benefits accruing to it under Article XXIII:1(b) as the result of tariff concessions granted by Japan on black and white film and paper during the Kennedy Round (1967), on colour and black and white film and paper during the Tokyo Round (1979) and on colour and black and white film and paper during the Uruguay Round (1994). Japan argues that the reasonable expectations of the United States must be limited to those existing in 1994 at the conclusion of the Uruguay Round in that these latter expectations reflected a new balance and global reassessment of the value of market access concessions, replacing any reasonable expectations that may have arisen under prior tariff negotiations.

10.64 Two provisions of GATT 1994 (sub-paragraphs (b)(i) and (d) of paragraph 1) appear to us to be relevant to the resolution of this matter. The text of GATT 1994 provides in relevant part:

> "1. The General Agreement on Tariffs and Trade 1994 ('GATT 1994') shall consist of:
>
> (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, …
>
> (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
>
> (i) protocols and certifications relating to tariff concessions;
>
> . . .
>
> (d) the Marrakesh Protocol to GATT 1994".

As referenced in the quoted text -- also known as the GATT 1994 incorporation clause -- GATT 1994 incorporates both "protocols and certifications relating to tariff concessions" under paragraph 1(b)(i)

[1223] *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188; *Germany - Sardines*, adopted on 31 October 1952, BISD 1S/53; Panel Report on *Uruguayan Recourse*, adopted on 16 November 1962, BISD 11S/95; *EC - Citrus Products*, GATT Doc. L/5776, dated 7 February 1985 (unadopted); *EEC - Canned Fruit*, GATT Doc. L/5778, dated 20 February 1985 (unadopted); *Japan - Semi-conductors*, adopted on 4 May 1988, BISD 35S/116; *EEC - Oilseeds*, adopted on 25 January 1990, BISD 37S/86; *US - Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228. Only in *EC - Citrus Products* did the complaining party claim that the benefit denied was not improved market access from tariff concessions granted under GATT Article II, but rather GATT Article I:1 ("most-favoured-nation") treatment with respect to unbound tariff preferences granted by the EC to certain Mediterranean countries.

[1224] See, e.g., *Australian Subsidy on Ammonium Sulphate*, BISD II/188, 193-194; *Germany - Sardines*, BISD 1S/53, 58-59; *EEC - Oilseeds*, BISD 37S/86, 126-129.

and "the Marrakesh Protocol to GATT 1994" under paragraph 1(d). The ordinary meaning of the text of paragraphs 1(b)(i) and 1(d) of GATT 1994, read together, clearly suggests that all protocols relating to tariff concessions, both those predating the Uruguay Round and the Marrakesh Protocol to GATT 1994, are incorporated into GATT 1994 and continue to have legal existence under the WTO Agreement.

10.65 Japan appears to argue that the Schedules annexed to the Marrakesh Protocol prevail as a later agreement over Schedules that entered into force under GATT 1947. In our view, such an interpretation would only make sense if the Marrakesh Protocol, referred to in paragraph 1(d) of GATT 1994, were viewed as later in time than the protocols referred to in paragraph 1(b)(i) thereof, and then, only to the extent of any conflict between tariff concessions annexed to the Marrakesh Protocol and the concessions in the other tariff protocols incorporated in GATT 1994. We consider that, as argued by the United States, Article 30 of the Vienna Convention[1225], which is designed to resolve conflicts between provisions of successive treaties on the same subject matter, is not applicable to the situation at hand because there is nothing inherently incompatible -- in conflict -- between the earlier and later agreed tariff concessions. Such a conflict would only seem to exist if the subsequent concessions were less favourable than prior concessions, which is not the situation in this case. Where tariff concessions have been progressively improved, the benefits -- expectations of improved market access -- accruing directly or indirectly under different tariff concession protocols incorporated in GATT 1994 can be read in harmony. This approach is in accordance with general principles of legal interpretation which, as the Appellate Body reiterated in *US - Gasoline*, teach that one should endeavour to give legal effect to all elements of a treaty and not reduce them to redundancy or inutility.[1226]

10.66 The conclusion that benefits accruing from concessions granted during successive rounds of tariff negotiations may separately give rise to reasonable expectations of improved market access is consistent with past panel reports.[1227] The panel in *EEC - Canned Fruit* found that the United States had a reasonable expectation arising from the EEC's 1974 tariff concessions pursuant to Article XXIV:6 negotiations and 1979 Tokyo Round tariff concessions (even though the panel separately found that the United States could have anticipated certain subsidies in respect of the Tokyo Round tariff concessions).[1228] And the *EEC - Oilseeds* panel found that the United States had a reasonable expectation arising from the EEC's 1962 Dillon Round tariff concessions.[1229] As the United States points out, these findings would not have been possible if subsequent multilateral tariff agreements or enlargement agreements were deemed to extinguish wholesale the tariff concessions in prior tariff schedules.

10.67 The following quotation from the *EEC - Oilseeds* panel report appears to us to be particularly on point:

> "In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstitution of the tariff concessions for oilseeds as part of the withdrawal of the whole of the

[1225]Article 30 of the Vienna Convention, entitled "Application of successive treaties relating to the same subject-matter", provides in relevant part: "… 3. When all the parties to the earlier treaty are parties to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

[1226]WT/DS2/AB/R, p. 23.

[1227]See *EEC - Canned Fruit*, L/5778 (unadopted); *EEC - Oilseeds*, BISD 37S/86.

[1228]*EEC - Canned Fruit*, L/5778 (unadopted), para. 54.

[1229]*EEC - Oilseeds*, BISD 37S/86, 126-127, paras. 144-146.

> Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962".[1230]

10.68 The fact that the *EEC - Oilseeds* case (and the unadopted *EEC - Canned Fruit* case as well) dealt with renegotiation of tariff concessions under Article XXIV:6 as opposed to Article XXVIII or Article XXVIII*bis* does not, in our view, undermine the relevance of the above finding to the case at hand. This is because the Article XXIV:6 procedure is simply a means permitting a WTO Member, which has entered into a customs union and which proposes to increase a rate of duty above bound levels, to modify or withdraw that concession under the procedures of Article XXVIII.[1231] The panel in *EEC - Oilseeds* found that there was, effectively, no modification or withdrawal of tariff concessions under Article XXIV:6 -- and no new balance of concessions achieved, i.e., "the balance of concessions negotiated in 1962 … was not altered" -- even though the tariff bindings on oilseeds had been withdrawn and reinstated intact.

10.69 We note that Article XXVIII may be invoked under specifically defined circumstances to modify or withdraw concessions. And, as noted above, Article XXIV:6 permits Members which have entered into customs unions to modify or withdraw those concessions under the procedures of Article XXVIII. Article XXVIII*bis*, in contrast, which provides a legal basis for Members to reduce and bind tariffs on a mutually advantageous (i.e. multilateral) basis, as a general rule does not provide a means to modify or withdraw tariff concessions.[1232]

10.70 We consider, therefore, that reasonable expectations may in principle be said to continue to exist with respect to tariff concessions given by Japan on film and paper in successive rounds of Article XXVIII*bis* negotiations. Nevertheless, the establishment of a case based on expectations from rounds concluded 18 or 30 years ago may be difficult. The United States must show that those expectations, as well as its more recent ones, are currently nullified or impaired.

10.71 Turning to the four products at issue in this dispute and their relevance to reasonable expectations claimed by the United States, we note that the first tariff concessions by Japan on photographic film and paper were in the Kennedy Round and that these related only to *black and white* film and paper; the subsequent concessions granted during the Tokyo and Uruguay Rounds related to *both colour and black and white* film and paper. In light of these facts, two general points can be made as to how we shall proceed with our Article XXIII:1(b) analysis. First, it is clear that the United States cannot claim any reasonable expectations on colour film or paper emanating from the Kennedy Round. Second,

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[1230]Ibid, 127-28, para. 146.

[1231]We note in this regard that Article XXIV:6 does not establish a separate procedure, but explicitly cross-references the procedures of Article XXVIII.

[1232]In respect of GATT 1947 negotiating rounds under Article XXVIII*bis*, it should be noted that there is a provision in the Dillon Round "Protocol Embodying the Results of the 1960-61 Tariff Conference" providing for the substitution of new concessions for old concessions where Dillon Round schedules provided for treatment for a product less favourable than that provided in a pre-existing schedule. BISD 8S/8, 9, para. 4. While there is no such provision in the Kennedy Round or Tokyo Round protocols, a similar provision applicable only to Egypt, Peru, South Africa and Uruguay is found in paragraph 7 of the Marrakesh Protocol. These provisions would not be relevant to Japan's progressive tariff reductions for film and paper in its Kennedy, Tokyo and Uruguay Round schedules.

because the US arguments and Japanese rebuttals focus mainly on the film market, and particularly on that for colour film, we consider it appropriate to also focus on the *film market* in our analysis and, as of 1979, on the *colour film market* in particular, supplementing this analysis as necessary with reference to the market for black and white film and both black and white and colour paper.

(ii) Legitimate expectations of a benefit

10.72 The text of Article XXIII:1(b) simply refers to "a benefit accruing, directly or indirectly, under this Agreement" and does not further define or explain what benefits are referred to. Past GATT panel reports have considered that such benefits include those that a Member reasonably expects to obtain from a tariff negotiation.

10.73 The first GATT report analysing Article XXIII:1(b) was the 1950 Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*. The Working Party found that the withdrawal by Australia of a wartime subsidy on sodium nitrate fertilizer while maintaining a subsidy on ammonium sulphate fertilizer, although not inconsistent with Australia's GATT obligations, nullified or impaired benefits accruing to Chile under the General Agreement. The Working Party agreed that impairment would exist if the Australian action

> "which resulted in *upsetting the competitive relationship* between sodium nitrate and ammonium sulphate could not *reasonably have been anticipated* by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate. The working party concluded that the Government of Chile had reason to assume, during these negotiations, that the war-time fertilizer subsidy would not be removed from sodium nitrate before it was removed from ammonium sulphate. [Reasons omitted.] For these reasons, the working party also concluded that the Australian action should be considered as relating to a benefit accruing to Chile under the Agreement, and that it was therefore subject to the provisions of Article XXIII. … The inequality created and the treatment Chile could have expected at the time of the negotiation, after taking into consideration all pertinent circumstances, including the circumstances mentioned above, and the provisions of the General Agreement, were important elements in the working party's conclusions".[1233]

The 1952 Panel Report on *Germany - Sardines* also based a non-violation finding on an "action of the German Government, which resulted in *upsetting the competitive relationship* between [different members of the same fish family that] could not *reasonably have been anticipated* by the Norwegian Government at the time it negotiated for tariff reductions on [fish]".[1234] In so finding, the panel noted that Norway "had reason to assume" that the fish they were interested in would not be treated less favourably.[1235]

10.74 Two GATT study groups elaborated these concepts in the context of subsidies, in each case focusing on whether a party had reasonable expectations that certain treatment would continue. In 1955, a working party wrote:

> "So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a *reasonable expectation*, failing evidence to the contrary,

[1233] *Australian Subsidy on Ammonium Sulphate*, BISD II/188, para. 12 (emphasis added).

[1234] BISD 1S/53, 58, para. 16 (emphasis added).

[1235] Ibid. The panel found that the fish at issue, although of the same family, were not "like products" and thus the differential tariff treatment did not violate Article I.

> that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned".[1236]

A 1961 report, citing the foregoing paragraph, stated:

> "In this connexion it was noted that the expression 'reasonable expectation' was qualified by the words 'failing evidence to the contrary'. By this the Panel understands that the presumption is that unless such pertinent facts were available at the time the tariff concession was negotiated, it was then reasonably to be expected that the concession would not be nullified or impaired by the introduction or increase of a domestic subsidy."[1237]

10.75 The 1990 Panel Report on *EEC - Oilseeds* approached a non-violation complaint as follows:

> "The Panel examined whether it was *reasonable* for the United States to *expect* that the Community would not introduce subsidy schemes systematically counteracting the price effect of the tariff concessions.
> . . .
>
> The Panel does not share the view of the Community that the recognition of the legitimacy of such expectations would amount to a re-writing of the rules of the General Agreement. The contracting parties have decided that a finding of impairment does not authorize them to request the impairing contracting party to remove a measure not inconsistent with the General Agreement; such a finding merely allows the contracting party frustrated in its expectation to request, in accordance with Article XXIII:2, an authorization to suspend the application of concessions or other obligations under the General Agreement. The recognition of the legitimacy of an expectation thus essentially means the recognition of the legitimacy of such a request. The recognition of the legitimacy of an expectation relating to the use of production subsidies therefore in no way prevents a contracting party from using production subsidies consistently with the General Agreement; it merely delineates the scope of the protection of a negotiated balance of concessions. For these reasons the Panel found that the United States may be assumed not to have anticipated the introduction of subsidies which protect Community producers of oilseeds completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds, and which have as one consequence that all domestically-produced oilseeds are disposed of in the internal market notwithstanding the availability of imports".[1238]

10.76 As suggested by the 1961 report, in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated. If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures.

10.77 Thus, under Article XXIII:1(b), the United States may only claim impairment of benefits related to improved market access conditions flowing from relevant tariff concessions by Japan to the extent

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[1236]Working Party Report on *Other Barriers to Trade*, adopted on 3 March 1955, BISD 3S/222, 224, para. 13 (emphasis added).

[1237]Panel Report on *Operation of the Provisions of Article XVI*, adopted on 21 November 1961, BISD 10S/201, 209, para. 28.

[1238]*EEC - Oilseeds*, BISD 37S/86, 128-129, paras. 147-148.

that the United States could not have reasonably anticipated that such benefits would be offset by the subsequent application of a measure by the Government of Japan. In the case before us, there is disagreement between the parties on this issue of reasonable anticipation with respect to each and every "measure" claimed by the United States to nullify and impair benefits accruing to it under GATT.

10.78 An obvious starting point for determining whether a measure was reasonably anticipated is to consider whether the measure was adopted before or after the conclusion of the relevant round of tariff negotiations, which is the approach taken in the 1961 report quoted above. The parties argue, however, that the matter is much more complicated than that. According to the United States, it was simply unaware of some "measures" that predated the conclusion of the relevant round of tariff negotiations due to their nontransparent nature. In other instances, the United States indicates that although it was aware of the existence of the "measures" prior to such conclusion, it did not know and could not have known of their significance in relation to access of imported film and paper to the Japanese market at the time of the relevant tariff negotiations. Japan, in contrast, maintains that the United States did anticipate or should have anticipated all of the alleged "measures". In this regard, it argues that exporting Members should reasonably anticipate GATT-consistent measures taken by an importing Member to improve the efficiency of a particular sector of its economy, such as the distribution sector.

10.79 We consider that the issue of reasonable anticipation should be approached in respect of specific "measures" in light of the following guidelines. First, in the case of measures shown by the United States to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the United States has raised a presumption that it should not be held to have anticipated these measures and it is then for Japan to rebut that presumption. Such a rebuttal might be made, for example, by establishing that the measure at issue is so clearly contemplated in an earlier measure that the United States should be held to have anticipated it. However, there must be a clear connection shown. In our view, it is not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy. As in the *EEC - Oilseeds* case[1239], we do not believe that it would be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures, such as "measures" to improve what Japan describes as the inefficient Japanese distribution sector. Indeed, if a Member were held to anticipate all GATT-consistent measures, a non-violation claim would not be possible. Nor do we consider that as a general rule the United States should have reasonably anticipated Japanese measures that are similar to measures in other Members' markets. In each such instance, the issue of reasonable anticipation needs to be addressed on a case-by-case basis.

10.80 Second, in the case of measures shown by Japan to have been introduced prior to the conclusion of the tariff negotiations at issue, it is our view that Japan has raised a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption. In this connection, it is our view that the United States is charged with knowledge of Japanese government measures as of the date of their publication. We realize that knowledge of a measure's existence is not equivalent to understanding the impact of the measure on a specific product market. For example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. However, where the United States claims that it did not know of a measure's relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect. Such a showing will need to be tied to the relevant points in time (i.e., the conclusions of the Kennedy, Tokyo and Uruguay Rounds) in order to assess the extent of the United States' legitimate expectations of benefits from these three Rounds. A simple statement that a Member's measures were

[1239] *EEC - Oilseeds*, BISD 37S/86, paras. 147, 148.

so opaque and informal that their impact could not be assessed is not sufficient. While it is true that in most past non-violation cases, one could easily discern a clear link between a product-specific action and the effect on the tariff concession that it allegedly impaired, one can also discern a link between general measures affecting the internal sale and distribution of products, such as rules on advertising and premiums, and tariff concessions on products in general.

10.81 Third, for our purposes, we consider the conclusion of the tariff negotiations in the three Rounds to be as follows: In the case of the Kennedy Round, it appears that tariff negotiations continued until the very end of the Round and thus we will consider the date of the conclusion of the Round, i.e., 30 June 1967, as the relevant date. In the case of the Tokyo Round, the conclusion of the Round was 12 April 1979, although the relevant Protocol was formally dated 30 June 1979. We will address where appropriate the US argument that the negotiations on film tariff reductions ended earlier. In the case of the Uruguay Round, tariff negotiations were substantially completed as of 15 December 1993, although the formal end of the Round occurred on the signing of the WTO Agreement in Marrakesh on 15 April 1994. Accordingly, we will use the date of 15 December 1993 as the conclusion of the Uruguay Round tariff negotiations.

(c) Nullification or impairment of benefit: causality

10.82 The third required element of a non-violation claim under Article XXIII:1(b) is that the benefit accruing to the WTO Member (e.g., improved market access from tariff concessions) is *nullified or impaired as the result of* the application of a measure by another WTO Member. In other words, it must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being *upset by* ("nullified or impaired … as the result of") the application of a measure not reasonably anticipated. The equation of "nullification or impairment" with "upsetting the competitive relationship" established between domestic and imported products as a result of tariff concessions has been consistently used by GATT panels examining non-violation complaints. For example, the *EEC - Oilseeds* panel, in describing its findings, stated that it had "found … that the subsidies concerned had impaired the tariff concession because they *upset the competitive relationship between domestic and imported oilseeds*, not because of any effect on trade flows".[1240] The same language was used in the *Australian Subsidy* and *Germany - Sardines* cases.[1241] Thus, in this case, it is up to the United States to prove that the governmental measures that it cites have upset the competitive relationship between domestic and imported photographic film and paper in Japan to the detriment of imports. In other words, the United States must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships.

10.83 We consider that this third element -- causality -- may be one of the more factually complex areas of our examination. In this connection, we note that in the three prior non-violation cases in which panels found that the complaining parties had failed to provide a detailed justification to support their claims, the issue turned primarily on the lack of evidence of causality.[1242] Four issues related to causation merit general discussion. First, the question of the degree of causation that must be shown -- "but for" or less. Second, the relevance of the origin-neutral nature of a measure to causation of nullification or impairment. Third, the relevance of intent to causality. And fourth, the extent to which measures may be considered collectively in an analysis of causation.

10.84 As to the first issue, the United States argues that it need not show that the measures in issue are a *"but for"* cause of impairment of market-access conditions for imported film and paper, but that it need only demonstrate that these measures are *"a"* cause of such distortion. Japan argues that a

[1240]Follow-up on the Panel Report, *EEC - Oilseeds*, BISD 39S/91, 114-115, para. 77 (emphasis added).

[1241]See para. 10.73 above.

[1242]*Uruguayan Recourse*, BISD 11S/95, 100, para. 15; *Japan - Semi-conductors*, BISD 35S/116, 161, para. 131; *US - Agricultural Waiver*, BISD 37S/228, 261-62, paras. 5.20-5.23.

clear linkage between the measure at issue and the alleged nullification or impairment must be proved by the complaining party in order to establish the necessary causal connection. Specifically, Japan states that the issue is whether the complaining party has provided a "detailed justification" in support of its claim that a measure has caused nullification or impairment. In our view, Japan should be responsible for what is caused by measures attributable to the Japanese Government as opposed, for example, to what is caused by restrictive business conduct attributable to private economic actors. At this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a *de minimis* contribution to nullification or impairment.

10.85 In respect of the second issue, Japan argues that all of the accused "measures" are neutral as to origin of the goods, none of them distinguishing between the imported and domestic products concerned, and that there is accordingly no causal connection between the alleged "measures", individually or collectively, and any unfavourable competitive conditions for imported film and paper. The United States responds that the "measures" at issue have had a disparate impact on imported products in their application, thereby upsetting competitive conditions of market access for imported film and paper. In our view, even in the absence of *de jure* discrimination (measures which on their face discriminate as to origin), it may be possible for the United States to show *de facto* discrimination (measures which have a disparate impact on imports). However, in such circumstances, the complaining party is called upon to make a detailed showing of any claimed disproportionate impact on imports resulting from the origin-neutral measure. And, the burden of demonstrating such impact may be significantly more difficult where the relationship between the measure and the product is questionable.

10.86 We note that WTO/GATT case law on the issue of *de facto* discrimination is reasonably well-developed, both in regard to the principle of most-favoured-nation treatment under GATT Article I[1243] and in regard to that of national treatment under GATT Article III.[1244] The consistent focus of GATT and WTO panels on ensuring effective equality of competitive opportunities between imported products from different countries and between imported and domestic products has been confirmed by the Appellate Body in its reports on *Japan - Alcoholic Beverages*[1245] and most recently in *Bananas III*[1246], with respect to both GATT and GATS non-discrimination rules. We consider that despite the fact that these past cases dealt with GATT provisions other than Article XXIII:1(b), the reasoning contained therein appears to be equally applicable in addressing the question of *de facto* discrimination with respect to claims of non-violation nullification or impairment, subject, of course, to the caveat, that in an Article XXIII:1(b) case the issue is not whether equality of competitive conditions exists but whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset.[1247]

10.87 The third issue is the relevance of intent to causality. The parties disagree in many cases whether the intent behind a specific measure is to limit imports or to promote an unrelated policy goal. From our reading of the measures and consideration of the parties' arguments, it is apparent that there may have been more than one reason motivating the adoption of measures. We note, however, that Article XXIII:1(b) does not require a proof of intent of nullification or impairment of benefits by a government adopting a measure. What matters for purposes of establishing causality is the impact of a measure, i.e. whether it upsets competitive relationships. Nonetheless, intent may not be irrelevant. In our

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[1243]See, e.g., Panel Report on *European Economic Community - Imports of Beef from Canada*, adopted on 10 March 1981, BISD 28S/92, 98, paras. 4.2, 4.3.

[1244]See Panel reports on *United States - Section 337 of the Tariff Act of 1930* ("*US - Section 337*"), adopted on 7 November 1989, BISD 36S/345, para. 5.11; *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted on 18 February 1992, BISD 39S/27, paras. 5.12-5.14 and 5.30-5.31; *US - Malt Beverages*, BISD 39S/206, para. 5.30; *US - Gasoline*, WT/DS2/R, para. 6.10; *Japan - Alcoholic Beverages*, WT/DS8/R, para. 6.33 and *Bananas III*, WT/DS27/R/ECU, paras. 7.179-7.180

[1245]WT/DS8/AB/R, adopted on 1 November 1996, p. 16.

[1246]WT/DS27/AB/R, pp. 97-99.

[1247]See para. 10.82 above.

view, if a measure that appears on its face to be origin-neutral in its effect on domestic and imported products is nevertheless shown to have been intended to restrict imports, we may be more inclined to find a causal relationship in specific cases, bearing in mind that intent is not determinative where it in fact exists. It remains for the complaining party to show that the specific measure it challenges does in fact nullify or impair benefits within the meaning of Article XXIII:1(b).

10.88 Finally, as for the US position that the Panel should examine the impact of the measures *in combination* as well as individually (a position contested by Japan), we do not reject the possibility of such an impact. It is not without logic that a measure, when analyzed in isolation, may have only very limited impact on competitive conditions in a market, but may have a more significant impact on such conditions when seen in the context of -- in combination with -- a larger set of measures. Notwithstanding the logic of this theoretical argument, however, we are sensitive to the fact that the technique of engaging in a combined assessment of measures so as to determine causation is subject to potential abuse and therefore must be approached with caution and circumscribed as necessary.

10.89 For the sake of a complete analysis of the US claims, we will examine each alleged "measure" in light of each of the three elements of a non-violation claim. Thus, even if we find an alleged "measure" is not a measure for purposes of Article XXIII:1(b), we will continue with an analysis of the other two elements. Similarly, even if we find that a measure should have been reasonably anticipated, we will nevertheless carry through with the causality analysis.

3. DISTRIBUTION "MEASURES"

(a) General

10.90 The US case against distribution "measures" may best be understood in the context of the general theme advanced by the United States to the effect that there exists in Japan a unique relationship between government and industry. The US argument is that for Japan to develop and implement its industrial policy, the government relies heavily on different types of quasi-governmental entities, including, *inter alia*, fair trade councils, advisory committees, study groups, research institutes, and chambers of commerce. The US position is that the participation of these entities in the "concerted adjustment" process increases the "peer pressure" on these entities to comply with the industrial policies adopted by the government.

10.91 In Japan's view, the United States relies on a distorted characterization of the Japanese system by attempting to lump all forms of government-industry cooperation, as well as administrative guidance, into one catch-all category of informal but binding regulations. Japan's position is that each "measure" should be examined on its own merit without any preconceived prejudice of a so-called "unique" Japanese system.

10.92 The United States argues that when the liberalization of international trading conditions became imminent, MITI and Japanese industry recognized the superiority of foreign firms which could create serious competition for Japanese manufacturers and their products. MITI and Japanese manufacturers, it is argued, consequently devised a plan to streamline Japan's distribution system in order to bring it under the control of domestic producers. The basic US position is that MITI sought to strengthen vertical distribution channels that would handle the products of a particular domestic manufacturer exclusively.

10.93 As noted above (para. 10.23), the United States claims that Japan's application of the following eight distribution "measures" encouraged and facilitated the creation of a market structure for

photographic film and paper in Japan in which imports are excluded from traditional distribution channels, thereby nullifying or impairing benefits accruing to the United States under Article XXIII:1(b):[1248]

(1) 1967 Cabinet Decision;
(2) 1967 JFTC Notification 17 on premiums to businesses;
(3) 1968 Sixth Interim Report on Distribution Modernization Outlook and Issues;
(4) 1969 Seventh Interim Report on Systemization of Distribution Activities;
(5) 1969 Survey Report regarding Transaction Terms;
(6) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film;
(7) 1971 Basic Plan for the Systemization of Distribution; and
(8) 1975 Manual for Systemization of Distribution by Industry: Camera and Film.

We will examine each of these eight distribution "measures" in the order listed above.

10.94 In the following analysis, we will consider whether the US claim in respect of each "measure" has been justified in light of the three required elements of Article XXIII:1(b): (i) the application of a measure; (ii) the existence of a benefit accruing to the United States; and (iii) the nullification or impairment of that benefit by the measure (causality).

(b) 1967 Cabinet Decision

10.95 The first distribution "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) is the Japanese Cabinet Decision on Liberalization of Inward Direct Investment of 6 June 1967 ("1967 Cabinet Decision")[1249]. The Cabinet Decision gave three points as

> "the basic direction of the countermeasures that the government should adopt … : (1) prevent disorder that may arise from the advancement of foreign capital; (2) create the foundation to enable our enterprises to compete with foreign enterprises on equal terms; and (3) actively strengthen the quality of [domestic] enterprises and reorganize the industrial system so that they can fully compete with foreign capital".[1250]

10.96 The United States asserts that this Cabinet Decision was a "watershed" in Japan's efforts to restructure Japanese industry to resist imminent foreign competition following capital liberalization in the 1960s, establishing a clear national priority to pursue distribution policies aimed at protecting domestic manufacturers from foreign competition. According to the United States, this decision formally endorsed the use of "countermeasures" to offset the effects of liberalization, making the protection of Japanese markets from foreign competition a high national priority. The decision further allegedly emphasized that the distribution sector was a key area for renovation and improvement so as to support the production sector, using a concerted industry-government approach.

10.97 Japan responds that the 1967 Cabinet Decision, which implemented the first stage of capital liberalization, was concerned generally with modernization and improved efficiency in the Japanese

[1248]We found in paragraph 10.21 above that three additional distribution "measures" cited by the United States -- specifically, application of the international contract notification provisions of JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (April 1971), JDB funding for Konica's wholesalers (1976) and SMEA funding for photoprocessing laboratories (July 1977) -- are not within the terms of reference of this Panel because they were not raised in the request for the establishment of the Panel in a manner consistent with Article 6.2 of the DSU. We have therefore excluded them from further consideration.

[1249]US Ex. 67-6. It should be noted that the 1967 Cabinet Decision is also cited by the United States as a promotion "countermeasure".

[1250]Ibid, p.4.

distribution sector so as to permit domestic industries to compete with foreign rivals in the new, less regulated business environment.

10.98 *Application of measure.* Although there can be little doubt that the 1967 Cabinet Decision as a whole constitutes a measure, within the meaning of Article XXIII:1(b), we note that the part of the decision addressing modernization of the Japanese distribution system is more in the nature of a general policy statement than either a decision on particular government actions or a mandate to private industry to follow governmental policy by taking specific actions. We further note that the parties differ on the issue of whether or not this measure is still in effect. While Japan submits and the United States concedes that the 1967 Cabinet Decision was repealed on 26 December 1980, the United States argues that the repeal affects only that portion of the 1967 Cabinet Decision relating to controls on international investment in Japan, not the distribution policies and liberalization "countermeasures" directed by the 1967 Cabinet Decision. In reply, Japan indicates that it is impossible to respond adequately to this contention because the United States does not specify which measures it believes resulted from the 1967 Cabinet Decision, and that in any case any measures not specifically identified are not properly before this Panel.

10.99 Reviewing the 1967 Cabinet Decision, we note that it addresses, in general terms, broad categories of measures which the Japanese Government considered as needing to be taken in conjunction with the liberalization of direct investment rules. The decision indicates that

> "[a]s for our national economy as liberalization progresses, although foreign capital may advance into many of our industries, it is hoped that our firms will be able to compete fairly and effectively with them fairly and cooperate with them on equal terms, thereby promoting national economic interests. The largest future goal of the people, business circles and government must be the swift attainment of such a stage by our national economy. … [I]t would be necessary to restrain foreign enterprises coming into Japan after liberalization from disturbing order in domestic industries, by resorting to the strength of their superior power, and from advancing into the non-liberalized sectors by evading control. … The establishment of these countermeasures for strengthening the capacity of our enterprises for international competition and for preventing foreign enterprises from disturbing order in our industries and market would be a basic necessity if the liberalization is to be promoted and if our people are to enjoy its economic benefits".[1251]

10.100 By its terms, the Cabinet Decision of 26 December 1980 abolishes the 1967 Cabinet Decision.[1252] However, although there can be no doubt that the 1967 Cabinet Decision has been abolished, it is not clear to us that the broad policies on modernization of the manufacturing and distribution sectors outlined in the 1967 Cabinet Decision have been abandoned. The 1980 Decision provides only that

> "1. The Government will apply the Foreign Exchange and Foreign Trade Control Law in an appropriate manner for the management of foreign direct investment …
>
> 2. Furthermore, the Government, for the time being, will deal carefully, as we have done so in the past with foreign direct investment in agriculture, forestry, mining, oil, and leather and leather product manufacturing …".

In our view, the 1967 policies could have been carried forward, consistently with the 1980 Decision. To the extent the policies have not been abandoned, we consider that they continue to constitute a measure within the meaning of Article XXIII:1(b).

[1251]Ibid, pp. 2, 4.

[1252]Concerning the Application of Inward Investments, Cabinet Decision, 26 December 1980, Japan Ex. B-55.

10.101 *Benefit accruing.* We recall the US claim that the benefits accruing to it are its legitimate expectations of improved market access resulting from Japanese tariff concessions on film and paper at the conclusion of the Kennedy, Tokyo and Uruguay Rounds. The United States maintains that it could not have reasonably anticipated the impact of the 1967 Cabinet Decision during the Kennedy Round negotiations. Specifically, according to the United States, at the time of the Kennedy Round negotiations there were no pertinent facts available concerning the actions Japan was preparing to take to implement its "liberalization countermeasures programme" and that as of 30 June 1967, the Cabinet Decision had yet to be promulgated and implemented. Similarly, the United States argues that it was unaware of the impact of this Cabinet Decision on the film market in Japan even as of the conclusion of the Tokyo and Uruguay Rounds.

10.102 Japan argues that the United States cannot properly claim to have any legitimate expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, several weeks following the Cabinet Decision of 6 June 1967. Moreover, according to Japan, the Cabinet Decision was preceded by a high-level public debate on capital liberalization, a debate of which the United States would have been aware. Japan argues that the measure should have been anticipated by the United States *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.103 We note that this Cabinet Decision of 6 June 1967 was published in Kampo (Japan's official gazette) on 21 June 1967[1253], thus predating the formal conclusion of the Kennedy Round (30 June 1967) by nine days. We recall the test developed in our general discussion of reasonable anticipation to the effect that a Member is presumed to have knowledge of a measure as of the date of its publication, but that this presumption may be rebutted where the Member identifies exceptional circumstances. Because of the short time period between this particular measure's publication and the formal conclusion of the Kennedy Round, we consider it difficult to conclude that the United States should be charged with having anticipated the 1967 Cabinet Decision since it would be unrealistic to expect that the United States would have had an opportunity to reopen tariff negotiations on individual products in the last few days of a multilateral negotiating round. Accordingly, we consider that the United States, in relation to the 1967 Cabinet Decision, has legitimate expectations of improved market access emanating from the Kennedy Round. However, applying the test developed earlier, we find that the United States may not claim legitimate expectations arising from the Tokyo and Uruguay Round concessions.

10.104 *Impairment and causality.* The United States argues that improved market access to the Japanese distribution system for film and paper emanating from Japan's Kennedy Round concessions on black and white film and paper are nullified and impaired as the result of the 1967 Cabinet Decision and subsequent "liberalization countermeasures" of the Japanese Government. Japan contends that the 1967 Cabinet Decision contains only very general policy statements as to what sorts of actions the government considered to be desirable in order to modernize Japan's overall distribution sector following capital liberalization; it does not set in motion any specific measures which could be said to discriminate *de jure* or *de facto* against the access of imports to the Japanese market. Japan argues that the United States has not provided any evidence to the Panel demonstrating "impairment" resulting from the Cabinet Decision.

10.105 In our analysis of the claim that the 1967 Cabinet Decision impairs market-access benefits accruing to the United States, we note that one theme found in the 1967 Cabinet Decision is that the Japanese Government should find ways to help modernize the distribution sector so as to respond to the intensified competition that capital liberalization was expected to bring. However, the portions of the Cabinet Decision addressing the need to modernize the Japanese distribution system are in the nature of very general policy statements, which do not provide for clear mandates, orders or

[1253]Table U of Japan's First Submission, p. 188.

recommendations to government entities or private companies to act in a specific way. In fact, the United States has not been able to point to any specific governmental actions or private sector activity in the distribution sector emanating from the 1967 Cabinet Decision in and of itself (although it does argue that in general terms most of the subsequent distribution "measures" it cites are grounded in the 1967 Cabinet Decision). Accordingly, we find that the United States has not demonstrated that the general policy statements contained in the 1967 Cabinet Decision, nullify or impair benefits accruing to the United States within the meaning of Article XXIII:1(b). At most, in our view, the 1967 Cabinet Decision is part of the context for later actions taken by the Government of Japan.

10.106 Thus, while the 1967 Cabinet Decision may still be viewed as a measure for purposes of Article XXIII:1(b) and the United States is not charged with having anticipated the measure prior to the conclusion of the Kennedy Round, the United States should have anticipated the Decision as of the conclusion of the Tokyo and Uruguay Rounds. Moreover, the United States has not shown that the measure nullifies or impairs benefits accruing to it from the Kennedy Round in respect of black and white film and paper, nor from the Tokyo or Uruguay Rounds in terms of black and white and colour film and paper.

(c) 1967 JFTC Notification 17 on premiums to businesses

10.107 The second distribution "measure" we shall examine is JFTC Notification 17 of 10 May 1967, which sets a ceiling of 100,000 yen per year on premiums between businesses (e.g., manufacturers and wholesalers) ("JFTC Notification 17").[1254] This notification is based on Article 3 of the Premiums Law. It limits to 100,000 yen annually the right of manufacturers of certain goods, including manufacturers of photosensitivity materials, to offer cash or other premiums to wholesalers or retailers as an inducement for the wholesaler or retailer to begin handling the manufacturer's products, or to meet other transaction conditions. An exception to this prohibition on premiums in excess of 100,000 yen (Item 2-4) allows a manufacturer to offer premiums to employees of distributors and retailers that are in a special relationship with the manufacturer (e.g. through capital investment, interlocking directorates, etc.). JFTC Notification 17 was repealed in April 1996 in the course of review of the Premiums Law.

10.108 *Application of measure.* The United States contends that JFTC Notification 17 is a governmental measure. While conceding that the measure was repealed in April 1996, the United States argues that other provisions of Japanese law make the repeal meaningless. Specifically, premiums from manufacturers to wholesalers are still subject to Designation 9 of JFTC Notification 15 of 1982[1255], i.e., the provision governing the use of "unjust inducements" under the Antimonopoly Law. That designation prohibits premium offers in excess of "normal business practice". Thus, according to the United States, given that JFTC Notification 17 set industry practice for 19 years, it is uncertain at best as to whether present restrictions under Designation 9 will differ at all from the situation under JFTC Notification 17. Japan counters that, although JFTC Notification 17 was at one time a governmental measure, it was formally repealed in April 1996. Thus, for Japan, there is no governmental measure in issue. As for the alleged continuation of the policy underlying JFTC Notification 17 through Designation 9 of JFTC Notification 15 (1982), Japan responds that the United States is belatedly raising a "measure" or policy that was not specifically identified in its panel request and which is therefore outside the Panel's terms of reference. Japan further states that under Designation 9 of JFTC Notification 15, the automatic trigger level of 100,000 yen no longer exists and the burden of proof lies with the JFTC.

[1254]US Ex. 67-4; Japan Ex. D-42. It should be noted that JFTC Notification 17 is also claimed by the United States to be a promotion "countermeasure".

[1255]US Ex. 82-6.

10.109 We note that both parties agree that between 1967 and 1996, JFTC Notification 17 was a governmental measure. We also note that they both agree that the measure was repealed in April 1996. The issue before us, therefore, is whether or not we should take cognizance of what the United States describes as a continuation of the policy of JFTC Notification 17 by means of Designation 9 of JFTC Notification 15 (1982), the latter not having been specifically identified in the US panel request. On this issue, we recall that JFTC Notification 17 itself was also not specifically identified in the panel request, but that we decided to include it within our terms of reference given that it was a measure taken pursuant to the Premiums Law which was specifically identified in the request. JFTC Notification 15 of 1982, in contrast, is a measure taken pursuant to Article 2.9 of the Antimonopoly Law of 1947. While the Antimonopoly Law was cited in the panel request, it was cited only in respect of a "measure" relating to dispatched employees. Consequently, we found that "measures" unrelated to dispatched employees (i.e., measures relating to international contract notification and to guidance on loss-leader advertising and dumping) were not within our terms of reference. That finding suggests that we should also not consider Designation 9 of JFTC Notification 15 to be within our terms of reference. Moreover, even if we were to consider that it is appropriate to take into account the US argument that the policy underlying JFTC Notification 17 (1967) has continued to be applied under Designation 9 of JFTC Notification 15 (1982), we note that the United States has not demonstrated that the policy underlying JFTC Notification 17 has been continued through ongoing administrative guidance under the Designation.

10.110 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that it could not have anticipated the impact of JFTC Notification 17 at the time of the Kennedy Round negotiations because there were no pertinent facts available at that time concerning the actions Japan was preparing to take to implement its liberalization "countermeasures" programme. The United States further argues that it could not have reasonably anticipated the impact of this measure even as of Japan's concessions on film in paper at the conclusion of the Tokyo and Uruguay Rounds. We also recall the Japanese position that the United States cannot properly claim to have any legitimate expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, more than a month and a half following issuance JFTC Notification 17 on 10 May 1967. Japan argues that the United States should have reasonably anticipated the measure *a fortiori* as of the conclusion of the two later rounds.

10.111 In our view, given that the publication of JFTC Notification 17 predated the conclusion of the Kennedy Round, it is difficult to conclude that the United States should not be held to have anticipated JFTC Notification 17 in advance of Japan's first tariff concessions on film and paper. As we noted earlier, the United States is charged with knowledge of Japanese regulations on publication. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. We are not persuaded that the United States has met its burden of establishing that in relation to JFTC Notification 17, it has legitimate expectations of improved market access emanating from the Kennedy Round. We consider that this reasoning applies *a fortiori* to claimed legitimate expectations arising from the Tokyo and Uruguay Round concessions.

10.112 *Impairment and causality.* The United States contends that even though JFTC Notification 17, which set a 100,000 yen ($278 in 1967) maximum annual limit on the premium that a manufacturer could give to a wholesaler or retailer (or a primary wholesaler to a secondary wholesaler or retailer) for all products traded between the two, applied to both domestic and foreign enterprises, it upset the competitive relationship between the two. In the US view, foreign enterprises entering the Japanese market or trying to expand their market share following tariff reductions and import liberalization, were not able to invest in their own distribution networks until the 1970s when investment restrictions

were progressively lifted. Thus, foreign enterprises had to compete with Japanese manufacturers for existing wholesalers and distributors to carry their products. JFTC Notification 17 limited the ability of foreign enterprises to outbid Japanese enterprises in the competition for Japanese distributors by setting an arbitrarily low ceiling on the amount of premiums that a manufacturer could give to a wholesaler or retailer in any one year. In addition, the United States argues that foreign manufacturers, which had no direct relationships with Japanese wholesalers because of Japan's requirement that they deal with a sole import agent, were prohibited from availing themselves of the exception under Item 2-4 of the JFTC Notification 17 which permitted the offering of unlimited premiums to the employees of enterprises that were in exclusive, vertically-integrated relationships with the manufacturer.

10.113 Japan responds that JFTC Notification 17 did not single out the photographic materials industry: more than 100 industries were covered. In any event, the regulation only restricted excessive premium offers to distributors, not other promotional activities. The rationale for the restriction was that excessive offers could impair fair and free price competition in the distribution sector and could increase the distribution cost to the detriment of consumer interests. Low price offers, rebates and offers of goods to assist the other parties' promotional activities were not regulated under this JFTC notification. Japan also argues that the United States misconstrues the nature of the exception found in Item 2-4. Premiums offered to employees of companies which were in a special relationship, through share holdings or interlocking directorates, with the manufacturer, did not fall under the regulation, because they were no different than premiums offered to one's own employees. The exception applied only to transactions which were virtually identical to operations within a single entity. Fuji and its primary wholesalers were not eligible because they were not in such a special relationship. Finally, as to the US arguments on investment restrictions, Japan responds that during the period before capital liberalization, if Kodak had wanted to use investments to establish and build relationships with any single-brand primary wholesalers it could have done so. According to Japan, Kodak's exclusive importer, Nagase, could and did invest in distribution by buying two primary wholesalers; it could have legally made equity investments in Fuji's primary wholesalers if it had wanted to. For Japan, US arguments about capital restrictions interfering with Kodak's business plans makes no sense because Kodak exercised virtually none of its legal options during the period of restrictions on investments or even after such restrictions were lifted.

10.114 Assessing the issue of impairment and causality, we note that JFTC Notification 17 appears to be directed at promotional activities with regard equally to domestic and foreign products. It is not specifically aimed at imports, nor does it specifically target film and paper, even though it lists "photographic materials" among the many consumer products to which it is directed. Although there is reference in a press summary to the need to counteract the influence of US capital[1256], the JFTC explanation cites excesses in Japanese industry leading to distortions in intrinsic competition for price, quality and beneficial services, and "cut-throat sales practices promoted by huge capital power" as justifications for the measure.[1257]

10.115 On balance, in our view, the evidence concerning its adoption suggests that this measure is directed against potential excesses of promotional activities in the distribution sector in general. It targets excessive premiums given by manufacturers to wholesalers and by wholesalers to retailers. It does not, however, attempt to regulate other forms of promotional activity, such as low price offers and rebates. Moreover, while we do not reject the notion that formally neutral measures may be shown

[1256]Severe Restrictions on Businesses for Premium Offers: Shatokuren Hears JFTC Explanations at Jyoshi Kaikan on the 12th, Nihon Shashin Kogyo Tsushin, 20 June 1967, US Ex. 67-8, p. 1. In this press summary, JFTC explained that "[t]he primary objective of [Notification 17] is (a) rationalization of the distribution stage … ; and (b) eliminat[ion] of the stronger prey upon the weaker sales competition based on the power of capital … If US capital were to conduct [premium offers] directed at the Japanese distribution sector. this would be no match for [Japan], so the restrictions should be applied as a breakwater before liberalization". Ibid.

[1257]US Ex. 67-10, p. 2.

to be applied to imported products in a manner that upsets the competitive relationship between domestic and imported products to the detriment of imports[1258], the United States has not been able to point to any single instance where implementation of JFTC Notification 17 has led to such a result in respect of US film or paper. For example, we note that at the time in question, Kodak had a relationship with a primary wholesaler -- Asanuma. That relationship later ended in 1975, apparently because of Kodak's refusal to deal directly with Asanuma.[1259] The United States has not shown that its inability to give premiums to Asanuma employees was relevant to the termination. In addition, the US contextual arguments about the impact of Japanese restrictions on investments, to the extent that they are true[1260], do not demonstrate anything in relation to the application of JFTC Notification 17. Finally, as to the exception provided in Item 2-4 of JFTC Notification 17, the evidence suggests that this provision, neither inherently nor in its application, discriminates against imported film or paper. Although it appears that Kodak was unable to avail itself of this exception, due to the structure of Kodak's distribution relationships, the same was true in the case of Fuji.

10.116 On the evidence before us, therefore, we are not persuaded that JFTC Notification 17, and its implementation in the Japanese photographic materials sector (to the extent this occurred), have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market by preventing Kodak from establishing distribution relationships in that market. Accordingly, we find that the United States has not demonstrated that JFTC Notification 17 nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.117 Thus, while the United States has shown that JFTC Notification 17 is a measure for purposes of Article XXIII:1(b), it is no longer in effect. Moreover, the United States has not demonstrated that it should not be held to have anticipated Notification 17 in relation to its Kennedy Round expectations in respect of black and white film and paper and it has not demonstrated that Notification 17 nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has shown only one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(d) 1968 Sixth Interim Report

10.118 The third distribution "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) is the Sixth Interim Report on "Distribution Modernization Outlook and Issues" (5 August 1968), prepared by MITI's Industrial Structure Council's Distribution Committee ("Sixth Interim Report").[1261] This Sixth Interim Report focuses on the need for broad-based efforts to modernize the distribution system in Japan. The United States argues that the report analyzes ways that foreign manufacturers might gain control of Japan's distribution system and highlights the government's concerns over such control, including:

> "1. There is a risk that growth sectors will fall under the monopolistic control of foreign capital, resulting from the difference in capital resources and the like.
>
> 2. There is a risk that the process of sales expansion by foreign capital affiliated distribution enterprises will aggravate excessive competition and hinder the smooth

[1258]See discussion in paras. 10.85-10.86 above.

[1259]Affidavit of Takenosuke Katsuoka, Japan Ex. A-11, pp. 2-4.

[1260]We note in this regard Japan's reference to a statement by the President of Kodak Japan, Mr. Albert Sieg, in a 1988 interview: "The glaring mistake was waiting so long to take aggressive action in this market. We should have been here with this approach ten years ago. Clearly, the momentum of our local competitors got a strong forward thrust, and our task will be much, much more difficult". Japan Ex. B-45. Japan also indicates that Kodak could have established a 50-50 joint venture, such as Kodak Nagase (set up in 1986), as early as 1971, or a fully-owned subsidiary as of 1976..

[1261]US Ex. 68-8 and Japan Ex. B-7.

> implementation of distribution modernization plans, and the [established] order of trade will be disrupted.
>
> 3. There is a risk that the manufacturing sector will be dominated by controlling the sales routes, bringing about the international subcontracting of Japanese industry".[1262]

10.119 We note the US position that under Japan's systemization plan, the nature of the links between companies in a "system" would include commercial transaction ties, physical ties, and information ties. Each of these ties would become essential to ensuring that the system operated as a single and exclusive whole. The United States argues that horizontal business cooperation would make the system more difficult for foreign firms to penetrate because many of the individual actors in the system would be bound together in a common distribution channel tied to and dominated by domestic manufacturers.

10.120 In response, Japan contends that the Sixth Interim Report is concerned with modernization of the distribution sector as a whole, to promote efficiency and competitiveness of domestic industries, not with impeding access of imported goods to distribution channels in Japan. Distribution modernization would also help the Japanese distribution sector compete with foreign capital. As cited by Japan, the preface to the Sixth Interim Report provides:

> "Today, the delay in modernizing distribution activities is often seen to prevent the effectiveness of economy and improvement of people's living. The necessity of improving the structure of the distribution industry is gradually increasing. In addition, the modernization of distribution activities is pressed by the following two viewpoints. First, liberalization of direct investment by foreign capital is drawing near. It is necessary to quickly establish [market] conditions in which domestic capital could compete with foreign capital. Second, improving productivity of distribution activities is considered an effective way to solve the consumer price issue".[1263]

MITI's concern, according to Japan, was that domestic manufacturers would be stuck with existing distribution channels while foreign producers freed from capital restrictions would be able to construct their own modern (and possibly exclusive) distribution channels.

10.121 *Application of measure.* The United States contends that the Sixth Interim Report is a governmental measure and that it is effectively still in force. Japan responds that the Sixth Interim Report is not a governmental measure and is nothing more than a report of an advisory council, setting out certain policy options for the government. Japan further argues that this report is not currently in effect. According to Japan, MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. These recommendations were made, and private businesses followed them or ignored them at their own choosing. This report, Japan maintains, was never government action at all, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

10.122 In examining the nature of the Sixth Interim Report, we note that the Distribution Committee was a committee set up by MITI's Industrial Structure Council which itself was an advisory council composed of academics and industry representatives, not government officials. And, whereas the Industrial Structure Council was established pursuant to a Cabinet Order, the advisory nature of this Council and the Distribution Committee created under it does not seem to be in doubt. Applying the analysis we developed above in our general discussion of governmental measures, we note that the Sixth Interim Report is clearly not in the nature of a binding law or regulation. It provides no incentives

[1262]US Ex. 68-8, p. 8.
[1263]Preface to Sixth Interim Report, Japan Ex. B-7.

or disincentives to the private sector to take any particular action. Essentially, the Sixth Interim Report is an analysis of the current and future status of the distribution sector that recommends certain general policies for the government to follow in the distribution sector. Those listed specifically are (i) the promotion of organized and cooperative business activity so as to realize economies of scale, (ii) the modernization of facilities and management systems, (iii) the securing of workforce and personnel training, and (iv) the rationalization of trade practices and transaction terms. Since it is a general report *to* the government, it cannot in itself be viewed as a government exhortation to the private sector to take specific actions in the distribution sector and it does not entail the likelihood of compliance as exemplified by *Japan - Semi-conductors* and *Japan - Agricultural Products* (see paras. 10.45-10.50 above). These recommendations are made in general terms; they are not specific enough to warrant concluding, even in the Japanese system, that they could have the same effect as formal government action. As such, the Sixth Interim Report appears to be a study report setting out possible options for governmental action, and we are not persuaded that it is in the nature of a measure attributable to the government. Accordingly, we find that the United States has not demonstrated that the Sixth Interim Report is a measure within the meaning of Article XXIII:1(b).

10.123 If despite our finding above, we assume that the Sixth Interim Report is a governmental measure, there is still the question of whether or not it is still in force. Since a report by a quasi-governmental entity is normally not formally adopted or promulgated by a government, it is not surprising that there is no evidence to suggest that it has been withdrawn or otherwise disavowed by the Government of Japan. Nonetheless, in light of this lack of disavowal, and even if there are more recent government policy statements on modernization of the Japanese distribution sector, if the Sixth Interim Report is a measure, it may still be in effect.

10.124 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen Japan's intention to issue the Sixth Interim Report (1968) before the conclusion of the Kennedy Round. Similarly, the United States argues that it could not have anticipated the impact of this measure on the Japanese film market as of the conclusion of the Tokyo and Uruguay Rounds. To this, Japan responds that the United States should have reasonably anticipated the Sixth Interim Report as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's decision to help promote modernization of the Japanese distribution sector, following a high-profile, publicized debate on capital liberalization. Japan further argues that the United States should reasonably have anticipated the measure *a fortiori* as of the Tokyo and Uruguay Rounds.

10.125 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the Sixth Interim Report, we recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result (para. 10.79). In this regard, we are not persuaded by Japan's argument that the Sixth Interim Report is a logical outgrowth of Japan's pre-Kennedy Round policies on distribution and therefore should have been anticipated by the United States. In the first place, we have found that the 1967 Cabinet Decision did not call for any specific actions to be taken by the Government of Japan or private companies. Moreover, the First through the Fifth Interim Reports contain in part different recommendations from those of the Sixth Interim Report. Thus, it cannot be said that the specific conclusions of the Sixth Interim Report were clearly contemplated in the 1967 Cabinet Decision and these earlier reports. Additionally, the nature of the report -- it emanates from an advisory group composed of academics and industry representatives, is non-binding, is not product-specific in its recommendations, and is more in the nature of a policy option paper submitted to the government than what could properly be said to be a governmental measure -- is such that we find that the United States should not be charged with having anticipated its appearance prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we find that these relate only to black and white film and paper.

10.126 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult not to conclude that the United States should be held to have anticipated this 1968 report and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to the Sixth Interim Report it has legitimate expectations of improved market access for photographic film and paper emanating from the Tokyo or Uruguay Rounds.

10.127 *Impairment and causality.* The United States contends that the Sixth Interim Report recommended that MITI take steps to systematize distribution by: adjustment of market conditions; rationalizing physical distribution techniques (packaging, storage, transportation, cargo handling)[1264]; and making improvements in the distribution environment (location of distributors, information links between manufactures, wholesalers, and retailers, and financing).[1265] The overall goal, the United States maintains, was to improve the efficiency of distribution channels and, more importantly, give control of these channels to domestic manufacturers in Japan by "striving for cooperation and systemization of enterprises through producers, intermediate processors, and wholesalers".[1266] The United States notes that the report also states that "[t]here is a risk that the manufacturing sector will be dominated by controlling the sales routes, bringing about the international subcontracting of Japanese industry".[1267]

10.128 Japan responds that MITI saw the backwardness of the distribution sector as an "Achilles' heel" that would render domestic manufacturers unable to compete with foreign products. Specifically, the concern was that domestic manufacturers would be stuck with existing distribution channels while foreign producers, freed from investment restrictions, would be able to construct their own modern (and exclusive) distribution channels. However, Japan emphasizes, MITI policy on modernizing the distribution sector sought to promote efficiency and competitiveness of domestic industries following liberalization, not to block imports. Overall, Japan argues that the United States has not provided any evidence to the Panel to show the causal connection between the measure and the alleged impairment.

10.129 In assessing the issue of whether or not US market-access expectations are impaired by the application of the Sixth Interim Report, we note that: first, the report is an advisory report directed to the government, setting out non-binding policy options for the government; second, these policy options are directed to modernizing and improving the overall efficiency of the distribution sector in Japan; third, they are not at all product-specific; and fourth, the United States has not been able to point to any specific government actions resulting from this policy options report, except perhaps for the 1970 Guidelines discussed below. We note that while it is true that the report supports cooperation among different levels of the distribution system, it also discusses the need to offset the possible adverse effects of such cooperation.[1268] In any event, even if we assume that the Sixth Interim Report constitutes administrative guidance to the Japanese photographic film industry to integrate vertically and use single-brand primary wholesalers, there are timing problems with respect to causation since most of the wholesale distribution sector for film in Japan was already single-brand in 1968 (see para. 10.173 below).

10.130 In addition, we note that the report appears to be origin-neutral. While the report refers to the need to prepare for the arrival of foreign capital, in our view, the clear emphasis of the report is on the need to improve the competitiveness of the Japanese distribution sector so that it can compete effectively. The report is not directed at preventing the arrival of foreign capital, although it suggests

[1264]Sixth Interim Report, US Ex. 68-8, p. 9.
[1265]Ibid.
[1266]Ibid, p. 14.
[1267]Ibid, p. 8.
[1268]Ibid, e.g., pp. 15, 18.

a need to improve the competitive position of Japanese firms. It in fact lists advantages that will flow from liberalization in respect of increased efficiency in the Japanese distribution sector.[1269] While it is possible that a measure that is formally neutral as to the origin of products may be shown to be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports[1270], the United States has not been able to point to any single instance where application of the Sixth Interim Report has done so in respect of US film or paper.

10.131 In this context, it is difficult to conclude that this advisory report has contributed in any meaningful manner to the impairment of US market-access expectations emanating from the Kennedy Round. Also, there is no evidence that application of the report has resulted in impairment of legitimate expectations flowing from the Tokyo and Uruguay Rounds. At most, we consider that the report establishes part of the context of later cited measures of the Japanese Government, such as the 1970 Guidelines and 1971 Basic Plan, which are discussed below. Accordingly, we find that the United States has not demonstrated that the Sixth Interim Report nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.132 Thus, while the United States has shown that it should not be held to have anticipated the Sixth Interim Report in relation to its Kennedy Round expectations in respect of black and white film and paper, it has not demonstrated that the Sixth Interim Report is a measure for purposes of Article XXIII:1(b) or that it nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim.

(e) 1969 Seventh Interim Report

10.133 The fourth distribution "measure" is the Seventh Interim Report on "Systemization of Distribution Activities, prepared by MITI's Industrial Structure Council's Distribution Committee in July 1969.[1271] Like the Sixth Interim Report of this committee, which has been addressed above under the heading "standardization of transaction terms", the Seventh Interim Report sets out a series of policy options for the consideration of MITI. We note that the Seventh Interim Report was issued as a "first step in meeting the challenges currently facing Japan's distribution sector".[1272] In the Committee's perception, the aim of systemization was to improve functionality and productivity. The Committee stated that the best approach to systemization was to look at the distribution sector not as a cluster of separate entities but as a single whole and thereby apply a systems approach. Acknowledging that with respect to goods the most important factor is distribution, the Committee stated that systemization could only progress through centralized processing of physical control at distribution centres and stock points. The Committee identified three approaches (commodity, institutional and functional) to systemization and proposed the following policies to the government: (i) establishing a Distribution Systemization Council; (ii) presenting guide posts and promoting standardization; (iii) establishing a system for providing distribution-related information; and (iv) providing incentives in areas such as financing and taxation.

10.134 The United States presents the Seventh Interim Report as, in essence, one of the key foundation stones of Japan's alleged plan to systematize the distribution sector in Japan. In its view, the report suggests that to the extent that fostering efficiency becomes inconsistent with protection against foreign competition, the latter goal should prevail. The United States argues in particular that the premise of distribution systemization was to reorganize the Japanese distribution system along vertical and

[1269]Ibid, p. 7.

[1270]See discussion in paras. 10.85-10.86 above.

[1271]Distribution Systemization - Industrial Structure Council Distribution Committee, 22 July 1969 (Seventh Interim Report 1969), US Ex. 69-4.

[1272]Ibid, p.1.

horizontal lines by (i) the formation and strengthening of product-specific vertical distribution ties between a Japanese manufacturer and various wholesalers, and between the wholesalers and retailers, and (ii) the creation of linkages -- commercial, physical and information ties -- among horizontal elements of the distribution system, which could be brought more easily into the systemized vertical arrangement (paras. 5.81-5.82). Japan counters that, in MITI's view, the backwardness of the distribution system would render domestic manufacturers unable to compete with foreign producers. Specifically, the concern was that domestic manufacturers would be stuck with existing distribution channels while foreign producers, freed from capital restrictions, would be able to construct their own modern (and exclusive) distribution channels (para. 5.83).

10.135 *Application of measure.* As in the case of the Sixth Interim Report, the United States contends that the Seventh Interim Report is a governmental measure and that it is effectively still in force. And Japan responds that the Seventh Interim Report is not a governmental measure, that it is nothing more than a report of an advisory council, setting out certain policy options for the government. Japan further argues that this report is not currently in effect. According to Japan, MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. These recommendations were made, and private businesses followed them or ignored them at their own choosing. This report was never government action at all, Japan maintains, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

136 In examining the nature of the alleged "measure", we again note that the Distribution Committee was a committee set up by MITI's Industrial Structure Council which itself was an advisory council composed of academics and industry representatives, not government officials. And, whereas the Industrial Structure Council was established pursuant to a Cabinet Order, the advisory nature of this Council and of the Distribution Committee created under it does not seem to be in doubt. Applying the analysis we developed earlier, we note that the Seventh Interim Report is clearly not in the nature of a binding law or regulation. It provides no incentives or disincentives to the private sector to take any particular action. Since it is in itself a general report *to* the government, it cannot be viewed as a government exhortation to the private sector to take specific actions in the distribution sector and it does not entail the likelihood of compliance as exemplified by *Japan - Semi-conductors* and *Japan - Agricultural Products* (see paras. 10.45-10.50 above). As in the case of the Sixth Interim Report, we do not consider that the recommendations are specific enough to conclude, even in Japan, that they could have the same effect as formal government measures. As such, the Seventh Interim Report appears to be no more than a study report setting out possible options for governmental action, and we are not persuaded that it is in the nature of a governmental measure. Accordingly, we find that the United States has not demonstrated that the Seventh Interim Report is a measure within the meaning of Article XXIII:1(b).

10.137 If, despite our finding above, we assume that the Seventh Interim Report is a governmental measure, there is still the question of whether or not it is still in force. Since a report by a quasi-governmental entity is normally not formally adopted or promulgated by a government, it is not surprising that there is no evidence to suggest that it has been withdrawn or otherwise disavowed by the Government of Japan. In light of this lack of disavowal, and even if there are more recent government policy statements on modernization of the Japanese distribution sector, if the Seventh Interim Report is a measure, it may still be in effect.

10.138 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen Japan's intention to issue the Seventh Interim Report (1969) before conclusion of the Kennedy Round. Similarly, the United States argues that it still could not reasonably anticipate the significance of the measure for the Japanese film market as of the conclusion of the Tokyo and Uruguay Rounds. To this, Japan responds that the United States should have reasonably anticipated the Seventh Interim Report as of June 1967 because

the policies discussed therein were the logical outgrowth of MITI's decision to help promote modernization of the Japanese distribution sector, following a high-profile, publicized debate on capital liberalization. Japan further argues that the United States should have reasonably anticipated the measure *a fortiori* as of the end of the Tokyo and Uruguay Rounds.

10.139 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the Seventh Interim Report, we recall, as we did in the case of the related Sixth Interim Report, our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result. In this regard, we are not persuaded by Japan's argument that the Seventh Interim Report is a logical outgrowth of Japan's pre-Kennedy Round policies on distribution and therefore should have been anticipated by the United States. In the first place, we have found that the 1967 Cabinet Decision did not call for any specific actions to be taken by the Government of Japan or private companies. Moreover, the First through the Sixth Interim Reports contain in part different recommendations from those of the Seventh Interim Report. Thus, it cannot be said that the conclusions of the Seventh Interim Report were clearly contemplated in the 1967 Cabinet Decision or other Japanese measures. Additionally, the nature of the report -- it emanates from an advisory group composed of academics and industry representatives, is non-binding, is not product-specific in its recommendations, and is more in the nature of a policy option paper submitted to the government than what could properly be said to be a governmental measure -- is such that we find that the United States should not be charged with having reasonably anticipated its existence prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we find that these relate only to black and white film and paper.

10.140 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult not to conclude that the United States should be held to have anticipated this 1969 report and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to the Seventh Interim Report it has legitimate expectations of improved market access for photographic film and paper emanating from the Tokyo or Uruguay Rounds.

10.141 *Impairment and causality.* We recall the US argument that the Distribution Committee stated in its Seventh Interim Report that "the concerted efforts of government and the private sector must be directed at systemization from the point of view of a capital liberalization countermeasure"[1273], and that the report recommended systemization policies to the Government, including: (1) establishing a "Distribution Systemization Promotion Council" comprised of scholars, manufacturers, wholesalers, retailers, and computer specialists, to establish consensus on the basic direction for systematizing distribution activities; (2) researching and promoting distribution systemization; and (3) providing financial incentives through loans or special tax treatment to support systemization.[1274] For the United States, Japanese Government documents leave no doubt of Japan's intent to create and support vertically-tied, domestic-manufacturer-dominated distribution channels. As noted by the United States, the Seventh Interim Report states that under systemization, "more systems will probably be formed in which keiretsu routes are covered under the guidance of the manufacturer"[1275] and " … comprehensively and

[1273]Ibid, p. 4.

[1274]Ibid, pp. 9-10. The Distribution Committee's Ninth Interim Report described the Seventh Interim Report as "a powerful political blueprint for reforming the distribution sector". Industrial Structure Deliberation Council - Distribution for the 1970s (Ninth Interim Report), 22 July 1971, Ex. US 71-9.

[1275]US Ex. 69-4, p. 7.

systematically integrate the various aspects of production, processing, and [distribution] services".[1276] Japan's response is that, in MITI's view, the backwardness of the distribution sector would render domestic manufacturers unable to compete with foreign products. However, Japan emphasizes, MITI policy on modernizing the distribution sector sought to promote efficiency and competitiveness of domestic industries, not to block imports. Overall, Japan argues, the United States has not provided any evidence to the Panel to show the causal connection between the measure and the alleged impairment.

10.142 In assessing the issue of whether or not US market-access expectations are impaired by the Seventh Interim Report, we note once again that: first, the report is an advisory report directed to the government, setting out non-binding policy options for the government without recommending specific actions to the government or private companies; second, these policy options are directed to modernizing and improving the overall efficiency of the distribution sector in Japan; third, they are not at all product-specific; and fourth, the United States has not been able to point to any specific government actions resulting from this policy options report. While it is true that the Seventh Interim Report supports cooperation among different levels of the distribution system, it does not endorse traditional forms of vertical integration as such. Indeed, it explicitly states in the introduction that "unlike Keiretsunization, cooperative business formations, etc., the concept of systemization as presented in no way refers to such preconceived notions of such institutions".[1277] The emphasis in the report is on the use of "systems" and the "systems approach" to modernize the Japanese distribution sector, including promotion of standardized forms and packaging. As noted below, foreign firms were expected to benefit from this as well as domestic ones, which suggests that vertical integration and single-brand distribution were not aims of the report. In any event, even if we assume that the Seventh Interim Report constitutes administrative guidance to the Japanese photographic film industry to integrate vertically and use single-brand primary wholesalers, there are timing problems with respect to causation since most of the wholesale distribution sector for film in Japan was already single-brand in 1968 (see para. 10.173 below).

10.143 In light of its emphasis on systems, we view the report as origin-neutral. Indeed, the report notes that "one effect of systematizing Japan's distribution system is the simplification of entry [into Japan's market] by foreign capital". While it is possible that a measure that is formally neutral as to the origin of products may be shown to be applied in a manner that results in upsetting the competitive relationship between domestic or imported products to the detriment of imports, the United States has not been able to point to any single instance where application of the Seventh Interim Report does so in respect of US film or paper. In this context, it is difficult to conclude that this advisory report has contributed to the impairment of US market-access expectations emanating from the Kennedy Round.

10.144 Also, there is no evidence that application of the report has resulted in impairment of legitimate expectations flowing from the Tokyo and Uruguay Rounds. At most, we consider that the report establishes part of the context of the 1970 Guidelines and the 1971 Basic Plan, which are discussed below. Accordingly, we find that the United States has not demonstrated that the Seventh Interim Report nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.145 Thus, while the United States has shown that it should not be held to have anticipated the Seventh Interim Report in relation to its Kennedy Round expectations in respect of black and white film and paper, it has not demonstrated that the Seventh Interim Report is a measure for purposes of Article XXIII:1(b) or that it nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim.

[1276]Ibid.
[1277]Ibid, p.1.

(f) 1969 Survey Report on Transaction Terms

10.146 The fifth distribution "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) is MITI's Survey Report regarding Transaction Terms including recommendations on transaction terms (from March 1969)[1278], and published drafts and republications (e.g., 1971) ("1969 Survey Report").[1279] In 1968, the Institute for Distribution Research, an apparently private organization, was requested by MITI to conduct a survey of transaction terms in several industries. In March 1969, it submitted its survey on transaction terms in the film industry. The survey examined business practices relating to: sales contracts, including discounts and rebate policies; deliveries and returns; settlement of accounts; and promotional practices, including dispatched employees and rebates.[1280]

10.147 *Application of measure.* The United States argues that the 1969 Survey Report is a governmental measure and that it is still in effect. Japan responds that this survey report is that of a private institute, undertaking research and analysis and providing information to the government as appropriate. Accordingly, Japan argues that this survey is not a governmental measure and cannot even be described as administrative guidance. In any case, Japan argues, this 1969 survey is not currently in effect (para. 6.119). MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. Japan maintains that these recommendations were made, and private businesses followed them or ignored them at their own choosing. Any substantive relevance of the survey ended decades ago when it was either acted upon or ignored.

10.148 In order to consider whether the 1969 Survey Report is a measure for purposes of Article XXIII:1(b), we recall the analytical framework we developed above. Applying this analytical framework, we note that the report is clearly not in the nature of a binding law or regulation. It provides no incentives or disincentives to the private sector to take any particular action. Rather, it is in the nature of a factual survey conducted by an apparently private organization at the request of the Government. Since it is a report *to* the government, it cannot be viewed as a government exhortation to the private sector to follow specific distribution policies. While it is true that the report contains a few introductory pages (and concluding paragraphs) on the subject of what are irrational contract terms, the vast bulk of the 1969 Survey Report simply provides a description of existing practices. As such, it is no more than a background report providing current factual information of the basis on which the government might later decide to act. In our view, the report is not in the nature of a governmental measure. Accordingly, we find that the United States has not demonstrated that the report is a measure within the meaning of Article XXIII:1(b). At most, this study may be viewed as part of the context of the 1970 Guidelines, which are discussed below.

10.149 We note that MITI published the 1969 Survey Report in 1971. We do not consider that this fact changes our analysis. Publication by MITI cannot be seen as administrative guidance or a governmental exhortation to follow specific practices, given (i) the fact that the report is essentially a non-normative survey of past practices, and (ii) the intervening publication of the 1970 Guidelines, a governmental action that deals with transactions terms more specifically.

10.150 If despite our finding above, we assume that the 1969 Survey Report is a measure, there is still the question of whether or not it is still in force. On this issue, there is no evidence to suggest

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[1278]Institute for Distribution Research, Fact-finding Survey Report Pertaining to Transaction Terms: Actual Conditions of Transaction Practices in the Wholesale Industry, March 1969, US Ex. 15.

[1279]MITI Business Bureau, Actual Conditions of Transaction Terms in the Wholesale Industry, 31 August 1971, US Ex. 20. Institute for Distribution Research, 1969 Survey of Trade Conditions in the Film and Other Industries, Japan Ex. B-1.

[1280]The parties disagree as to whether the institute published the report in 1969. They agree that MITI (re)published it in 1971.

that this measure has been withdrawn or otherwise disavowed by the Government of Japan. However, recalling that the report is essentially a description of practices prevailing in the 1960s, it is not clear what it would mean to describe it as still in force. It simply remains a description of past practices. Nevertheless, to the extent that the report contains a small amount of normative content on the rationality of transaction terms, it has not been disavowed and even if, clearly, there are more recent government policy statements on modernization of the Japanese distribution sector, it could be viewed as being in force in that sense. Thus, if the 1969 Survey Report is to be considered a measure, then it may still be in effect.

10.151 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen the 1969 Survey Report -- what the United States describes as part of "the Japanese government's array of opaque, informal measures" -- before conclusion of the Kennedy Round. The United States also argues that it could not reasonably anticipate the significance of the measure for the Japanese film market even as of the conclusion of the Tokyo and Uruguay Rounds. To this, Japan responds that the United States should have reasonably anticipated the 1969 Survey Report as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices. In addition, Japan argues that the United States should have reasonably anticipated the measure *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.152 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the 1969 Survey Report, we recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result. In this regard, we are not persuaded by the Japanese argument that the report is a logical outgrowth of its pre-Kennedy Round distribution policies and therefore should have been anticipated by the United States. In the first place, we have found that the 1967 Cabinet Decision did not call for an specific actions to be taken by the Government of Japan or private companies. Additionally, the nature of the 1969 Survey Report -- it is in the nature of a study conducted by a quasi-governmental organization at the request of the Government, which may be seen as a background report setting out the current situation so as to provide factual information on the basis of which the government might later decide that certain governmental actions should be taken -- is such that we find that the United States should not be charged with having reasonably anticipated its existence prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we find that these relate only to black and white film and paper.

10.153 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult to conclude that the United States could not reasonably anticipate this 1969 Survey Report, its 1971 publication and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here, where the report is specific to the film sector. Accordingly, we find that the United States has not demonstrated that in relation to 1969 Survey Report that it has legitimate expectations of improved market access emanating from the Tokyo or Uruguay Rounds.

10.154 *Impairment and causality.* Neither the United States nor Japan has submitted any evidence or argument regarding the impact of the 1969 Survey Report on US market-access expectations stemming from the Kennedy, Tokyo and Uruguay Rounds, beyond the type of arguments made in relation to the Sixth and Seventh Interim Reports. Accordingly, we find that the United States has not demonstrated the existence of any nullification or impairment resulting from this Survey Report.

10.155 Thus, while the United States has shown that it should not be held to have anticipated the 1969 Survey Report in relation to its Kennedy Round expectations in respect of black and white film and paper, it has not demonstrated that the Report is a measure for purposes of Article XXIII:1(b) or that it nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim.

(g) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film

10.156 The sixth distribution "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) consists of the 1970 "Guidelines for Rationalizing Terms of Trade for Photographic Film" prepared by MITI's Transaction Terms Standardization Committee ("1970 Guidelines").[1281] According to the United States, this "measure" includes related actions to implement recommendations in the 1970 Guidelines.

10.157 The United States argues that the 1970 Guidelines are directed at promoting vertical integration in the film distribution sector through the use of transaction terms so as to tie wholesale distributors more closely to domestic manufacturers. According to the United States, MITI promoted this policy in the 1970 Guidelines by calling for volume discounts, rebates, and standardized and shortened payment terms: discounts and rebates encouraged wholesalers to purchase greater volume from fewer suppliers; and standardized and shortened payment terms limited the opportunities for wholesalers to seek better credit terms from other suppliers. This, the United States argues, left wholesalers more dependent on and vulnerable to the credit terms offered by the manufacturer with whom they primarily did business. We further note the US position that prior to standardization, wholesalers were able to "shop around" different manufacturers for the best transaction terms. The alleged MITI actions reduced such competition in the distribution sector. The result, according to the United States, was to create stable, long-term and exclusive relationships in the distribution chain.

10.158 Japan responds that over the 1970-1972 period, MITI issued rationalization guidelines to 15 different industries, including photographic film. The guidelines to each of the 15 industries addressed the same issues and made basically the same suggestions. We further recall Japan's position that MITI has been consistently concerned with rationalization of trading terms in the distribution sector since the 1960's. What had hitherto existed, Japan maintains, were irrational business practices that were economically inefficient. According to Japan, the 1970 Guidelines explicitly discouraged the use of rebates and did not call for shorter payment terms. Thus, in Japan's view, they were unrelated and inimical to the establishment of single-brand distribution. In any case, according to Japan, the US argument is subject to intractable timing problems since single-brand distribution occurred as an industry trend before the alleged "measure" was implemented. Moreover, single-brand wholesale distribution of film is a common business practice which prevails in every major market in the world. Japan notes that its efforts towards distribution rationalization did not end in the 1970s: in 1990 MITI issued the "Guidelines for Improving Trade Practices".

10.159 *Application of measure.* The United States argues that the 1970 Guidelines represent a classic form of Japanese administrative guidance and, in line with established case precedent, they constitute a measure within the meaning of Article XXIII:1(b). Japan's position is that although the 1970 Guidelines constitute a form of administrative guidance (the only cited distribution "measure" which Japan considers can be so characterized), this particular administrative guidance is not a governmental measure because MITI merely issued guidance with no government-provided benefit attached to compliance and no government sanction attached to non-compliance. Japan's position is that the 1970 Guidelines were simply general suggestions and lacked any legal force. Thus, according to Japan, the administrative

[1281]US Ex. 70-3; US Ex. 70-4; Japan Ex. B-24.

guidance reflected in the 1970 Guidelines does not meet the two criteria outlined in *Japan - Semiconductors*.

10.160 Our analysis of the 1970 Guidelines and subsequent actions taken by MITI and various industry groups leads us to conclude that the 1970 Guidelines are more than a mere set of suggestions. When publishing the 1970 Guidelines in the MITI gazette, MITI explained that it

> "intends to see to it that improvement of terms of trade will be implemented in accordance with this guideline. As terms of trade deal with actual commercial transactions, it is not appropriate to immediately rely on legislative measures. Accordingly we expect that the parties involved in transactions understand the need for trade rationalization, and will make voluntary efforts to achieve this purpose".[1282]

MITI went on to request industry associations to formulate and implement more specific transaction terms based on the 1970 Guidelines and to report back to MITI by November 1970.[1283] As the United States notes, shortly after publication of MITI's 1970 Guidelines, the photosensitivity wholesalers association published a "Transaction Outline" to implement the association's own transaction terms based on the 1970 Guidelines and reported it to MITI.[1284] Later, in 1971, MITI commissioned the Chamber of Commerce, along with the MITI-established Transaction Terms Standardization Committee and domestic photographic materials trade associations, to draft a "Model Contract" based upon the transaction terms outlined in the 1970 Guidelines for the photographic film sector.[1285] When publishing the standard transaction contract for photographic film in the spring of 1972, the Chamber stated that its actions were pursuant to the MITI request.[1286] Japan questions the scope of these implementation activities and responds that most elements of transactions were not regulated by the Transaction Outline or the Standard Contract and that it was left open to competitors to offer more favourable non-standardized transaction terms.

10.161 In light of these statements and actions by MITI and industry associations, we consider that there is sufficient likelihood that the administrative guidance given by MITI in the 1970 Guidelines provides sufficient incentives for private parties to act in a particular manner such that it would have a similar effect on business activity in Japan to a legally binding measure. In our view, this conclusion is in accord with past GATT practice.[1287] While we note Japan's argument that the type of administrative guidance given in the 1970 Guidelines does not meet the test set out in *Japan - Semi-conductors*, we recall our explanation that the test set out in *Japan - Semi-conductors* is not an exhaustive test for the types of administrative guidance that may be assimilated to governmental measures. Accordingly, we find that the 1970 Guidelines are measures within the meaning of Article XXIII:1(b).

10.162 As for the question of the continued application of this measure, the United States argues that the 1970 Guidelines, and in particular the policies underlying them, have never been revoked and are still in effect. Japan responds that the 1970 Guidelines never had any binding effect, and thus never were measures "in effect" even from the beginning. In the alternative, Japan argues that the guidelines are clearly no longer in effect given that after almost 30 years, the business environment has changed so much that neither MITI nor private industry considers the 1970 Guidelines as having any current

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[1282]Japan Ex. B-24, p. 1.

[1283]US Ex. 70-3; Japan Ex. B-24.

[1284]A Policy Outline, dated November 28, 1970, on Commercial Transactions was submitted by the Shashoren to replace MITI's Recommended Guidelines for More Appropriate Transactions, Nihon Shashin Kogyo Tsushin, 10 December 1970, Japan Ex. B-31.

[1285]Draft a Standard Contract for Film with Criteria for Standardization of Transaction Terms, Zenren Tsuho, August 1971, US Ex. 71-11.

[1286]Standard Contract Drafted for Photo Film Based on the Transaction Standardization Guideline Assigned to the Japan Chamber of Commerce by MITI, US Ex. 24.

[1287]*Japan - Agricultural Products*, BISD 35S/163, 242.

relevance or effect. Japan further indicates that the 1970 Guidelines have been superseded by MITI's very similar 1990 Guidelines, the latter receiving the support of the US Government.

10.163 Although one may have doubts as to the continued relevance today of guidelines developed by MITI in 1970, there is nothing in the record to suggest that MITI has revoked or disavowed the recommendations it made in 1970 concerning rationalization of transaction terms. Even if one might posit that these earlier guidelines, which were specific to the film sector, have to a certain extent been replaced by the generally applicable 1990 Guidelines, there is nothing in the text of the 1990 Guidelines suggesting the withdrawal of the 1970 Guidelines, although some parts might be deemed to have been superseded by the provisions of the 1990 Guidelines. Accordingly, we consider that the 1970 Guidelines may still be in effect.

10.164 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen the 1970 Guidelines -- part of "the Japanese government's array of opaque, informal measures" -- before conclusion of the Kennedy Round. The United States further argues that it could not anticipate the significance of the guidelines for the Japanese film market even as of the conclusion of the Tokyo and Uruguay Rounds. To this, Japan responds that the United States should have reasonably anticipated the 1970 Guidelines as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices. Moreover, according to Japan, the trend towards single-brand distribution was well-advanced as of the conclusion of the Kennedy Round. Japan argues that the United States should have reasonably anticipated the measure *a fortiori* as of the Tokyo and Uruguay Rounds.

10.165 Assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the 1970 Guidelines, we recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result. In this regard, we note the degree to which this measure is more specific in its analysis and recommendations as compared to the previous three "measures". Even if the United States should have been aware in 1967 that there was a trend towards vertical integration in the film and paper industry, and that MITI was seeking to promote modernization of the distribution sector, including rationalization of transaction terms, we do not believe that the United States should have been aware at that time that MITI would be enunciating a detailed set of product-specific recommendations covering the rationalization or standardization of transaction terms in the photographic film sector. Accordingly, we find that the United States should not be charged with having reasonably anticipated the existence of the 1970 Guidelines prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we find that these relate only to black and white film and paper.

10.166 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult to conclude that the United States could not reasonably anticipate this 1970 measure and its application as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here, where the measure is specific to the film sector. Accordingly, we find that the United States has not demonstrated that in relation to 1970 Guidelines that it has legitimate expectations of improved market access with respect to film and paper emanating from the Tokyo or Uruguay Rounds.

10.167 *Impairment and causality.* The United States contends that application of the 1970 Guidelines, establishing industry standards for discounts, rebates, terms of payment, and dispatched employees, upset the competitive relationship between imported and domestic photographic materials in several

ways. The standardization of transaction terms chilled the ability of foreign manufacturers to offer competitive terms to Japanese wholesalers: first, by setting uniform transaction terms, limiting the ability of foreign enterprises to outbid their Japanese competitors; second, by establishing shortened payment terms that enhanced the financial strength of Japanese manufacturers at the expense of wholesalers, and positioned domestic manufacturers to better withstand foreign penetration; and third, by establishing standardized terms, in particular volume rebates, that were by their very nature more beneficial to Japanese manufacturers with large market share.

10.168 Japan responds that the starting point for the analysis should be the wording of the 1970 Guidelines which did not either mandate uniform transaction terms or provide specific transaction terms to be followed by manufacturers, primary wholesalers, secondary wholesalers or retailers. The 1970 Guidelines only made general suggestions related to payment terms, volume discounts, and rebates, including that: (i) interest should be charged for an unusually long payment period (neither the reasonable payment period, the amount of interest to be charged, nor other terms were specified); (ii) volume discounts should have clear transparent terms (whether and under what circumstances such discounts should be granted and the amount of the discounts were not specified); and (iii) rebates should be minimized (with no details at all about the specific terms of rebates). The 1970 Guidelines urged the adoption of economically rational transaction terms, and then left it to individual manufacturers, wholesalers and retailers to establish their own specific terms.

10.169 Japan points out that, in fact, the transaction terms of individual manufacturers may and do vary, e.g., Fuji had and continues to have different transaction terms with each of its four independent primary wholesalers. Japan further states that MITI believed that rationalizing transaction terms would help to ensure fair competition in the market, that there was neither ongoing monitoring nor ongoing enforcement of compliance with the 1970 Guidelines (only one of three industry associations even responded to a request for a report of actions taken, and no enforcement efforts were directed at specific companies), and that the United States has not shown how anything in the distribution policies or their application discriminates against imports. Most importantly, according to Japan, the United States has not been able to show any nexus between the 1970 Guidelines and single-brand distribution: private companies had taken actions regarding payment terms and rebates well before any actions by the Japanese Government regarding "standardized" transaction terms; and private companies had adopted single-brand distribution prior to any government action -- single-brand distribution had emerged by the mid-1960s, and was essentially complete by 1968. Japan also points out that the alleged objective behind adoption of the rationalized transaction terms, i.e., single-brand distribution, is the common form of distribution in the film industry in every market in the world.

10.170 Addressing the issues of impairment and causality in relation to the 1970 Guidelines, we agree with Japan that the starting point for our analysis should be the text of the guidelines. Examining the 1970 Guidelines, we note that they do not encourage the use of volume discounts without reservation but encourage transparency in their use, and that they discourage the use of rebates.[1288] They also do not appear to mandate uniform terms or shortened payment terms. Thus, it appears that the United States may have overstated the specificity of the guidelines.

10.171 In considering the purpose of the guidelines, we note that the introduction to the 1970 Guidelines states:

> "It goes without saying that rationalization of terms of trade is essential to improving market conditions, assuring effective competition, creating efficient distribution activities, developing a large scale distribution system, systematizing distribution activities, and facilitating the response to foreign capital".

[1288] 1970 Guidelines, US Ex. 70-4; Japan Ex. B-24.

However, beyond this general introductory reference to facilitating the response to foreign capital, the recommendations set out in the 1970 Guidelines appear to be origin neutral, i.e., they do not formally differentiate as to the treatment of domestic and imported film and paper. We are not persuaded, therefore, that the 1970 Guidelines are directed at promoting vertical integration in the photographic materials distribution sector with a view to impeding market access for foreign products. Rather, as argued by Japan, they appear to be directed at generally improving transaction efficiency in this sector, a result that is not inherently unfavourable to imports. As noted above, the 1967 Cabinet Decision, the Sixth Interim Report, the Seventh Interim Report and the 1969 Survey Report provide context for the interpretation of the 1970 Guidelines. Our examination of those documents supports our view of the 1970 Guidelines. While the documents occasionally make reference to the imminent entry of foreign capital into Japan, in our reading of them, their main focus is clearly on improving the various inefficiencies and deficiencies in Japan's distribution system, as a means to address broader problems, such as the need to cope with inflationary pressures and labour shortages. The US support for the 1990 Guidelines lends support to the view that improving the efficiency of the Japanese distribution system, through such actions as standardization of basic contract terms, promotes rather than restricts the ability of imports to enter the Japanese market.

10.172 Nonetheless, we do not rule out the possibility that measures which appear to be formally neutral as to the origin of products may in their application turn out to have a disproportionate impact on imports, in that they could upset the competitive relationship between domestic and imported products to the detriment of imports. The United States has not been able to point to any specific governmental or private actions with such impact in the distribution sector emanating from the 1970 Guidelines.

10.173 More significantly, when we examine what is the fundamental assertion of the United States, i.e., that the "measures" cited in connection with the standardization of transaction terms, and, in particular, the 1970 Guidelines, were designed to and did promote single-brand distribution at the wholesale level, there are serious difficulties of timing in the US argument on causation. Given the evidence that (i) most of the wholesale distribution sector for film in Japan was already single-brand before 1970, with Konica having all single-brand wholesaler distribution by 1955[1289], and Fuji having three of its four wholesalers single-brand by 1968[1290], with Fuji's fourth primary wholesaler -- Asanuma -- becoming a single-brand distributor in 1975, apparently because Kodak refused to deal with it directly[1291], and (ii) Fuji started to tighten payment terms in 1966, well before the guidelines or other cited distribution "measures",[1292] we are not persuaded that there is a meaningful nexus between the 1970 Guidelines and this largely pre-existing market structure. We also note, as argued by Japan and not contested by the United States, that single-brand wholesale distribution is the common market structure[1293] -- indeed the norm -- in most major national film markets, including the US market. While the United States responds that the US market structure was the result of private and not governmental actions, it is unclear why the same economic forces acting in the United States would not also exist in Japan.

10.174 Accordingly, we find that the United States has not demonstrated that the 1970 Guidelines nullify or impair benefits accruing to the United States within the meaning of Article XXIII:1(b).

[1289]Paras. 5.116, 6.350-6.351.

[1290]Paras. 5.115-5.119, 6.350-6.351; Affidavit of Tomihiko Asada, Japan Ex. A-12; Affidavit of Yukiyoshi Noro, Japan Ex. A-14; Affidavit of Kaoru Kono, Japan Ex. A-15.

[1291]Paras. 5.116-5.117, 6.352. See: F.M. Scherer, Retail Distribution Channel Barriers to International Trade, October 1995, Japan Ex. A-19; Affidavit of Takenosuke Katsuoka, Japan Ex. A-11, pp. 2-4;

[1292]Paras. 5.122-5.133, 6.346-6.349, 6.356ff; Fuji Film's Result of Stricter Policy on Receivables, Zenren Tsuho, March 1968, US Ex. 68-2; Affidavit Tanaka Takeshi, p.3, Japan Ex. A-10; Affidavit of Haruyoshi Okyama, p.3, Japan Ex. A-18.

[1293]Paras. 5.111-5.112, 5.120

10.175 Thus, while the United States has shown that the 1970 Guidelines are a measure for purposes of Article XXIII:1(b) and that it should not be held to have anticipated them in relation to its Kennedy Round expectations in respect of black and white film and paper, the United States has not demonstrated that the Guidelines nullify or impair benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has shown only one of the required elements of an Article XXIII:1(b) claim -- that the 1970 Guidelines are a measure.

(h) 1971 Basic Plan for the Systemization of Distribution

10.176 The seventh distribution "measure" to be examined is the "Basic Plan for the Systemization of Distribution" (28 July 1971) ("1971 Basic Plan")[1294], prepared by MITI's Distribution Systemization Promotion Council, together with actions to implement recommendations in the Plan. Following a recommendation contained in the Seventh Interim Report, MITI formed the Distribution Systemization Promotion Council in 1970. This council published the 1971 Basic Plan in July 1971.

10.177 The authors of the 1971 Basic Plan indicate that it "represents the result of government and the private sector joining forces to consider the basic direction and goals for the systemization of distribution in Japan, and the means of realizing these goals, with the year 1975 set as the tentative target date for completion".[1295] They also indicate that "[t]he decisive approach here is to regard the entire process of distribution from production to consumption as a single system, and to effect an overall, comprehensive increase in the efficiency of this system, i.e. the 'systemization of distribution activities'".[1296]

10.178 The 1971 Basic Plan calls for systemization of distribution to "be realized through various stages: vertically from the intra-firm level to the inter-firm level; horizontally on the inter-firm level to the national economic level. Furthermore, in seeking to implement this, sufficient attention must be paid to the introduction of computers as an effective means of achieving [such systemization] … ".[1297] The plan suggests that

> "[t]he systemization of distribution must be consistently planned within existing individual sectors, and also must transcend the boundaries of many existing industry sectors. In other words, there is a need to view individual industry sectors as 'closed systems', and to achieve a systematic coordination of production, distribution and consumption within such a framework; we must consider how this can be accomplished. At the same time, however, these 'closed systems' should be logically dismantled, and existing industry sectors reshuffled through the medium of distribution … ".[1298]

The recommendations on distribution systemization contained in the 1971 Basic Plan do not make any distinction between domestic and imported products, and, in general, these recommendations are not product-specific. However, in a section dealing with "rational transaction terms", reference is made to the guidelines established with respect to various specific industries, including those for the photographic film industry.[1299] It is also stated in this section that "in order to promote the spread and adoption of these guidelines, [MITI] will seek to obtain the cooperation of relevant industry groups to draft standard agreements that incorporate the substance of these guidelines".[1300]

[1294]US Ex. 71-10; Japan Ex. B-18.
[1295]US Ex. 71-10, p. 4.
[1296]Ibid.
[1297]Ibid.
[1298]Ibid, p. 6.
[1299]Ibid, p. 10.
[1300]Ibid.

10.179 *Application of measure.* The United States contends that the 1971 Basic Plan is a governmental measure and that it is effectively still in force. The United States points out that the Distribution Systemization Promotion Council, which authored and published the plan, was established by MITI "as a forum for promoting the systemization of distribution through the joint efforts of government and the private sector", and that upon publication of the plan the chief of MITI's Business Bureau stated that "modernization of distribution is urgent from the standpoint of achieving balanced development of the Japanese economy, as well as from the standpoint of consumer price countermeasures and capital liberalization countermeasures"[1301], and that "[w]ith this plan, the Ministry of International Trade and Industry has decided to make every effort toward the fulfilment of distribution systemization policies.[1302] As such, the United States considers that this plan represents official policy of MITI. Japan's position is that the 1971 Basic Plan is simply a report of an advisory body to the government and can therefore not be characterized as a governmental measure. Japan further contends that the plan is no longer in effect. MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. According to Japan, these recommendations were made, and private businesses followed them or ignored them at their own choosing. This plan, Japan maintains, was never government action at all, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

10.180 Applying the analysis developed earlier in our general discussion of Article XXIII:1(b), we note that the 1971 Basic Plan is not a law or regulation nor does it provide incentives or disincentives to the private sector to take particular action. Although the 1971 Basic Plan was authored and published by a quasi-governmental advisory body composed of academics, industry representatives and government officials, it nonetheless bears some hallmarks of a governmental measure in that the Distribution Systemization Promotion Council was created by MITI and commissioned by MITI to prepare the plan. Moreover, as noted above, upon its publication senior MITI officials endorsed the plan and stated that MITI would work with the private sector to ensure implementation of the plan's recommendations. In light of these statements and actions by MITI, we consider that there is sufficient likelihood that the administrative guidance given by MITI in connection with the 1971 Basic Plan provides sufficient incentives for private parties to act in a particular manner such that it would have a similar effect on business activity in Japan to a legally binding measure. In our view, this conclusion is in accord with past GATT practice.[1303] Accordingly, we find that the 1971 Basic Plan is a measure within the meaning of Article XXIII:1(b).

10.181 As for the current effectiveness of the plan, although one may question whether the particular recommendations contained in the plan still have relevance in the Japanese market 26 years after the fact, there is no evidence to suggest that the plan has ever been abandoned. Accordingly, we consider that 1971 Basic Plan, as a measure within the meaning of Article XXIII:1(b), may still be in effect.

10.182 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen the 1971 Basic Plan -- part of "the Japanese government's array of opaque, informal measures" -- before conclusion of the Kennedy Round. The United States further argues that it could not reasonably anticipate the significance of the measure for the Japanese film and paper market even as of the conclusion of the Tokyo and Uruguay Rounds. To this, the Japanese government responds that the United States should have reasonably anticipated the 1971 Basic Plan as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices. Japan further argues that even assuming that MITI's distribution modernization policies during the 1960s and '70s encouraged single-brand distribution

[1301]Ibid, p. 2.
[1302]Ibid.
[1303]*Japan - Agricultural Products*, BISD 35S/163, 242. See also *Japan - Semi-conductors*, BISD 35S/116, 155.

of film and paper as a means to exclude foreign brands from traditional distribution channels, these trends began well in advance of the conclusion of the Kennedy Round. Japan maintains that the United States should have reasonably anticipated the Basic Plan *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.183 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the 1971 Basic Plan, even if we are not convinced by the US characterization of the plan as an "opaque, informal measure", neither are we convinced by Japan's argument that this plan and the relatively detailed recommendations contained therein should have been anticipated as part of a "logical outgrowth of MITI's ongoing distribution modernization policies". We recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a tariff negotiating round. Thus, even if the United States should have been aware in 1967 that there was a trend towards vertical integration in the film and paper industry, and that MITI was seeking to promote modernization of the distribution sector, including systemization of distribution practices, we do not believe that the United States necessarily should have been aware at that time that MITI would be enunciating a detailed set of recommendations covering systemization of distribution practices in the Japanese economy. Accordingly, we find that the United States should not be charged with having reasonably anticipated the existence of the 1971 Basic Plan prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, these relate only to black and white film and paper.

10.184 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult to conclude that the United States could not reasonably anticipate this 1971 measure and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to 1971 Basic Plan that it has legitimate expectations of improved market access emanating from the Tokyo or Uruguay Rounds.

10.185 *Impairment and causality.* The United States argues that the 1971 Basic Plan announced that "modernization" of the Japanese distribution sector was urgent from the standpoint of capital liberalization "countermeasures"[1304] and that for individual industrial sectors "the decisive approach here is to regard the entire distribution process from production to consumption as a single system".[1305] According to the United States, the plan was thus a prime example, along with the Seventh Interim Report, of Japan's intent to promote vertical *keiretsu* in its systemization policy.[1306] The United States argues that these facts are clear examples of the manner in which MITI sought to upset the competitive relationship between domestic and imported film and paper in Japan. Japan argues that the 1971 Basic Plan recommended systemization in the distribution sector of the Japanese economy and in doing so, did not discriminate in favour of domestic industries. According to Japan, systemization and the resulting improved efficiencies and modernization in the distribution sector were and are to the benefit of all manufacturers, domestic and foreign alike.

10.186 Our assessment of the impact of this 1971 Basic Plan is that the policy recommendations for systemization and modernization in the Japanese distribution sector are addressed to distribution of products in the national economy at large, without regard to the source of the products involved. Also, even if one of the concerns expressed by MITI and the Distribution Systemization Promotion Council in advancing the plan was to address "capital liberalization countermeasures", this concern does not

[1304]US Ex. 71-10, p. 2.
[1305]Ibid, p. 4.
[1306]Ibid, p. 6.

appear to be reflected in the actual recommendations advanced in the plan. Rather, the recommendations appear to be neutral as to source of the products, whether domestic or foreign, promoting the standardization and modernization of business practices and management techniques, including computerization. Indeed, as noted in the Seventh Interim Report, imported products were expected to benefit from the systemization of distribution. Although it is possible that a measure that is formally neutral as to origin of products could nonetheless be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports, the United States has not been able to point to any specific instances where the 1971 Basic Plan has done so in respect of US film or paper. Nor, for that matter, has it shown that this measure would be likely to lead to such a result.

10.187 Even if we assume that the 1971 Basic Plan constitutes administrative guidance to the Japanese film industry to integrate vertically and use single-brand primary wholesalers, the US complaint has a significant timing problem in that the two dominant film manufacturers in Japan (Fuji and Konica) had virtually completed single-brand vertical integration of their wholesale distributors well in advance of the 1971 Basic Plan.

10.188 On the evidence before us, we are not persuaded that recommendations of the 1971 Basic Plan, and their implementation in the Japanese economy (to the extent this occurred), have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market. Accordingly, we find that the United States has not demonstrated that the 1971 Basic Plan nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.189 Thus, while the United States has shown that the 1971 Basic Plan is a measure for purposes of Article XXIII:1(b) and that it should not be held to have anticipated the plan in relation to its Kennedy Round expectations in respect of black and white film and paper, it has not demonstrated that the plan nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has shown only one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(i) 1975 Manual for Systemization of Distribution by Industry: Camera and Film

10.190 The eighth and final distribution "measure" is a "Manual for Systemization of Distribution by Industry: Camera and Film", prepared and published by the Distribution Systemization Development Centre in March 1975 ("1975 Manual")[1307], together with actions taken to implement its recommendations. The Distribution Systemization Development Centre was established with MITI support in 1972, pursuant to the 1971 Basic Plan, in order to facilitate the work of the Distribution Systemization Promotion Council, and was delegated the task of working with industry to produce various "Systemization Manuals" for specific industries. The 1975 Manual was prepared by the centre in collaboration with a "Working Group" comprised of industry groups, camera manufacturers, film manufacturers, camera and film wholesalers, camera and film retailers, and camera and film industry publishers, and with a MITI official observing the proceedings.

10.191 In a foreword to the 1975 Manual, the centre acknowledges that "[a]s the economic environment grows worse, the systemization of distribution activities has become an issue of critical importance".[1308] The centre also indicates that the development of the 1975 Manual was one part of MITI's policy to actively develop effective policies related to the systemization of distribution activities.[1309] The 1975 Manual states that "it is an urgent need to improve the structure of manufacturers to a capacity that

[1307]US Ex. 75-5.
[1308]Ibid.
[1309]Ibid.

will resist foreign capital affiliated firms".[1310] With regard to promoting systemization of distribution in the camera and film industry, the 1975 Manual makes specific recommendations on: (i) standardization of transaction terms; (ii) integration of codes and forms; (iii) increasing efficiency of physical distribution; and (iv) enhancement of information processing, including computer ties between manufacturers, distributors and retailers.[1311]

10.192 The 1975 Manual also calls for the establishment of an association for the promotion of distribution systemization in the camera and film industry, to provide a forum for industry and government to discuss and study proposed solutions.[1312] Thereafter, a Photosensitive Materials Committee was established for the systemization of distribution by industry. This committee was charged with promoting information ties and physical integration of distribution facilities.

10.193 *Application of measure.* The United States claims that the 1975 Manual is a governmental measure because the Distribution System Development Centre, which produced the manual, was a "MITI creation" and the manual makes clear that it was prepared as part of MITI's policy of systemization. The United States also claims that this measure is effectively still in force. Japan responds that the author of the 1975 Manual is an advisory body to MITI, and that the information and recommendations contained in the 1975 Manual were directed toward MITI, not private industry. As such, Japan claims, the 1975 Manual can in no manner be construed as a governmental measure. In any case, according to Japan, the "measure" is not currently in effect. MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. These recommendations were made, Japan argues, and private businesses followed them or ignored them at their own choosing. This plan was never government action at all, Japan maintains, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

10.194 Applying the analysis developed above, we note that the 1975 Manual is not a law or regulation nor does it provide incentives or disincentives to the private sector to take particular action. However, in further addressing the issue of whether or not the 1975 Manual is a governmental measure, we find that the evidence is somewhat conflicting. Whereas the Distribution System Development Centre was established and initially funded by MITI, there is nothing in the record to suggest that the centre's staff were governmental employees. Also, the membership of the working group which collaborated in the preparation of the manual appears to have come from private industry. On the other hand, the content of the 1975 Manual and the mandate for its preparation suggest a linkage to governmental policy on distribution systemization. And, as noted above, the foreword to the manual states that the development of the manual "is one part of MITI's policy … "[1313]; it concludes by expressing the centre's hope "for the widespread adoption of this manual … ".[1314] This, of course, is not a statement by the Government of Japan, but by the centre itself. There is no evidence that the 1975 Manual was endorsed by MITI, as was the case for the 1970 Guidelines and the 1971 Basic Plan. On balance, in contrast to our conclusions on this issue in respect of the 1970 Guidelines and the 1971 Basic Plan, we consider that the evidence on this issue suggests that the 1975 Manual does not have sufficient government imprimatur to be considered a governmental measure in this case. There is not the likelihood of compliance as exemplified by *Japan - Semi-conductors* and *Japan - Agricultural Products*, discussed earlier. Accordingly, we find that the United States has failed to demonstrate that the 1975 Manual is a measure within the meaning of Article XXIII:1(b).

10.195 If, however, we assume that the 1975 Manual is a governmental measure, we still have to consider whether it is currently in effect. Although one may question whether the particular

[1310]Ibid, p. 122.
[1311]Ibid, pp. 122-124.
[1312]Ibid, p. 124.
[1313]Ibid, foreword.
[1314]Ibid.

recommendations contained therein still have relevance in the Japanese market some 22 years after their publication, there is no evidence to suggest that the plan has ever been revoked. Assuming that the 1975 Manual is a measure, it may still be in effect.

10.196 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen the 1975 Manual -- part of "the Japanese government's array of opaque, informal measures" -- before conclusion of the Kennedy Round. The United States also argues that it could not reasonably foresee the impact of the 1975 Manual on the Japanese film and paper market even as of the conclusion of the Tokyo and Uruguay Rounds. To this, the Japanese Government responds that the United States should have reasonably anticipated the 1975 Manual as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices. Japan further argues that even assuming that MITI's distribution modernization policies during the 1960s and '70s encouraged single-brand distribution of film and paper as a means to exclude foreign brands from traditional distribution channels, these trends began well in advance of the conclusion of the Kennedy Round. Japan maintains that the United States should have reasonably anticipated the measure *a fortiori* as of the conclusion of the two later Rounds.

10.197 Assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the 1975 Manual, even if we are not convinced by the US characterization of the manual as an "opaque, informal measure", neither are we convinced by Japan's argument that it and the relatively detailed recommendations contained therein should have been anticipated as part of a "logical outgrowth of MITI's ongoing distribution modernization policies". We recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a tariff negotiating round. Thus, even if the United States should have been aware in 1967 that there was a trend towards vertical integration in the film and paper industry, and that MITI was seeking to promote modernization of the distribution sector, including systemization of distribution practices, we do not believe that the United States should have been aware at that time that MITI or a body such as the centre would be enunciating a detailed set of recommendations covering systemization of distribution practices in the Japanese economy. Accordingly, we find that the United States should not be charged with having reasonably anticipated the existence of the 1975 Manual prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we again find that these relate only to black and white film and paper.

10.198 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult to conclude that the United States could not reasonably anticipate the 1975 Manual and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance in respect of this manual, which we note applies to film by its terms. Accordingly, we find that the United States has not demonstrated that in relation to 1975 Manual that it has legitimate expectations of improved market access emanating from the Tokyo or Uruguay Rounds.

10.199 *Impairment and causality.* The United States argues that the 1975 Manual emphasized that the major issues facing the Japanese film industry included "the liberalization of capital and trade" and that there was an "urgent need to improve the structure of manufacturers to a capacity that will resist foreign capital affiliated firms", and recommended several actions towards systemization, including

standardization of transaction terms.[1315] The United States further argues that, using the vehicle of the 1975 Manual, MITI saw the development of information links as an integral part of its distribution systemization efforts and strongly advocated improving computer linkages to cement the closed vertical distribution system and ensure its perpetuation.[1316] Japan's view is that none of the policies discussed in the 1975 Manual were inherently disadvantageous to imports. Moreover, according to Japan, there is no basis for assuming that MITI's systemization policies, for example the creation of information ties, had any exclusionary impact. Japan notes in this connection that Nagase's subsidiary Kuwada, a single-brand primary wholesaler for Kodak, was a member of the wholesalers' trade association at the time the 1975 Manual was prepared. And as to the US argument that Japanese manufacturers established on-line computer links with their primary wholesalers based on guidance from the 1975 Manual, Japan responds that Fuji did not establish its first on-line connection with a primary wholesaler until 1989. Thus, Japan contends, the alleged systemization guidance that the United States claims was so effective in creating an exclusionary market structure was in reality ignored for at least 14 years.

10.200 Our assessment of the impact of this 1975 Manual is similar to that of the 1971 Basic Plan: the policy recommendations for systemization and modernization in the Japanese distribution sector are without regard to source of the products involved. Also, even if one of the concerns expressed in the manual was to address "foreign capital affiliated firms", this concern does not appear to be reflected in the actual analysis or recommendations advanced in the manual. For example, the manual explains that systemization of distribution has been emphasized in recent years for the following five reasons: (i) balancing supply and demand; (ii) controlling price increases; (iii) coping with labour shortages and wage increases; (iv) timely handling of increasing flows of distributed goods; (v) creating a management system for the information age.[1317] In addition, the recommendations appear to be directed at promoting the standardization and modernization of business practices and management techniques, including computerization. Indeed, as noted in the Seventh Interim Report, imported products were expected to benefit from the systemization of distribution. Although it is possible that a measure that is formally neutral as to origin of products could nonetheless be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports, the United States has not been able to point to any specific instances where such systemization of the distribution sector in the Japanese film industry has undermined market-access conditions for US film or paper.

10.201 Even if we assume that the 1971 Basic Plan constitutes administrative guidance to the Japanese film industry to integrate vertically and use single-brand primary wholesalers, the US complaint has a significant timing problem in that the two dominant film manufacturers in Japan (Fuji and Konica) had virtually completed single-brand vertical integration of their wholesale distributors well in advance of the 1975 Manual.

10.202 On the evidence before us, therefore, we are not persuaded that the 1975 Manual and its implementation in the Japanese economy (to the extent this has occurred), have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market. Accordingly, we find that the United States has not demonstrated that the 1975 Manual impairs nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.203 Thus, while the United States has shown that it should not be held to have anticipated the 1975 Manual in relation to its Kennedy Round expectations in respect of black and white film and paper, it has not demonstrated that the 1975 Manual is a measure for purposes of Article XXIII:1(b) or that it nullifies or impairs benefits accruing to the United States in respect of black and white film and paper.

[1315]Ibid, p. 122.
[1316]Ibid, pp. 123-124.
[1317]Ibid, pp.117-118.

In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim.

(j) Concluding observations on distribution "measures"

10.204 The essence of the US claim in respect of distribution "countermeasures" is that Japan created vertical integration and single-brand distribution in the Japanese film and paper market. In the US view, this was done through standardization of transaction terms, systemization and limitations on premiums to businesses. As we have found above, the United States has not been able to show that the various "measures" it cites have upset competitive relationships between domestic and US film and paper in Japan, principally because single-brand distribution appears to have occurred before and independently of those "measures", but also because the United States has not demonstrated that these "measures" are directed at promoting vertical integration or single-brand distribution. In answering the timing problem, the United States has provided no convincing evidence or arguments that the cited "measures" in fact had the effect of reinforcing single-brand distribution. Equally, the United States has not explained why the vertically integrated, single-brand distribution structure of the film sector in Japan -- a state of affairs that the evidence suggests is similar to that occurring elsewhere in the world (including in the United States) -- would have broken down in the absence of continuing government intervention.

10.205 In respect of a number of distribution "measures", the United States argues that they have continued in effect even though they may be dated or have been formally revoked. In our view, the United States has not shown that the 1967 Cabinet Decision, the Sixth and Seventh Interim Reports, the 1969 Survey Report, the 1970 Guidelines, the 1971 Basic Plan and the 1975 Manual are today upsetting competitive relationships between domestic and US film and paper in Japan.

10.206 We note that the Sixth and Seventh Interim Reports, the 1969 Survey Report, the 1971 Basic Plan and the 1975 Manual refer to "foreign capital" and the need to prepare for its imminent appearance in Japan. In each case, however, the focus of these "measures" is not on foreign capital, but on general reform of the Japanese distribution sector for reasons unrelated to foreign capital (e.g. labour shortages). We do not suggest that proof of intent to nullify or impair benefits is required under Article XXIII:1(b). We merely note that in our review of these "measures", we were not convinced that foreign capital was a major factor in their adoption or implementation.

10.207 To the extent that the alleged "measures" exist and should not have been reasonably anticipated by the United States, legitimate expectations in relation to these "measures" only exist for black and white film and paper. We note in this connection that today the black and white film market in Japan is insignificant as compared to colour film. The parties agree that it is on the order of three per cent.[1318] Moreover, proof of causation with regard to black and white film is undermined by an apparent increase, according to Japan, in market share from around 6.6 per cent in 1965 to a peak of around 41.4 per cent in 1985, despite the alleged impact of the "measures" in the 1965-1975 timeframe.[1319] The United States has submitted alternative statistics concerning the market shares in the photographic materials market that do not separately break out black and white film from colour film.[1320]

10.208 Finally, we would note that there is little argument from the United States in respect of the impact of these "measures" on imported paper. As argued by Japan, the only evidence cited by the United States on imported paper relates to a measure (SMEA financing to photofinishing laboratories) which we found not to be within our terms of reference.

[1318]See paras. 2.2, 5.26, 6.279 and 6.339 above.

[1319]See para. 2.4 above.

[1320]The US statistics rather focus on the issue of which percentage of the primary or secondary wholesalers used to or currently do carry foreign film.

4. RESTRICTIONS ON LARGE RETAIL STORES

10.209 The United States claims that Japan's application of (1) the Large Scale Retail Stores Law of 1 March 1974 (the "Large Stores Law")[1321] and related regulations and administrative "measures", including related local "measures", and (2) an amendment to the Large Stores Law, effective 14 May 1979[1322], restricted the growth of an alternative distribution channel for imported film, thereby nullifying or impairing benefits accruing to the United States under GATT Article XXIII:1(b). In light of their obvious relationship, we shall examine these two measures together in this section.

10.210 The Large Stores Law was passed by the Japanese Diet on 1 October 1973, with an effective date of 1 March 1974. The law established notification procedures to regulate the opening of large store structures (where more than one retailer may operate) and the opening and operation of retail stores operating in such structures. As originally enacted, it regulated stores with floor space in excess of 1500 square metres. The 1979 amendment effected two main changes: (1) the threshold for stores covered by the law was lowered from 1500 square metres to 500 square metres; and (2) large stores were divided into two classes -- Class I stores (1500 square metres and above) under MITI's jurisdiction, and Class II stores (500 to 1500 square metres) under the jurisdiction of local prefectural governors. The law permits the regulation of a store's size, opening date, operating hours and closing days ("store holidays").

10.211 Article 3 of the law requires that a party intending to build or open a large-scale retail store must submit, to MITI or the appropriate prefecture, an initial notification including the proposed floor area and planned opening date at least 12 months before the planned opening date. If the store is deemed to be subject to the law's procedures, the plans for the store must be explained to the appropriate authority, local retailers and consumers. Following this, the authority may recommend a reduction in the size of the store and/or a delay in the opening date and/or a change in its opening hours and store holidays. In 1982, MITI instituted, through Directive No. 36, a "prior explanation" requirement to precede the initial notification required by Article 3.[1323] This directive was revoked in 1992. Also in 1992, the minimum floor space requirements for Class I stores was raised from 1500 square metres to 3000 square metres (and to 6000 square metres in cities designated by ordinance).

10.212 The United States claims that large retail stores remain one potentially significant alternative distribution channel in Japan for foreign film manufacturers despite the Japanese Government's alleged reorganization of wholesale operations in the photographic materials sector. According to the United States, large retailers offered foreign manufacturers, foreclosed from the primary distribution network, a partial alternative to wholesalers. The United States also argues that large stores have carried imported products, including film, more frequently than small stores and have been less susceptible to pressure by domestic manufacturers. If such stores were permitted to proliferate across Japan, the United States argues, wholesalers would become less significant and foreign manufacturers could circumvent the bottle-necked distribution system. It was in response to this threat, the United States submits, that in 1967 and 1968 Japan began to impose controls on the expansion of large stores and finally enacted the Large Stores Law in 1973. According to the United States, this law imposes a burdensome process on the opening and expansion of large retail stores.

10.213 Japan responds that the Large Stores Law reflects long-standing Japanese policy, dating back to the enactment of the Department Store Law in 1956[1324], of regulating large stores to preserve a diversity of small, medium and large retailing competitors, a policy found in other countries as well.

[1321]US Ex. 74-4; Japan Ex. C-1.

[1322]Law Concerning the Adjustment of Business Activities of the Retail Industry for Large Retail Stores, 1978, US Ex. 78-1.

[1323]US Ex. 82-2; Japan Ex. C-16.

[1324]US Ex. 56-2; Japan Ex. C-3.

Japan contends that the law does not concern products generally, or film in particular. The law does not regulate which products large retailers can carry, nor does it take into account which products a retailer sells when determining whether and what adjustments are necessary. Accordingly, in Japan's view, the Large Stores Law is incapable of adversely modifying competitive conditions for any imported products, including film. Japan maintains that there is no correlation between store size and the likelihood of carrying foreign film brands. Japan also argues that the law has been significantly liberalized in recent years and is more favourable to imports now than at the time of any of the relevant tariff concessions.

10.214 *Application of measures.* Both parties agree -- and we have no reason to doubt -- that the Large Stores Law of 1974 and the 1979 amendment are governmental measures within the meaning of Article XXIII:1(b). The parties also agree -- and again we have no reason to doubt -- that the Large Stores Law, as amended, is currently in effect.

10.215 *Benefits accruing.* The United States claims that the benefits accruing to it are its legitimate expectations of improved market access resulting from Japanese tariff concessions on film at the conclusion of the Kennedy, Tokyo and Uruguay Rounds. It claims that it could not have reasonably anticipated the content of the Large Stores Law or its 1979 amendment during the Kennedy Round negotiations because at that time (1967) neither of these measures had been proposed, and because MITI's two key directives, which in the US view, laid the foundation for the law by expanding the scope of the Department Store Law, were not issued until June 1968 and September 1970, respectively.

10.216 Japan argues that the United States cannot properly claim to have any legitimate expectations of such improved market access because the enactment of the Large Stores Law in 1973 and amendments in 1978 and thereafter, while subsequent to the Kennedy Round, have represented the continuation of a long-standing policy of preserving retailing diversity through regulation of large stores. The Department Store Law, which was enacted in 1956, required new department stores to obtain permits before opening. According to Japan, the Large Stores Law merely represented an extension of this preexisting regulatory policy to new types of stores that were starting to appear, such as supermarkets and large-surface discount stores, and was enacted in an effort to block the deliberate circumvention of the earlier law. Moreover, in Japan's view, even the various versions of the Large Stores Law have always been more liberal than the Department Store Law: the Large Stores Law replaced a permission-based system with a notification system; regulations on store holiday and closing hours are now less restrictive; and approximately 96 per cent of notified plans are implemented today as compared to 84 per cent of applications being permitted under the Department Store Law. Thus, Japan argues, even if one accepts, for argument's sake, that restrictions on large stores are unfavourable to imported products, there is nothing unfavourable to imports that the United States could not have anticipated at the time of the Kennedy Round tariff concessions.

10.217 In analysing the issue of reasonable anticipation at the conclusion of the Kennedy Round, we take note of Japan's argument that Japanese policy of regulating the mix of larger and smaller stores dates back to the Department Store Law of 1956 and that, therefore, the United States should have anticipated that such a policy would continue and would evolve to take account of changes in store types. As we concluded earlier, however, in the case of measures shown by the United States to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the United States should not be held to have anticipated these measures unless Japan can show the contrary. We consider that such a broad notion of reasonable anticipation, as espoused by Japan, could have the effect of depriving this element of a non-violation case of its meaning. In our view, it is not sufficient to claim that a *specific* measure should have been anticipated because it is a continuation of a past *general* government policy. We note in this regard that the panel on *EEC - Oilseeds* rejected a similar argument that the existence of some measures at the time of the tariff concessions meant that the complaining

party (the United States) should have reasonably anticipated their significant modification or enhancement.[1325] We thus consider that the United States should not be deemed to have reasonably anticipated the Large Stores Law and its subsequent amendments, as of the conclusion of the Kennedy Round. Its reasonable expectations in respect of Japan's Kennedy Round concessions are limited to black and white film and paper.

10.218 Concerning expectations in respect of the Tokyo Round tariff concessions on film and paper, the United States concedes that it was aware of the Large Stores Law at that time; however, the United States argues that what negotiators could not have known, and did not know, at that time was the extent to which Japan's closed distribution system for photographic film and paper was the result of the government's distribution "countermeasures", and that the distribution "countermeasures", the Large Stores Law and the promotion "countermeasures" worked together to impede market access. The United States emphasizes that during the Tokyo Round, no contracting party other than Japan could have anticipated the actions Japan would take to dramatically expand the scope and invasiveness of the Large Stores Law following conclusion of the Round. In particular, the United States argues, the addition in 1982 of the "prior explanation" requirement, by which builders were required to meet with and try to obtain consent of local retailers before submitting the Article 3 Notification, significantly increased the burdensome nature of the law. Japan responds that the United States should have reasonably anticipated the measures in effect at the time of the tariff concession, including the Large Stores Law and its 1979 amendment. According to Japan, no significant government measures or policy changes occurred after 1979 (Directive No. 36 in 1982 not being a significant modification), and thus, there were no measures, not anticipated at the time of the 1979 tariff concessions, that were capable of upsetting the competitive position of imported film or paper.

10.219 We consider that the United States should be charged with knowledge of the Large Stores Law of 1974 prior to the conclusion of the Tokyo Round. As for the 1979 amendment, it was passed by the Diet on 15 November 1978. Although it appears that an agreement on film and paper tariffs may have been reached between Japan and the United States in August 1978, it appears that in general the bilateral Japan-US negotiations ended only in December 1978[1326], after the passage of the amendment. Moreover, the negotiations in the Tokyo Round did not end until 12 April 1979, with the protocol being dated 30 June 1979. In light of these facts, we consider that the United States should reasonably have anticipated the 1979 amendment. In this regard, we recall our conclusion that knowledge of a measure's existence is not equivalent to understanding the potential impact of the measure on a specific product market. However, the United States has not demonstrated why initially it could not have reasonably anticipated the effect of the Large Stores Law, as amended, on the film or paper market. In our view, a simple statement that Japan's measures were so opaque and informal that their impact could not be assessed is not sufficient. As for the 1982 directive on "prior explanation", we accept that this particular requirement was not reasonably anticipated by the United States as of the Tokyo Round.

10.220 The United States concedes that it was aware of the Large Stores Law, as amended, as of the conclusion of the Uruguay Round, but claims that, at the time of the Uruguay Round tariff negotiations, it was not aware and could not have been aware that Japan had seized upon the Large Stores Law as a key instrument to protect and support the vertical integration of distribution in the consumer photographic materials sector. Japan responds that the law and relevant regulations have been published and that their requirements have long been publicly known facts. Moreover, Japan contends that the United States has been making these claims concerning the Large Stores Law with respect to imports generally for years, both in the "National Trade Estimate Report on Foreign Trade Barriers", published annually by the Office of the United States Trade Representative, and in bilateral talks with the Japanese Government under the Structural Impediments Initiative.

[1325] *EEC - Oilseeds*, BISD 37S/86, 129, para. 149.

[1326] See Gilbert R. Winham, International Trade and the Tokyo Round Negotiation 268 (1986), Japan Ex. E-6.

10.221 In light of the fact that the Large Stores Law, its amendments and the major elements of policy underlying the law and its amendments all predate the conclusion of the Uruguay Round, and indeed appear to have been the subject of official US publications and bilateral discussions and joint reports between the United States and Japan, we find that the United States should have reasonably anticipated the essential elements of the law and its amendments, as well as their potential impact on the photographic materials sector in Japan, as of the conclusion of the Uruguay Round.

10.222 *Impairment and causality.* The United States contends that the suppression of large stores under the Large Stores Law affects the distribution of foreign film in Japan in two respects. First, restricting large stores indirectly supports manufacturer domination of oligopolistic distribution structures. This structure depends on manufacturer dominance of wholesalers, and wholesaler dominance over retailers. Retailers with greater purchasing power and business sophistication could effectively play the various wholesalers and manufacturers off of each other to gain more favourable terms, and to resist attempts to hold the retailers under the control of a single manufacturer-wholesaler chain. Second, large stores provide an alternative channel to market film for foreign manufacturers excluded from the wholesale distribution system. With a sufficiently developed network of large stores, a manufacturer could reach a large portion of the Japanese market with a limited number of accounts. Consequently, the United States claims that Japan upset the competitive relationship between imported and domestic photographic film and paper by inhibiting the development of a viable alternative channel for the distribution and sale of imported film and paper.

10.223 Japan argues in reply that in the present case the United States bears the burden to show specifically how the application of the Large Stores Law to the specific products at issue, i.e., black and white film and paper, and colour film and paper, nullifies or impairs some benefit. Japan maintains that the law and its implementing regulations neither apply directly to film or paper, nor to any product generally. The law does not distinguish between domestic and imported film and thus there is no explicit disadvantage imposed on imports. Furthermore, the regulation of large stores under this law also does not impose any inherent disadvantage on imports and there is nothing intrinsic in the nature of imports that renders them less capable of competing in a marketplace where a diversity of retailing types is promoted. Moreover, Japan points out, the Large Stores Law does not vest the government with the authority to recommend or order any store to carry certain products or products of a certain origin. Indeed, the only distinction the law draws with respect to products is to apply more liberal rules with respect to retail stores that carry imported products. In addition, the regulations imposed by the law on large stores do not differ depending on the origin of products carried by large stores or small retailers within their vicinity. Thus, the law does not create any artificial incentive for retailers to buy domestic film, nor does it discourage retailers from buying imported film. For Japan, there is thus no reason to believe that larger retail space inherently works to the advantage of imported film products, because retailers choose products to maximize profit, and the size of retail space does not change the profitability of film products to the advantage of domestic brands. The law is thus incapable of altering even indirectly the competitive conditions between domestic and imported products. Japan concludes that it is not possible for this law to frustrate any reasonable US anticipation concerning specific products at the time of any of the relevant tariff concessions. According to Japan, under the overly broad US theory of Article XXIII:1(b), virtually every form of government policy would become actionable as measures potentially relating to specific products. Japan believes, however, that a clear nexus must exist between specific products and the challenged government measure, and that the US allegations concerning the Large Stores Law do not meet this test.

10.224 In evaluating the US claim that the Large Stores Law upsets the competitive relationship between domestic and imported film and paper, we will consider (i) the relationship of large stores to imported film and paper, and (ii) the evolution of Japanese regulation of large stores.

10.225 First, as to the relationship of large stores to imported film and paper, we note that we are presented with measures regulating large stores that are clearly neutral as to products and the origin

of products. Added to this, there is a lack of evidence as to any product-specific or origin-specific implementation of these measures. Indeed, it seems clear the motivating force behind opposition to the expansion of large stores in Japan, and in many other countries as well, is from small- and medium-sized stores concerned with the impact that such stores may have on them, and not because of a desire to hinder imports of foreign film and paper. Thus, the rationale of the Large Stores Law is the protection of small stores.

10.226 It is possible, however, that a measure that is formally neutral as to the origin of products may be shown to be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports. In this regard, we note that the United States asserts that the application of the Large Stores Law has negatively affected the relative competitive position of imported film in the Japanese market because it restricts the spread of large stores, which the United States claims, on the basis of survey evidence, are more likely to carry imported film. Japan contends, however, that the US evidence shows only that stores selling a high volume of film, whether they are large or small stores, are more likely to carry imported film. The United States ripostes that its survey data, when controlled for volume of sales, still shows that large stores are more likely to carry imported film. It seems to us that even if there is a greater tendency for large stores to carry imported film, access to large stores is less important for film than for other imported products since film takes up very little shelf space even taking account that a full display of all film types is comprised of many rolls of film. This would seem to be confirmed by the Japanese evidence that high-volume sellers of film, whether large or small stores, are more likely to carry imported film. However, on balance we are left with conflicting evidence and no sure way to resolve the conflict. In light of our findings in the following paragraphs, we consider that it is not necessary to make a finding on this issue.

10.227 We note our unease, however, about relying on the type of evidence offered by the United States to justify its claim here. Essentially, it argues that since a certain type of store sells more imported products than other stores, any regulation of that type of store may give rise to legitimate claims under Article XXIII:1(b). Such an argument is similar to one used to attack Sunday closing laws in the European Community, i.e., since home improvement stores sell imported products and sell more products on Sunday, limitations on Sunday trading may be assimilated to import restrictions. The EC Court of Justice refused to find a violation of the EC Treaty.[1327]

10.228 Second, in considering whether the Large Stores Law upsets the competitive relationship between domestic and imported film and paper, we need to analyze the evolution of Japanese regulation of large stores. We will examine the differences between what was the situation in 1967, 1979 and 1993 and what is the situation today. In particular, we will look at the following factors: the detail of the regulations (permission versus notification; approval rates and qualifications, opening hours, store holidays, store size); and the relative market position of large stores in the Japanese economy.

10.229 Compared to 1967, the regulation of large stores has been tightened in the sense that the Large Stores Law covers more retail establishments than did the Department Store Law and stores of 1000 square metres are subject to the law while the Department Store Law applied only to stores of 1500 square metres.[1328] To evaluate the impact of this change, however, it is necessary to consider the detail of the regulation under the two laws, as of 1967 and today. Japan notes that the Large Store Law only requires notifications as opposed to applications for permits (as required under the Department

[1327]Torfaen Borough Council v. B & Q PLC, Case C-145/88, [1989] ECR 3851. For a subsequent development of relevant EC law on the application of Article 30 of the EC Treaty (prohibiting quantitative restrictions on imports and measures having equivalent effect) generally, see: Keck & Mithouard, Cases C-267 & 268/91, [1993] ECR I-6097, Punta Casa SpA v. Sindaco del Commune di Capena, Cases C-69 & 258/93, [1994] ECR I-2355.

[1328]The Large Stores Law applies to stores of 500 square metres, but since 1994, stores of less than 1000 square metres are generally exempted from adjustment because they are in principle deemed to have no probability of adversely affecting nearby small and medium-size retailers. Standards for Evaluating Probability Under Article 7(1,4) Large Stores Law, No. 96, MITI, 1 April 1994, Japan Ex. C-7.

Store Law), but since notified stores may in fact be regulated as to various elements (size, opening hours), this aspect of the Department Store Law does not seem significantly more burdensome than the provisions of the Large Stores Law, which covers smaller stores, as well. The United States cites statistics on denials and required size reductions under the Large Stores Law, but it does not show how the situation differs from that prevailing under the Department Store Law as it applied at the conclusion of the Kennedy Round in 1967. Some firm conclusions may be drawn, however. In terms of what is normally permitted, policies on opening hours and store holidays are now more liberal than they were in 1967. The "normal" closing time has been extended from 6 p.m. to 8 p.m. and the required number of store holidays has been reduced from 48 to 24 days. These changes are significant because they affect the actual day-to-day operations of large stores. On the relative market position of large stores in the Japanese economy, we note initially that neither party has submitted evidence for the years between 1967 and 1982. However, since 1982, both parties agree that the market share of large stores in retail sales has increased, albeit modestly. We note that this increase occurred despite the existence from 1982 to 1992 of the "prior explanation" requirement.

10.230 Comparing the present situation in respect of the application of the Large Stores Law to those existing at the conclusions of the Tokyo Round in 1979 and of the Uruguay Round in 1993 leads to the same result. As of the conclusion of the Tokyo Round, the Large Stores Law was in effect and applied to stores of more than 500 square metres. Since that time, the size threshold has been raised to 1000 square metres, the "normal" closing time has been extended from 6 p.m. to 8 p.m. and the required number of store holidays has been reduced from 48 to 24 days. Since 1982, both parties agree that the market share of large stores in retail sales has increased, albeit modestly. Compared to the situation prevailing at the conclusion of the Uruguay Round in 1993, the size threshold has been raised from 500 metres to 1000 square metres, the "normal" closing time has been extended from 7 p.m. to 8 p.m. and the required number of store holidays has been reduced from 44 to 24 days.

10.231 On balance, we are not persuaded that the regulation of large stores today is tighter than it was in 1967, 1979 or 1993. The evidence relating to the recent evolution of procedural requirements and conditions of operation of stores under the law suggests that there has been a substantial liberalization in the application of the law since the early 1990s, with the concomitant result that the law is now more favourable to the opening of large stores than it was at the conclusion of any of the three rounds of multilateral trade negotiations.

10.232 Finally, we consider the ramifications for the US claim under Article XXIII:1(b) of our conclusions concerning the evolution of Japan's regulation of large stores. We note that the essence of the US claims in respect of large stores differs from its claim in respect of distribution and promotion measures. In the case of those measures, the US claim is that the Government of Japan acted to impede market access for imports by taking actions that made it more difficult to sell imported film compared to the time the tariff concession was granted. The Large Stores Law claim is different. The United States concedes that there are more large stores in Japan today than there were in 1982 in total number and their share of retail sales is greater than it was in 1982. Thus, to the extent that more large stores means more favourable conditions for import market penetration, the situation today is better than it was in 1982. (There is no evidence on market shares of large stores prior to 1982.) In these circumstances, the argument would seem to be that the situation would be even better if Japan had not interfered with this favourable market evolution by slowing it. This raises the question of whether the United States can claim legitimate expectations related to expected market evolution, as opposed to expectations that the market situation at the time of a tariff concession will not be upset, e.g., by a grant of subsidies or implementation of measures that change existing competitive relationships or by restricting the use of previously permitted sales techniques. Normally, for competitive relationships to be upset, we would expect an adverse change in the situation existing at the time of the tariff concessions. In the case of subsidies, for example, a Member reasonably expects that subsidies will not be increased, not that they will be decreased. To the extent that the United States claim is viewed as being based on expectations about market evolution, the question becomes to what extent it must

establish it had reasons to expect in 1967 (or 1979 or 1993) that there would be a relative expansion of the large-store segment of Japan's economy, taking into account the existing regulation under the Department Stores Law or Large Stores Law. Even assuming that such expectations would be protected by Article XXIII:1(b), the United States has not established that it had any such expectation in 1967, 1979 or 1993.

10.233 On the record before us, therefore, we find that the United States has not demonstrated that the Large Stores Law of 1974, its amendment in 1979, or any implementing regulations or administrative measures, nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

5. PROMOTION "MEASURES"

10.234 The United States claims that Japan's application of the following eight promotion "countermeasures" allegedly disadvantage imports by restricting sales promotions, thereby nullifying or impairing benefits accruing to the United States under Article XXIII:1(b):

(1) 1967 Cabinet Decision on Liberalization of Inward Direct Investment;
(2) 1967 JFTC Notification 17 on premiums to businesses;
(3) 1977 JFTC Notification 5 on premium offers to consumers;
(4) 1981 JFTC Guidance on Dispatched Employees;
(5) 1982 Self-Regulating Rules Concerning Fairness In Trade With Business;
(6) 1982 Establishment of Fair Trade Promotion Council;
(7) 1982 Self-Regulating Standards Concerning Display of Processing Fees; and
(8) 1987 JFTC approval of the Retailers Fair Competition Code and the Retailers Fair Trade Council.

The text of and background material surrounding these "measures" is set out in Part II.

10.235 In general terms, the United States claims that Japan has reinforced the distribution "countermeasures" not only through legislated restrictions on retail stores but also through a system of measures limiting how photographic material manufacturers, wholesalers and retailers may promote their products in order to expand their sales of photographic film and paper in the Japanese market by means of economic inducements and aggressive advertising. The United States claims that promotion "countermeasures" have disadvantaged foreign manufacturers of film and paper by constraining their ability to use certain discounts, gifts, coupons, and other inducements, or to rely upon innovative advertising campaigns, particularly where price or price comparisons are discussed. The United States argues that Japan has implemented these promotion "countermeasures" through the Premiums Law and certain regulations issued by the JFTC under the Antimonopoly Law. Although these measures also apply to domestic film and paper producers, the United States contends that Japan has imposed them with the intention of striking against international competition by foreign imports following trade liberalization, i.e., the ability of foreign manufacturers to convert their strong capitalization and cost competitiveness into potent marketing strategies and aggressive promotional competition.

10.236 Japan responds that the Premiums Law imposes restrictions only on excessive premiums and regulates only misleading representations. In the interest of consumer protection, the Premiums Law is designed to deal effectively with unfair trade practices and encourage manufacturers to compete principally on the basis of price and quality, not unfair inducements or deceptive and misleading representations. Japan emphasizes that the law makes no distinctions between imported or domestic products. Japan further argues that the Premiums Law does not hinder vigorous price and promotional competition. Low price offers are not only permitted, but are, in Japan's view, facilitated by the law, and a broad range of promotional practices are consistent with the law. All companies, both domestic and foreign, have been and continue to be free to spend as much money as they want on advertising.

Companies are free to use any expressions they wish, so long as they do not deceive or mislead consumers. Japan also submits that no businesses have ever been restricted from offering promotional gifts or prizes by lotteries and competition, so long as they are in line with the standards set in accordance with the law to protect consumers. In Japan's view, these standards are no more rigid than those set by similar laws in many other countries. Japan also contends that in some respects, the standards are actually less rigid than those of the United States because certain types of lotteries and prize competitions prohibited in the United States have been allowed in Japan.

10.237 The United States also points out that enforcement actions under the Premiums Law may be taken by the JFTC and the 47 prefectural governments. Moreover, the JFTC has given its official sanction to so-called "fair competition codes" promulgated by private sector "fair trade councils". The United States also argues that the "fair trade councils" have authority to discipline members who violate the codes, often employing methods of coercion and monetary penalties, and that the standards established by the councils in their codes typically are adopted by the JFTC, which then applies the same rules to "outsiders" given that the Premiums Law expressly exempts the cartel-like practices of the councils from antitrust enforcement. Japan responds that private "fair competition codes" and the "fair trade councils" are not relevant to this case because no "code" or "council" covers photographic film or paper.

10.238 Bearing in mind these general arguments of the parties, we shall now proceed with our examination of each of the eight promotion "measures" in light of the three elements of a non-violation case outlined earlier.

(a) 1967 Cabinet Decision

10.239 The first promotion "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) is the Japanese Cabinet Decision on Liberalization of Inward Direct Investment of 6 June 1967 ("1967 Cabinet Decision")[1329], considered previously in our examination of distribution "measures". We recall the US assertion that this 1967 Cabinet Decision was a "watershed" in Japan's efforts to restructure Japanese industry to resist imminent foreign competition following capital liberalization in the 1960s. We further recall Japan's response that the 1967 Cabinet Decision, which implemented the first stage of capital liberalization, was concerned generally with modernization and improved efficiency in the Japanese distribution sector so as to permit domestic industries to compete with foreign rivals in the new, less regulated business environment.

10.240 We note that in June 1967, following a request of the government for a study concerning inward direct investment, the Foreign Investment Council ("FIC") Expert Committee, an advisory committee of the Ministry of Finance, submitted a report stating, *inter alia*, that

> "[f]or the provision of large-scale premiums, it is believed that establishing fair competition codes pursuant to the [Premiums Law] with assistance from the industry that might be affected, would be an effective countermeasure".[1330]

On the regulation of unfair trade practices, the FIC Expert Committee Report also stated:

> "(1) When foreign capital is brought into Japan, it is possible for a parent company to use vast amounts of capital to engage in dumping, offer premiums, and conduct large-scale publicity and advertising, etc. In the future, as liberalization of direct investment in the domestic market progresses, such risk may conceivably be reinforced. Therefore, in such a situation, it is necessary to fully study whether these actions qualify

[1329]US Ex. 67-6.
[1330]US Ex. 67-5 (B), p. 3.

> as unfair trade practices as defined in Article 2 of the Antimonopoly Law and can be regulated pursuant to provisions under Article 19 of the said Antimonopoly Law or the Law Against Unjustifiable Premiums and Misleading Representations.
>
> (2) For the application of the Antimonopoly Law, while one may not specifically select foreign capital affiliated firms for differential treatment, foreign capital affiliated firms nevertheless have the strong capital and technological background of the parent company and are usually in an economically strong position. Consequently, it is believed that they will often become the object of regulation of the Antimonopoly Law. On this point, we must be able to apply standards to deal with any disorderly activities by foreign capital because existing standards of regulation of unfair trade practices are not necessarily clear and we may, for example, clarify them by making use of a special designation or some other method".[1331]

10.241 The 1967 Cabinet Decision provides the following basic direction for the "countermeasures" to be taken in carrying out liberalization:

> "If, therefore, our enterprises are to compete against foreign capital on equal terms, the following would be necessary: companies must improve their own quality and pursue the organization of the industrial system, intensively strengthen the capacity for technological development, organize the financial system in parallel with the organization of the industrial system, and lower of long-term interest rates.
>
> On the other hand, it would be necessary to restrain foreign enterprises coming into Japan after liberalization from disturbing order in domestic industries, by resorting to the strength of their superior power, and from advancing into the non-liberalized sectors by evading control.
>
> The establishment of these countermeasures for strengthening the capacity of our enterprises for international competition and for preventing foreign enterprises from disturbing order in our industries and market would be a basic necessity if the liberalization is to be promoted and if our people are to enjoy its economic benefits.
> …
> The basic direction of the countermeasures that the government should adopt are the following three points:
>
> 1) Prevent disorder that may arise from the advancement of foreign capital;
> 2) Create the foundation to enable our enterprises to compete with foreign enterprises on equal terms;
> 3) Actively strengthen the quality of [domestic] enterprises and reorganize the industrial system so that they can fully compete with foreign capital".[1332]

10.242 We recall the US claim that in July 1967, the Cabinet adopted the recommendations of the FIC and its Expert Committee that the Premiums Law should be used as a liberalization "countermeasure" by establishing fair competition codes. According to the United States, the government directed that the codes were to be established by industry representatives and trade associations, as provided under Article 10 of the Premiums Law, and the government would exercise "active guidance".[1333] Japan responds that it does not believe it is necessary to address fair competition codes or fair trade councils as none of them cover photographic film or paper. Nevertheless, Japan argues that it was considered

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[1331]Ibid.

[1332]MITI History Vol. 17, pp. 379-388, (provisional translation) US Ex. 67-6, p. 4.

[1333]US Ex. 67-5, A and B.

desirable for effective enforcement of the Premiums Law to have business entities agree on self-restraint of excessive premiums and misleading representations, and to prevent actual violations of the Premiums Law. According to Japan, it is against this background that the Premiums Law allows business entities to adopt, subject to the JFTC's approval, fair competition codes on premiums and representations. Japan also argues that, contrary to the US allegation, the Cabinet did not adopt the FIC Expert Committee Report. Therefore, Japan submits, the Japanese Government did not exercise "active guidance".

10.243 *Application of measure.* Although there can be little doubt that the 1967 Cabinet Decision as a whole constitutes a governmental measure, within the meaning of Article XXIII:1(b), the parties differ on the issue of whether or not this measure is still in effect. While Japan submits and the United States concedes that the 1967 Cabinet Decision was repealed on 26 December 1980, the United States argues that the repeal affects only that portion of the 1967 Cabinet Decision relating to controls on international investment in Japan, not the distribution policies and liberalization "countermeasures" directed by the 1967 Cabinet Decision. In reply, Japan indicates that it is impossible to adequately respond to this contention because the United States does not specify which measures it believes resulted from the 1967 Cabinet Decision, but that in any case any "measures" not specifically identified are not properly before this Panel.

10.244 Although the United States puts the emphasis here on another part of the 1967 Cabinet Decision than it did in its arguments on distribution "measures", the same analysis that we applied in the distribution section in respect of the effectiveness of the 1967 Cabinet Decision applies here as well. On the basis of that analysis, we find that the 1967 policies could have been carried forward, consistently with the 1980 Decision. To the extent that these policies have not been abandoned, we consider that they continue to constitute a measure within the meaning of Article XXIII:1(b).

10.245 *Benefit accruing.* We recall the US claim that the benefits accruing to it are its legitimate expectations of improved market access resulting from Japanese tariff concessions on film and paper at the conclusion of the Kennedy, Tokyo and Uruguay Rounds. The United States maintains it could not have reasonably anticipated the impact of the 1967 Cabinet Decision during the Kennedy Round negotiations. Specifically, according to the United States, at the time of the Kennedy Round negotiations there were no pertinent facts available concerning the actions Japan was preparing to take to implement its "liberalization countermeasures programme" and that as of 30 June 1967, the Cabinet Decision had yet to be promulgated and implemented. Similarly, the United States argues that it was unaware of the impact of this Cabinet Decision on the film industry in Japan even as of the conclusion of the Tokyo and Uruguay Rounds.

10.246 Japan argues that the United States cannot properly claim to have any legitimate expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, several weeks following the Cabinet Decision of 6 June 1967. Moreover, according to Japan, the Cabinet Decision was preceded by a high-level public debate on capital liberalization, a debate of which the United States would have been aware. Japan also argues that the Premiums Law was enacted in 1962 and that this law targeted conduct that had been identified by the JFTC as unfair trade practices as early as 1953. Accordingly, Japan claims, the United States had no legitimate basis for expecting fair competition codes would not be approved or that excessive premiums and deceptive advertising would go unregulated, or that this regulation would not be enforced vigorously. Japan argues that the measure should have been anticipated by the United States *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.247 We note that this Cabinet Decision of 6 June 1967 was published in Kampo (Japan's official gazette) on 21 June 1967[1334], thus predating the formal conclusion of the Kennedy Round (30 June 1967) by nine days. We recall the test developed in our general discussion of reasonable anticipation to the effect that a Member is presumed to have knowledge of a measure as of the date of its publication, but that this presumption may be rebutted where the Member identifies exceptional circumstances. Because of the short time period between this particular measure's publication and the formal conclusion of the Kennedy Round, we consider it difficult to conclude that the United States should be charged with having anticipated the 1967 Cabinet Decision since it would be unrealistic to expect that the United States would have had an opportunity to reopen tariff negotiations on individual products in the last few days of a multilateral negotiating round. Accordingly, we consider that the United States, in relation to the 1967 Cabinet Decision, has legitimate expectations of improved market access emanating from the Kennedy Round. However, applying the test developed earlier, we find that the United States may not claim legitimate expectations arising from the Tokyo and Uruguay Round concessions.

10.248 *Impairment and causality.* The United States argues that improved access to the Japanese market for film and paper emanating from Japan's Kennedy Round concessions on black and white film and paper are nullified and impaired as the result of the 1967 Cabinet Decision and subsequent promotion "countermeasures" of the Japanese Government. According to the United States, the 1967 Cabinet Decision approved the use of "countermeasures" for "preventing foreign enterprises from disturbing order in our industries".[1335] The United States further argues that its additional expectations emanating from the Tokyo Round and the Uruguay Round, including those relating to improved market access for *colour* film and paper, are also nullified or impaired.

10.249 Japan contends that the 1967 Cabinet Decision contains only very general policy statements as to what sorts of actions the government considered to be desirable in order to modernize Japan's overall distribution sector following capital liberalization; it does not set in motion any specific measures which could be said to discriminate *de jure* or *de facto* against the access of imports to the Japanese market. Japan argues that the United States has not provided any evidence to the Panel demonstrating "impairment" resulting from the 1967 Cabinet Decision.

10.250 Our analysis of the claim that the 1967 Cabinet Decision impairs market-access benefits accruing to the United States is made particularly difficult by the fact that, as argued by Japan, the portions of the Cabinet Decision addressing the need to modernize the Japanese distribution system are in the nature of very general policy statements. The overall theme of the policy statements contained in the 1967 Cabinet Decision is to the effect that the Japanese Government should find ways to help modernize the distribution sector so as to respond to the intensified competition that capital liberalization was expected to bring. Moreover, the United States has not been able to point to any specific actions governing or consequences of promotion activities disfavouring imports emanating from the 1967 Cabinet Decision (although it does argue that in general terms most of the subsequent promotion "measures" it cites are grounded in the 1967 Cabinet Decision). Accordingly, we find that the United States has not demonstrated that the general policy statements contained in the 1967 Cabinet Decision nullify or impair benefits accruing to the United States within the meaning of Article XXIII:1(b). At most, in our view, the 1967 Cabinet Decision is part of the context for later actions taken by Japan.

10.251 Thus, while the 1967 Cabinet Decision may still be viewed as a measure for purposes of Article XXIII:1(b) and the United States is not charged with having anticipated the measure prior to the conclusion of the Kennedy Round, the United States should have anticipated the Decision as of the conclusion of the Tokyo and Uruguay Rounds. Moreover, the United States has not shown that the measure nullifies or impairs benefits accruing to it from the Kennedy Round in respect of black

[1334]Table U of Japan's First Submission, p. 188.
[1335]US Ex. 67-6, p. 4.

and white film and paper, nor from the Tokyo or Uruguay Rounds in terms of black and white and colour film and paper.

(b) 1967 JFTC Notification 17 on premiums to business

10.252 The second promotion "measure" cited by the United States is JFTC Notification 17 on premiums to business, of 10 May 1967 ("JFTC Notification 17")[1336], previously discussed under the section on distribution "measures". This notification was made pursuant to Article 3 of the Premiums Law (authorization to the JFTC to restrict premiums), and provides *inter alia* the following:

> "Businesses … who manufacture (including process, hereinafter the same) the products listed in the attached table or businesses who sell such products shall not offer premiums to businesses who purchase and sell the products involved in such manufacture or sale, or who use the products to supply services to general consumers (hereinafter referred to as "other party business"), as a means of inducing the other party business to begin to transact such products, or on the condition that the other party business' s transaction amount or such other transaction condition satisfy certain criteria which the [first] business has established. Provided, however, that the preceding provisions shall not apply to cases of premium offers which are within the annual limit of 100,000 yen or less per one other party business, and which are found reasonable in the light of normal business practices".[1337]

10.253 JFTC Notification 17 limits to 100,000 yen annually the right of manufacturers of certain goods, including manufacturers of photosensitive materials, to offer cash or other premiums to wholesalers or retailers as an inducement for the wholesaler or retailer to begin handling the manufacturer' s products, or to meet other conditions established by the manufacturer (e.g., purchase tickets). An exception to this prohibition on premiums in excess of 100,000 yen (Item 2-4) allows a manufacturer to offer premiums to employees of distributors and retailers that are in a special relationship with the manufacturer (e.g., through capital investment, interlocking directorates, etc.). JFTC Notification 17 was repealed in April 1996 in the course of a review of the Premiums Law.

10.254 *Application of measure.* The United States contends that JFTC Notification 17 is a governmental measure. While conceding that the measure was repealed in April 1996, the United States argues that other provisions of Japanese law make the repeal meaningless. Specifically, premiums from manufacturers to wholesalers are still subject to Designation 9 of JFTC Notification 15 of 1982[1338], i.e., the provision governing the use of "unjust inducements" under the Antimonopoly Law. That designation prohibits premium offers in excess of "normal business practice". Thus, according to the United States, given that JFTC Notification 17 set industry practice for 19 years, it is uncertain at best as to whether present restrictions under Designation 9 differ at all from the situation under Notification 17.

10.255 Japan contends that, although JFTC Notification 17 was at one time a governmental measure, it was formally repealed in April 1996. Thus, for Japan, there is no governmental measure in issue. As for the alleged continuation of the policy underlying JFTC Notification 17 through Designation 9 of JFTC Notification 15 (1982), Japan responds that the United States is belatedly raising a "measure" or policy that was not specifically identified in its panel request and which is therefore outside the Panel' s terms of reference. Japan further states that under Designation 9 of JFTC Notification 15, the automatic trigger level of 100,000 yen no longer exists and the burden of proof lies with the JFTC.

[1336]US Ex. 67-4; Japan Ex. D-42.

[1337]Ibid, p. 1.

[1338]Designation 9 of Notification 15 (1982): "Inducing customers of a competitor to deal with oneself by offering unjust benefits in the light of normal business practice", US Ex. 82-6.

10.256 We note that both parties agree that between 1967 and 1996, JFTC Notification 17 was a governmental measure. We also note that they both agree that the measure was repealed in April 1996. The issue before us, therefore, is whether or not we should take cognizance of what the United States describes as a continuation of the policy of JFTC Notification 17 by means of Designation 9 of JFTC Notification 15 (1982), the latter not having been specifically identified in the US panel request. On this issue, we recall that JFTC Notification 17 itself was also not specifically identified in the panel request, but that we decided to permit its inclusion within our terms of reference given that it was a measure taken pursuant to the Premiums Law which was specifically identified in the request. JFTC Notification 15 of 1982, in contrast, is a "measure" taken pursuant to Article 2.9 of the Antimonopoly Law of 1947. While the Antimonopoly Law was cited in the panel request, it was cited only in respect of a "measure" relating to dispatched employees. Consequently, we found that "measures" unrelated to dispatched employees (i.e., a "measure" relating to international contract notification and to guidance on loss-leader advertising and dumping) were not within our terms of reference. Consistent with that finding we also do not consider Designation 9 of JFTC Notification 15 to be within our terms of reference. Moreover, even if we were to consider that it is appropriate to take into account the US argument that the policy underlying JFTC Notification 17 (1967) has continued to be applied under Designation 9 of JFTC Notification 15 (1982), we note that the United States has not demonstrated that the policy underlying JFTC Notification 17 has been continued through ongoing administrative guidance under the Designation.

10.257 *Benefit accruing.* The United States argues that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that it could not have anticipated the impact of JFTC Notification 17 at the time of the Kennedy Round negotiations because there were no pertinent facts available at that time concerning the actions Japan was preparing to take to implement its liberalization "countermeasures" programme. Similarly, the United States argues that it could not have anticipated the impact of this measure as of the conclusion of the Tokyo and Uruguay Rounds. We also recall the Japanese position that the United States cannot properly claim to have any legitimate expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, more than a month and a half following issuance of JFTC Notification 17 on 10 May 1967. Japan further argues that the measure should have been anticipated *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.258 In our view, given that the publication of JFTC Notification 17 predated the conclusion of the Kennedy Round, it is difficult to conclude that the United States should not be held to have anticipated JFTC Notification 17 in advance of Japan's first tariff concessions on film and paper. As we noted earlier, the United States is charged with knowledge of Japanese regulations on publication. Although we can conceive of circumstances were the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. This is particularly true given that as of 1967 the current structure of the Japanese film market was largely in place, i.e., there were only a few primary film wholesalers and single-brand distribution of film was typical, it would seem that the United States should have been able to assess the impact of this measure, if any, on the Japanese market for film at the time it was introduced. Thus, we are not persuaded that the United States has met its burden of establishing that in relation to JFTC Notification 17, it has legitimate expectations of improved market access emanating from the Kennedy Round. We consider that this reasoning *a fortiori* applies to claimed legitimate expectations arising from the Tokyo and Uruguay Round concessions.

10.259 *Impairment and causality.* The United States contends that even though JFTC Notification 17, which sets a 100,000 yen ($278 in 1967) maximum annual limit on the premium that a manufacturer could give to a wholesaler or retailer (or a primary wholesaler to a secondary wholesaler or retailer)

for all products traded between the two, it upset the competitive relationship between the two. According to the United States, foreign enterprises entering the Japanese market or trying to expand their market share following tariff reductions and import liberalization, were not able to invest in their own distribution networks until the 1970s when investment restrictions were progressively lifted. Thus, the United States maintains, foreign enterprises had to compete with Japanese manufacturers for existing wholesalers and distributors to carry their products. JFTC Notification 17 limited the ability of foreign enterprises to outbid Japanese enterprises in the competition for Japanese distributors by setting an arbitrarily low ceiling on the amount of premiums that a manufacturer could give to a wholesaler or retailer in any one year. Moreover, the United States argues that foreign manufacturers, which had no direct relationships with Japanese wholesalers because of Japan's requirement that they deal with a sole import agent, were prohibited from availing themselves of the exception under Item 2-4 of the JFTC Notification 17 which permitted the offering of unlimited premiums to the employees of enterprises that were in exclusive, vertically-integrated relationships with the manufacturer.

10.260 Japan responds that JFTC Notification 17 did not single out the photographic materials industry: more than 100 industries were covered. In any event, the regulation only restricted excessive premium offers to distributors, not other promotional activities. The rationale for the restriction was that excessive offers could impair fair and free price competition in the distribution sector and could increase the distribution cost to the detriment of consumer interests. Low price offers, rebates and offers of goods to assist the other parties' promotional activities were not regulated under this JFTC notification. Japan also argues that the United States misconstrues the nature of the exception found in Item 2-4. Premiums offered to employees of companies which were in a special relationship, through share holdings or interlocking directorates, with the manufacturer, did not fall under the regulation, because they were no different than premiums offered to one's own employees. The exception applied only to transactions which were virtually identical to operations within a single entity. Fuji and its primary wholesalers, for example, were not eligible because they were not in a special relationship. Finally, as to the US arguments on investment restrictions, Japan responds that during the period before capital liberalization, if Kodak had wanted to use investments to establish and build relationships with any single-brand primary wholesalers it could have done so. According to Japan, Kodak's exclusive importer, Nagase, could and did invest in distribution by buying two primary wholesalers; it could have legally made equity investments in Fuji's primary wholesalers if it had wanted to. For Japan, US arguments about capital restrictions interfering with Kodak's business plans makes no sense because Kodak exercised virtually none of its legal options during the period of restrictions on investments or even after such restrictions were lifted.

10.261 Assessing the issue of impairment and causality, we note that JFTC Notification 17 appears to be equally directed at promotional activities with respect to both domestic and foreign products. It is not specifically aimed at imports, nor does it target film and paper, even though it lists "photographic materials" among the many consumer products to which it is directed. Although there is reference in a press summary to the need to counteract the influence of US capital[1339], the JFTC drafting history cites excesses in Japanese industry leading to distortions in intrinsic competition for price, quality and beneficial services, and "cut-throat sales practices promoted by huge capital power" as justifications for the measure.[1340]

[1339]Severe Restrictions Placed on Businesses for Premium Offers: Shatokuren Hears JFTC Explanations at Jyosui Kaikan on the 12th, Nihon Shashin Kogyo Tsushin, 20 June 1967, p. 25, US Ex. 67-8, p. 1. In this press summary, JFTC explained that "[t]he primary objective of [Notification 17] is (a) rationalization of the distribution stage … ; and (b) eliminat[ion] of the stronger prey upon the weaker sales competition based on the power of capital … If US capital were to conduct [premium offers] directed at the Japanese distribution sector, this would be no match for [Japan], so the restrictions should be applied as a breakwater before liberalization". Ibid.

[1340]Restriction on Premium Offers to Businesses, JFTC, Premiums and Representations Inspection Division, Kosei Torihiki, July 1967, p. 30, US Ex. 67-10, p. 2.

10.262 On balance, in our view, the evidence suggests that this measure is directed against potential excesses in the distribution sector in general. It targets excessive premiums given by manufacturers to wholesalers and by wholesalers to retailers. It does not, however, attempt to regulate other forms of promotional activity, such as low price offers and rebates. Moreover, while we do not reject the notion that facially-neutral measures may be shown to be applied in a manner that upsets the competitive relationship between domestic and imported products to the detriment of imports, the United States has not been able to point to any single instance where implementation of JFTC Notification 17 has led to such a result in respect of US film and paper. In this regard, we note that until 1975, Kodak had a relationship with a primary wholesaler - Asanuma. That relationship later ended apparently because of Kodak's refusal to deal directly with Asanuma.[1341] The United States has not shown that Kodak's inability to give premiums to Asanuma was relevant to the termination. In addition, the US contextual arguments about the impact of Japanese restrictions on investments, to the extent that they are true[1342], do not demonstrate anything in relation to the application of JFTC Notification 17. Finally, as to the exception provided in Item 2-4 of JFTC Notification 17, the evidence suggests that this provision, neither inherently nor in its application, discriminates against imported film or paper. Although it appears that Kodak was unable to avail itself of this exception, due to the structure of Kodak's distribution relationships, the same was true in the case of Fuji.

10.263 On the evidence before us, therefore, we are not persuaded that JFTC Notification 17, and its implementation in the Japanese photographic materials sector (to the extent this has occurred), have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market by preventing Kodak from establishing distribution relationships in that market. Accordingly, we find that the United States has not demonstrated that JFTC Notification 17 nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.264 Thus, while the United States has shown that JFTC Notification 17 is a measure for purposes of Article XXIII:1(b), it is no longer in effect. Moreover, it has not shown that it should not be held to have anticipated JFTC Notification 17 in relation to its Kennedy Round expectations in respect of black and white film and paper and it has not demonstrated that JFTC Notification 17 nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim - except that it is a measure under Article XXIII:1(b).

(c) 1977 JFTC Notification 5 on premium offers to consumers

10.265 The third promotion "measure" cited by the United States is JFTC Notification 5 on Restriction on Premium Offers to Consumers of 1 March 1977 ("JFTC Notification 5").[1343] This notification was issued pursuant to Article 3 of the Premiums Law. It was amended by JFTC Notification 2 of 16 February 1996 (which removed the ceiling of 50,000 yen for premiums to all purchasers). Subject to certain exceptions dealing, *inter alia*, with samples, discount coupons, articles presented at business openings (all subject to the condition that they be "found reasonable in the light of normal business practices"), JFTC Notification 5 provides in relevant part:

[1341]Affidavit of Takenosuke Katsuoka, Japan Ex. A-11, pp. 2-4.

[1342]We note in this regard Japan's reference to a statement by the President of Kodak Japan, Mr. Albert Sieg, in a 1988 interview: "The glaring mistake was waiting so long to take aggressive action in this market. We should have been here with this approach ten years ago. Clearly, the momentum of our local competitors got a strong forward thrust, and our task will be much, much more difficult", A Century of Sales, in Taking on Japan (1988), pp. 35-39, Japan Ex. B-45. Japan also indicates that Kodak could have established a 50-50 joint venture, such as Kodak Nagase (set up in 1986), as early as 1971.

[1343]Japan Ex. D-32.

> "1. The value of a premium offered to general consumers, excluding those by lotteries or prize competition … , shall be within 10 percent of the transaction value involved in the premium offer (provided that if the amount is less than 100 yen, the limit shall be 100 yen), and which is found reasonable in the light of normal business practices".[1344]

10.266 We recall the US claim that JFTC Notification 5 has the effect of severely restricting the offering of premiums on photographic film and paper to general consumers. According to the United States, given the relatively low price of film and paper, the value of any premium falling within the JFTC's restrictions would be negligible.

10.267 *Application of measure.* There is no dispute in this case that JFTC Notification 5 is a governmental measure and that it is still in effect, although, as noted above, it was amended in February 1996 with the removal of the ceiling of 50,000 yen for premiums to all purchasers. We therefore find that this notification is a measure within the meaning of Article XXIII:1(b).

10.268 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds. In particular, the United States argues that it could not have anticipated JFTC Notification 5 at the conclusion of the Kennedy Round negotiations since it was not issued until 1977. There was no reason, according to the United States, that it could or should have known that Japan would take such an action. Similarly, the United States maintains that it could not have anticipated the impact of the this measure as of the conclusion of the Tokyo and Uruguay Rounds (although these Rounds were concluded subsequent to the measure).

10.269 Japan responds that the Premiums Law was enacted in 1962, that JFTC Notification 5 merely represented an elaboration of the general norms set forth in that law. According to Japan, this elaboration of general norms set out in the Premiums Law should have been reasonably anticipated by the United States, since the United States could have had no legitimate basis for expecting that excessive premiums would go unregulated, or that the Premiums Law would not be enforced vigorously. Japan further argues that the measure should have reasonably been anticipated *a fortiori* prior to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds.

10.270 In assessing whether the United States should have reasonably anticipated this measure, we recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result. Here, we are not persuaded that the existence of the Premiums Law meant that the United States should be held to anticipate the specific way and terms pursuant to which premiums are regulated in Notification 5. However, to the extent that any legitimate expectations exist, they are limited to black and white film and paper.

10.271 With respect to the Tokyo and Uruguay Round concessions, which were granted subsequent to the measure, it is difficult not to conclude that the United States should have anticipated this already existing measure. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its possible differential impact until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to JFTC Notification 5, it has legitimate expectations of improved market access for photographic film and paper emanating from the Tokyo or Uruguay Round concessions.

[1344]Ibid, p. 1.

10.272 *Impairment and Causality.* The United States claims that the JFTC's imposition of new restrictions on the use of premiums upset the conditions of competition between imported and domestic products after the Kennedy Round by severely limiting the inducements enterprises could use to attract wholesalers, retailers and consumers to their products. Specifically with regard to JFTC Notification 5, the United States argues that the imposition of limits on the value of premium offers severely restricted the offering of premiums on film and paper to general consumers, and that given the relatively low price of such products, the value of any premium falling within the JFTC's restrictions would be negligible. Although conceding that JFTC Notification 5 is facially neutral, the United States argues that its application is intended to have, and has, a disparate impact on imported film and paper. In particular, the United States argues that this measure helps preserve the dominant position of Japanese film and paper manufacturers by shielding them from significant forms of promotion competition. In short, the United States claims, JFTC Notification 5, along with other JFTC notifications, has had a "chilling effect" on the ability of foreign producers to engage in promotion activities sufficient to compete effectively with dominant domestic brands.

10.273 Japan responds that: first, the Premiums Law and JFTC notifications are trade-neutral, with the regulation of premiums and representations under the Premiums Law and JFTC notifications applying equally to imported and domestic products; second, there is nothing about restrictions on excessive premiums or on misleading representations that is inherently unfavourable to imports, nor is there anything intrinsic to imports that makes them particularly reliant on misleading representation or excessive premiums; third, there is no "chilling effect" in that the regulations are no less advantageous to imported products or products representing a lower market share than to domestic products; fourth, there is no constraint on foreign film manufacturers in promoting their products by spending as much as they want on advertising, or by competing on price and quality, lawful premiums and non-misleading representations[1345]; and fifth, even if regulations were eased, this would not necessarily operate to the advantage of the challenging brands in that dominant brands would likely respond with further aggressive promotional activities of their own. In any case, Japan submits that in the course of a review of its regulations under the Premiums Law in 1996, the JFTC streamlined its general rule on excessive premiums, abolished restrictions on premium offers to businesses, and raised the ceiling on prizes.

10.274 On price competition in particular, we recall Japan's claim that Kodak film (the leading foreign brand) is often sold at retail at substantial discounts off manufacturer's suggested retail price, and that although Kodak does not advertise as heavily as its domestic competitors, it does engage in focused campaigns of targeted heavy advertising, "with predictable results". Japan notes that Kodak's heavy advertising and promotion in Nagano, site of the 1998 Winter Olympics (of which Kodak is a corporate sponsor), has led to a doubling of its market share in that area. In response, the United States argues that the ability of foreign manufacturers to use price discounts to expand their presence in Japan has been rather limited in that price reductions by foreign photographic materials manufacturers, including Kodak and Agfa, have often not been passed on to consumers at the retail level. For instance, according to the United States, Kodak has reduced its prices by 56 per cent since 1986, substantially undercutting its Japanese competitors, yet these price discounts have had virtually no effect on consumer prices in the market. The United States further states that this lack of price competition is reflected in the fact that Japan's consumer price index for film showed almost no movement between 1989 and 1996, a period of seven years.

10.275 Assessing the issues of impairment and causality, we note that the text of JFTC Notification 5 appears to be equally directed at domestic and foreign practices of manufacturers, distributors and retailers, as well as at market incumbents and market entrants. It is not specifically aimed at imports, nor does it make any mention of or otherwise target film and paper. The evidence suggests that this measure limits one particular type of promotional activity, specifically, the value of premiums (as a

[1345]According to Japan, the United States often emphasizes the disadvantage felt by a challenging brand against a dominant brand, not the market competition between imported and domestic brands.

percentage of the value of individual transactions) that may be given to general consumers by manufacturers, distributors and retailers. It does not, however, regulate other forms of promotional activity, such as low price offers, rebates or advertising generally. While we appreciate the need for competitors with a small market share in an oligopolistic market to be able to engage in promotional activities in general, we consider it significant that JFTC Notification 5 and the other specific "measures" cited by the United States do not limit general advertising expenditures or price competition in general.

10.276 Turning first to the issue of how important it is for a seller of imported film and paper in Japan to be able to offer premiums to retail customers, we note that the United States suggests that the ability to offer premiums to retail customers is essential because retailers and wholesalers will not pass on lower wholesale prices to consumers. However, while it is not clear that Kodak has generally advertised as heavily as the domestic companies, there is evidence that when Kodak did advertise heavily (in the Nagano region) its market share increased.[1346] This suggests that giving premiums to customers is not essential to success in the Japanese market. At the same time, even if cartel-like activities of retailers in Japan may result in suppression of price competition and a failure to pass on to consumers price cuts given by manufacturers to distributors or retailers, and even if such activity may affect the imports of foreign manufacturers disproportionately, the United States has not demonstrated -- or even claimed -- that such private anti-competitive activity, to the extent it exists, is attributable to governmental measures, and we therefore refrain from considering such hypotheses in the context of this case.

10.277 As noted above, JFTC Notification 5 applies equally to domestic and imported products. Nonetheless, we do not rule out the possibility that a measure which appears to be formally neutral as to the origin of products may be shown to be applied a manner that upsets the competitive relationship between domestic and foreign products to the detriment of imports. In this connection, the United States cites two examples in its claims in respect of the Retailers Code that involve premium offers to retail customers. As explained in our later discussion of the Retailers Code, we do not consider that these examples establish that Japan's limitations on premium offers to retail customers have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market. Accordingly, we find that the United States has not demonstrated that JFTC Notification 5 nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.278 Thus, while JFTC Notification 5 may be viewed as a measure for purposes of Article XXIII:1(b), the United States has not shown that it should not be held to have anticipated the measure nor that the measure nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has only shown one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(d) 1981 JFTC Guidance on Dispatched Employees

10.279 The fourth promotion "measure" cited by the United States is JFTC guidance of December 1981 recommending the establishment of rules on the use of dispatched employees ("JFTC Guidance on Dispatched Employees").[1347] In October 1979, the JFTC proposed and the Cabinet approved the establishment of a Distribution Sector Office ("DSO") to "administer duties pertaining to unfair trade practice designations related to distribution".[1348] Following its establishment, the DSO studied 16 business sectors, issuing its findings on cameras and photographic materials in December 1981, in which it advised "camera, photographic materials, colour photo laboratories and related industries" to address "problems" created by manufacturers dispatching employees to large retail stores. The alleged

[1346]Japan's statement that Kodak's heavy advertising and promotion in Nagano led to a doubling of its market share in the area, is not contested by the United States.

[1347]Kosugi Misao, Trade Practices Department, Distribution Sector Office JFTC, Status of Distribution of Cameras, Kosei Torihiki, No. 377, March 1982, pp. 45-49, US Ex. 82-3, p. 8.

[1348]Cabinet Order No. 43 of 1979, US Ex. 79-1.

administrative guidance takes the form of a statement by a DSO official of the JFTC, in an article entitled "The Status of Distribution of Cameras". The relevant part of this article states the following:

> "The JFTC is issuing guidance to the camera, photographic accessories, colour photo lab and related industries to examine the use of self-regulating measures with respect to the permanent dispatch of sales people so as not to go too far as manufacturers' sales promotion methods or as acts based on the buying power of volume sales stores".[1349]

10.280 The US view is that dispatched employees are a unique form of economic inducement between businesses: they reduce costs for wholesalers and retailers and thereby allow for increased sales based upon cost or price reductions passed down the line of distribution. We also recall the Japanese response that the photographic industry was working on standards for the dispatch of personnel even before the JFTC published the result of the "Survey of Distribution of the Camera Industry" in December 1981.

10.281 *Application of measure.* The United States claims that the JFTC Guidance on Dispatched Employees is a measure in the traditional form of Japanese administrative guidance and that it is still in effect. Japan argues that while this statement by a JFTC official may have constituted a form of administrative guidance in the broadest sense, it does not represent the kind of administrative guidance that could be considered to be the substantive equivalent of a formally binding measure, in that it neither provides sufficient incentives or disincentives for private parties to act, nor does it depend on government action to ensure compliance with the guidance. Moreover, according to Japan, to the extent that this ever was a measure, it is no longer in effect.

10.282 Our analysis of the JFTC Guidance on Dispatched Employees focuses, in the first instance, on whether or not this particular "guidance" should be viewed as the type of administrative guidance that meets the requirements of a measure under Article XXIII:1(b). We note that neither party has devoted much space to arguing this issue. We nevertheless note that the relevant statement of the JFTC official makes explicit reference to "guidance" and advises the photographic materials industry (or a substantial part of it) "to examine the use of self-regulating measures with respect to the permanent dispatch of sales people … ". Given this explicit statement of guidance to the photographic materials industry from the government body charged with implementation of the Antimonopoly Law and the Premiums Law, we think it reasonable to assume, in the absence of substantial argument to the contrary, that this JFTC Guidance on Dispatched Employees meets the standard for governmental measures that we laid out in our general discussion of Article XXIII:1(b). This result is supported by the fact that the guidance was acted upon. Accordingly, we find that the JFTC Guidance on Dispatched Employees is a measure within the meaning of Article XXIII:1(b). Also, in the absence of any indication that this measure has been withdrawn, we find that it is still in effect although we note that its significance may be minimal given that the matter is now dealt with in the Self-Regulating Measures, described in the next section.

10.283 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that, in particular, it could not have anticipated the measure at the conclusion of the Kennedy Round nor that within two years of the conclusion of the Tokyo Round, the JFTC would issue JFTC Guidance on Dispatched Employees. The United States also argues that it has legitimate expectations resulting from Japan's Uruguay Round concessions in that even in 1994 it was not aware of the impact this guidance was having on the Japanese film market.

[1349]US Ex. 82-3, p. 8.

10.284 Japan responds that the United States should have reasonably anticipated such guidance in the context of the government's continuing implementation of the Premiums Law. Japan argues that the United States should have reasonably anticipated the measure *a fortiori* as of the conclusion of the Uruguay Round.

10.285 The JFTC Guidance on Dispatched Employees was published in January 1981, i.e., after the conclusion of both the Kennedy and Tokyo Rounds. In line with our previous assessment of various measures, we do not consider that the United States should be charged with having reasonably anticipated the particular application of the Premiums Law embodied in JFTC Guidance on Dispatched Employees as of the conclusion of the Kennedy Round or of the Tokyo Round. We therefore find that in relation to JFTC Guidance on Dispatched Employees, the United States has demonstrated the existence of legitimate expectations of improved market access emanating from tariff concessions granted by Japan during the Kennedy and Tokyo Rounds. These expectations are limited to black and white film and paper in respect of the Kennedy Round, but cover the full range of products at issue in respect of the Tokyo Round.

10.286 With respect to Japan's Uruguay Round concessions, which were granted subsequent to the measure, it is difficult to conclude that the United States should not be held to have anticipated this already existing measure. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its possible differential impact on imported products until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to JFTC Guidance on Dispatched Employees, it has legitimate expectations of improved market access emanating from the Uruguay Round concessions.

10.287 *Impairment and causality.* The United States argues that the JFTC's Guidance on Dispatched Employees results in the restriction of a unique form of economic inducement between businesses. According to the United States, the ability of manufacturers and wholesalers to dispatch employees to retailers reduces costs to such retailers and thereby allows for increased sales based upon cost or price reductions passed down the line of distribution. Japanese responds that the photographic industry was already working on standards for the dispatch of personnel before the JFTC published the result of the "Survey of Distribution of the Camera Industry" in December 1981 (para. 5.249). Moreover, according to Japan, the particular guidance in issue is not addressed to the film and paper sectors of the photographic materials industry.

10.288 The JFTC Guidance on Dispatched Employees arguably led to the Self-Regulating Measures, discussed in the next section. Those measures contain limitations on dispatched employees and therefore effectively fulfil the guidance. However, we will consider the effect of measures limiting dispatched employees in this section because the United States addresses the issue here and not in respect of the Self-Regulating Measures. At the outset, we note that there is disagreement between the parties as to whether or not this guidance applies to the film and paper sectors. The guidance applies to the "camera, photographic accessories, colour photo lab and related industries".[1350] The film and paper sectors are not explicitly mentioned in the guidance. While it is possible that these sectors felt bound by the guidance under the "related industries" language, we recall that the 1970 Guidelines stated: "Dispatched employees are rarely seen at general photography materials retailers". Thus, we have doubts as to whether this guidance was directed at the film and paper sectors.

10.289 To the extent that the guidance does apply to the film and paper sectors, we note that in calling for the use of self-regulating measures with respect to the permanent dispatch of sales people, the JFTC Guidance on Dispatched Employees potentially limits one form of promotional activity. However,

[1350]US Ex. 82-3, p. 8.

the United States has not provided any evidence to the Panel of how this particular measure has had any adverse effect on the efforts of foreign film and paper manufacturers to market their products in Japan. As noted above, there is evidence that the use of dispatched employees in the film and paper sector is not significant.

10.290 Also as noted above, this measure on its face affects domestic and imported products equally. Nonetheless, we do not rule out the possibility that a measure which appears to be formally neutral as to the origin of products may be shown to be applied in a manner that could upset the competitive relationship between domestic and foreign products to the detriment of imports. There is no evidence in the record before us that this has occurred in respect of this measure.

10.291 The lack of evidence of impact, when combined with the Japanese statement -- unrebutted by the United States -- that the photographic industry was already working on standards in this area prior to the JFTC guidance, leads us to find that the United States has failed to demonstrate that the application of JFTC Guidance on Dispatched Employees has nullified or impaired benefits accruing to it in terms of Article XXIII:1(b).

10.292 Thus, JFTC Guidance on Dispatched Employees may be viewed as a measure for purposes of Article XXIII:1(b) and the United States has shown that it should not be held to have anticipated the measure in respect of its expectations on black and white film and paper from the Kennedy Round and on the full range of products at issue in respect of the Tokyo Round. It has not shown, however, that the measure nullifies or impairs its benefits in terms of Article XXIII:1(b). In respect of the Uruguay Round, it has only shown one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(e) 1982 Self-Regulating Measures on Fairness In Trade and Establishment of the Fair Trade Promotion Council

10.293 The fifth and sixth promotion "measures" cited by the United States are the Self-Regulating Measures concerning Fairness in Trade with Business, issued in June 1982 ("Self-Regulating Measures on Fairness in Trade")[1351], and the Establishment of the Fair Trade Promotion Council on 23 December 1982.[1352] Because of the close interrelatedness of these two "measures", we shall consider them together in this section.

10.294 The Self-Regulating Measures on Fairness in Trade, which are set out in Part II, concern (i) the dispatch of employees by manufacturers or wholesalers to retailers for the purpose of sales promotion or other sales activities, and (ii) standards on promotional money and contributions.

10.295 The Fair Trade Promotion Council was established by the domestic photographic industry on 23 December 1982. According to its Articles of Association, the council is to, *inter alia*, establish fair transaction order in the photographic industry and to promote and enforce the Self-Regulating Measures on Fairness in Trade.[1353] The council consists of six groups, including Zenren (retailers association), Shashoren (photosensitive materials distributors' association), Zenraboren, the Photo-Sensitive Materials Manufacturers' Association, the Camera Industry Association and the Supplies Industry Association. Article 17 provides that "[e]stablishing or abolishing the provisions of these

[1351]Camera Times, "Self-Regulating Measures Regarding Making Business Dealings with Trading Partners Fair" ("Self-Regulating Rules on Fairness in Trade"), 22 June 1982, US Ex. 82-8, pp. 1-3.

[1352]The National Photography Industry Fair Trade Promotion Council Articles of Association, 23 December 1982, see: Fair Trade Promotion Council Established: "An Attempt to Improve the Structure of the Industry" Fujimori Masao (Misuzu) Appointed Chairman of the Council, in: Zenren Tsuho, January 1983, pp. 46-47, US Ex. 83-3, pp. 2 ff.

[1353]The council also enacted the 1984 Self-Regulating Standards regarding Representation of Developing Fees for Colour Negative Film (15 May 1984), US Ex. 84-4 (see below).

Articles of Association and the responsibilities of this Council, shall require prior approval from the Japan Fair Trade Commission".[1354]

10.296 *Application of measures.* The issue here is whether the establishment of the Fair Trade Promotion Council and the issuance and application of the Self-Regulating Measures on Fairness in Trade can be ascribed to the Government of Japan (the JFTC). We recall the US claims that the JFTC provided administrative guidance to the national photographic industry calling for self-regulating measures on dispatched employees (the previous measure considered above), and that thereafter the JFTC created the Fair Trade Promotion Council by administrative guidance. In relation to this latter claim, a 1992 directive of the Fair Trade Promotion Council states that

> "[t]his council was established under the guidance of the Japan Fair Trade Commission in December of 1982 for the purpose of securing a fair trade system in the photographic industry, deepening the exchange of ideas and understanding among businesses, and contributing to the development of the industry".[1355]

The United States further argues that Article 17 of the Fair Trade Promotion Council's Articles of Association illustrates the fact that the JFTC oversees the council's activities. Article 17 provides: "Establishing or abolishing the provisions of these Articles of Association and the responsibilities of this Council shall require prior approval from the Japan Fair Trade Commission".[1356] Moreover, in the US view, the delegation of authority from the JFTC to the Fair Trade Promotion Council is made explicit in Article 4 of the Articles of Association which confers upon the council a number of enforcement powers:

> "In order to achieve the objectives which were described in Article 3 above, the Council will create a committee which will be responsible for the following: … secure fair transaction order between all elements of the distribution system, manufacturers, wholesalers, and retailers. … Take the necessary actions against those who violate the Self-Regulating Measures. … Liaise with the competent governmental authorities. … All other responsibilities necessary to achieve the Council's objectives".[1357]

The United States also claims that the Japanese Government should bear responsibility for the effects of fair competition codes and the activities of fair trade councils, including trade associations acting under the aegis of a code or council because the codes and councils are subject to approval by the JFTC. Specifically, Article 10(1) of the Premiums Law provides:

> "Businesses or a trade association may, upon obtaining authorization from the Fair Trade Commission in accordance with the Rules of the Fair Trade Commission, with respect to matters relating to premiums or representations, conclude or establish an agreement or a code, aiming at preventing unjust inducement of customers and maintaining fair competition. The same shall apply in the event alterations thereto are attempted".[1358]

The United States points out that Article 10(3) goes on to state that the operation of the codes and councils is subject to JFTC supervision, and that Article 10(5) exempts their activities from antitrust enforcement. Article 10(5) of the Premiums Law provides that the Antimonopoly Law "shall not apply

[1354]US Ex. 83-3.
[1355]National Photographic Industry Fair Trade Promotions Council, Notice No. 1, 29 August 1992, US Ex. 92-7.
[1356]US Ex. 83-3.
[1357]Ibid, p. 2.
[1358]Premiums Law, US Ex. 62-6.

to the fair competition code that has been authorized … and to such acts of entrepreneurs or a trade association as have been done in accordance therewith".[1359]

10.297 Japan responds that industry self-regulation is private-sector conduct, and not a government measure. According to Japan, the Fair Trade Promotion Council is a private-sector organization which was established by the camera industry to implement voluntary standards on dispatched employees, and has no governmental authority. Japan points out that membership in the council is non-discriminatory and open to domestic and foreign entities; Kodak is a member through its affiliation with the Camera Manufacturers' Association. Japan also argues that although the council's documents refer to "approval" and "guidance", and that the council is free to declare that it will seek the JFTC's approval or follow its guidance, such references do not delegate to the council any authority of the JFTC. Moreover, Japan argues that the JFTC has no statutory authority to approve agreements underlying the Fair Trade Promotion Council; the JFTC's action with regard to the council's enforcement of the Self-Regulating Measures on Fairness in Trade, particularly as it relates to dispatched employees, was a non-binding expression of the JFTC's view that the agreement would not immediately violate the Antimonopoly Law. In addition, Japan argues, council actions under an approved code are not exempt from the operation of the substantive provisions, e.g., prohibitions of unfair trade practices, of the Antimonopoly Law. The only legal consequence of the JFTC approval is that the JFTC must first revoke the approval before it enforces the Antimonopoly Law against an approved code or implementation thereof.

10.298 In considering the issue of whether or not the establishment of the Fair Trade Promotion Council and the issuance and application of the Self-Regulating Measures on Fairness in Trade should be considered as measures attributable to the Japanese Government, we note, first, that the documents evidencing the Self-Regulating Measures on Fairness in Trade and the establishment of the Fair Trade Promotion Council suggest that the particular self-regulating measures and the council are largely the product of decisions by private industry associations. At the same time, however, we note the existence of a number of references in the Premiums Law, the JFTC Guidance on Dispatched Employees, the Articles of Association of the Fair Trade Promotion Council (as well as a later directive of the council) and the Self-Regulating Measures on Fairness in Trade, suggesting a substantial connection between the JFTC and these two alleged "measures". We recall in this regard the statement by a JFTC official in 1981 that

> "the *JFTC is issuing guidance* to the camera, photographic accessories, colour photo lab and related industries to examine the *use of self-regulating measures* with respect to the *permanent dispatch of sales people* so as not to go too far as manufacturers' sales promotion methods or as acts based on the buying power of volume sales stores" (emphasis added).[1360]

We further recall a 1992 directive of the Fair Trade Promotion Council which states:

> "*This council was established under the guidance of the Japan Fair Trade Commission in December of 1982 for the purpose of securing a fair trade system in the photographic industry*, deepening the exchange of ideas and understanding among businesses, and contributing to the development of the industry" (emphasis added).[1361]

Moreover, Article 17 of the Fair Trade Promotion Council's Articles of Agreement provides as follows: "*Establishing or abolishing the provisions of these Articles of Association and the responsibilities of this Council shall require prior approval from the Japan Fair Trade Commission*" (emphasis added).[1362]

[1359]Ibid.

[1360]US Ex. 82-3, p. 8.

[1361]National Photographic Industry Fair Trade Promotions Council, Notice No. 1, 29 August 1992, US Ex. 92-7.

[1362]US Ex. 83-3.

In addition, Article 4 of these same articles calls on the council, in carrying out its objectives (including the establishment of fair transaction order in the photography industry), to "*liaise with the competent governmental authorities*" (emphasis added).[1363] There is also the statement in the "addendum" to the Self-Regulating Measures on Fairness in Trade to the effect that

> "Each member company of the Fair Trade Promotion Council shall exert self-regulation in accordance with these standards, and the Fair Trade Promotion Council shall, *under the guidance of the Japan Fair Trade Commission*, issue guidance to them as appropriate and necessary" (emphasis added).[1364]

10.299 In light of the above statements by the JFTC and the Fair Trade Promotion Council, we consider that the Self-Regulating Measures have sufficient connection to administrative guidance of the Japanese Government to warrant a finding that they are attributable to the government within the meaning of Article XXIII:1(b). Regardless of whether the Promotion Council's Articles of Association or the 1982 Self-Regulating Measures were in fact formally approved by the JFTC, there is a sufficient likelihood that private parties will act in conformity with the Self-Regulating Measures to consider it administrative guidance within the ambit of Article XXIII:1(b).[1365] In our view, this finding is consistent with past GATT practice. In this regard, we note the characterization of the similar "fair competition codes" approved by the JFTC as "legal regulations" in the 1987 *Japan - Liquor Taxes* case.[1366] Also, in the absence of any argument or evidence to the contrary, we find that these two measures are still in effect.

10.300 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that, in particular, it could not have anticipated the measures at the conclusion of the Kennedy Round nor that by June 1982, within a few years of the conclusion of the Tokyo Round, the domestic photographic industry would respond to JFTC guidance in promulgating its Self-Regulating Measures on Fairness in Trade, or that this would be followed six months later by the formal establishment of the Fair Trade Promotion Council. Similarly, the United States argues that it was unaware of the impact of these measures on the film industry in Japan even as of the conclusion of the Uruguay Round.

10.301 We further recall the Japanese response that the Self-Regulating Measures on Fairness in Trade and the establishment of the Fair Trade Promotion Council are irrelevant to the reasonable expectations of the United States because these two actions represent private conduct.

10.302 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy and Tokyo Rounds, we recall our conclusion that normally a Member should not be considered to have anticipated measures taken after the conclusion of a negotiating round, absent some reason to reach a contrary result. In respect of these two specific measures, we see no reason why the United States should have anticipated them. The existence of codes and councils in the Japanese business system does not imply that the United States could or should anticipate the particular rules contained in a specific action taken by a council. Thus, we find that the United States has legitimate expectations of improved market access emanating from the Kennedy and Tokyo Round in respect of these measures.

10.303 However, with respect to Japan's Uruguay Round concessions, which were granted subsequent to the measures, it is difficult to conclude that the United States could not reasonably anticipate these

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[1363]Ibid.

[1364]US Ex. 82-8, p. 3.

[1365]See *Japan - Agricultural Products*, BISD 35S/163, 242. See also paras. 10.46, 5.495 and 5.501-5.505 above.

[1366]Panel Report on *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* ("*Japan - Liquor Taxes*"), adopted on 10 November 1987, BISD 34S/83, 87, para. 2.7.

already existing measures. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure or of a possible differential impact until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. The lack of such evidence would seem to be especially telling in view of the fact that the code regulates and the council encompasses members from the photographic industry, i.e., it was product-specific. Accordingly, we find that the United States has not demonstrated that in relation to the Self-Regulating Measures on Fairness in Trade and the establishment of the Fair Trade Promotion Council, it has legitimate expectations of improved market access emanating from the Uruguay Round concessions.

10.304 *Impairment and causality.* The United States argues that by regulating the use of dispatched employees, promotional funds and price-related representations, the Fair Trade Promotion Council serves to suppress competition for film, paper and other photographic goods. In this regard, the United States argues that the council's enforcement record reflects the extraordinary range of its activities and the potency of its enforcement powers. The United States gives the example of the council's "success in foiling Kodak's most important promotional campaign of the 1980s, the VR Trial-Pack".[1367] According to the United States, the council, at the behest of Zenren (the retailers' association) and working with the JFTC, determined before the campaign had even begun (in June 1983) that Kodak's anticipated advertisement of a discount price was a misrepresentation; as a result, the promotion was cut back and advertisements for the campaign were quite muted. In addition, the United States claims that the Fair Trade Promotion Council continues to apply pressure on photographic material manufacturers to reduce the number of employees they dispatch to retailers. The United States points out that as recently as July 1996, the council issued a "directive" to Kodak stating that the council has "decided in July 1995 to request [Kodak's] cooperation in continuing to reduce dispatched employees" and that Kodak is to "immediately report the status of your company to this Council".[1368]

10.305 Japan responds that because the formation of the Fair Trade Promotion Council and the issuance of Self-Regulating Measures on Fair Trade are private actions, there can be no cognizable impairment of US market-access conditions "as the result of" such actions. Although the council was established after consultation with the JFTC, Japan claims that such consultations did not delegate any authority to the council. Japan argues that Fair Trade Promotion Council is a private-sector organization which was established by the camera industry to implement voluntary standards on dispatched employees in that industry, and has no governmental authority, nor anything to do with film or paper. Moreover, Japan argues, there has never been a problem with or concern over dispatched employees in the photographic film or paper industry, probably because, in the case of film, most consumers choose such merchandise on their own, rather than relying on employees' sales pitches, and, in the case of paper, this is generally marketed to professionals who do not normally rely on dispatched employees. Thus, according to Japan, even assuming that the establishment of the Fair Trade Promotion Council and the issuance of Self-Regulating Measures on Fairness in Trade could be assimilated to governmental measures, there could be no basis for claiming impairment therefrom. Japan also argues that the only case of impairment cited by the United States in relation to these two measures is the alleged action to suppress Kodak's VR campaign in 1983, an action having nothing to do with the dispatch of sales personnel, that in any case the campaign was not "foiled" but went ahead essentially as planned, that the JFTC played a very minor role in discussions with Kodak's representatives concerning this campaign, and that there is simply no truth to the US allegation that Zenren, the Fair Trade Promotion Council and the JFTC acted in unison to prevent the VR campaign.

[1367]The United States explains that Kodak's "VR trial pack" was devised in 1983 by Nagase Sangyo, Kodak's main importer in Japan, as a promotion strategy for the launch of a special limited edition of Kodak's VR film series. The "trial pack" included a 12-exposure roll of each speed of VR film (100, 200, 400 and 1000 ASA). It was promoted through print and television advertising and sold at a 38 per cent discount off the standard retail price.

[1368]Promotion Council, Issue No. 8-1, 22 July 1996, US Ex. 96-7.

10.306 While we consider that the evidence presented strongly suggests that the self-regulating measures were initiated and the council was established through actions taken largely by the camera sector of the photographic materials industry in Japan, we also consider that this same evidence suggests that many different levels of the photographic materials industry participate in and are potentially affected by actions taken by the Fair Trade Promotion Council. Thus, it is not clear to us, despite Japan's arguments, that these measures are necessarily irrelevant to the film and paper sectors of the Japanese economy. At the same time, however, we agree with Japan that the only concrete example put forward by the United States of any claimed impairment resulting from these measures is the alleged foiling of Kodak's VR campaign in June 1983.

10.307 Concerning the VR campaign, we first note that this Kodak promotion scheme had nothing to do with the dispatching of employees or promotional money, the two general activities regulated by the Self-Regulating Measures. Indeed, the evidence of record suggests, as argued by Japan, that the issue of dispatching sales personnel was of little significance in the photographic film and paper market. Even before the adoption of the code, MITI's 1970 Guidelines themselves indicated that dispatching of employees was not a common occurrence in the Japanese film market[1369], and the 1990 MITI Guidelines basically recommend restricting the use of dispatched employees "to sales of new products where specialized knowledge and skills are required … ".[1370] And, indeed, the United States has not indicated to the Panel how, or even if, dispatching of employees has been or is used in the Japanese film and paper market, nor has it cited examples of how the use of promotional money has been limited.

10.308 Second, we are not persuaded by Japan's argument that the problems cited by the United States in respect of the Kodak VR campaign solely concerned a private-sector action by the Fair Trade Promotion Council. The evidence advanced by the two parties shows that the action against the VR trial pack had its origins with Zenren, the photo retailers' association, putting pressure on Kodak's distributor (Nagase) to limit promotion, in particular its pricing discounts on this new type of film. Indeed, the evidence suggests that Zenren succeeded in persuading Kodak to reduce the scope and duration of this promotional discount scheme. In addition to this private initiative by Zenren, however, the evidence also suggests that JFTC officials, at the urging of the Fair Trade Promotion Council, issued guidance to Kodak concerning potential issues under the Antimonopoly Law in relation to operation of the VR campaign. According to the United States, the guidance related to disclosing the limited nature of the offer, the number of Trial Packs involved, the stores carrying them and the terms of the offer. Also, Kodak was requested by JFTC officials to adjust its second shipment and to announce at store counters when the products were sold out.[1371] It is not clear to us that compliance with most of these terms would seriously hinder the VR campaign. In any event, Japan contests whether such guidance was given. In this regard, we note that other evidence submitted by the United States suggests that the VR campaign was limited by promises made to Zenren.[1372] Considering all the evidence taken together, it appears that the pressure put on Kodak's subsidiary by Zenren was by far the major factor impacting the VR campaign. The pressure from Zenren has not been shown to have emanated in any way from the JFTC. Thus, we find that the United States has not come forward with a sufficient demonstration of how statements made to Kodak representatives by JFTC and council officials in relation to the VR campaign could be said to have impaired competitive market-access conditions accruing to the United States. According to the evidence of record, it appears that Kodak did carry out a

[1369]Cover note to the 1970 Guidelines, US Ex. 70-3; 1970 Guidelines, US Ex. 70-4; Japan Ex. B-24. Specifically, the MITI Guidelines state that "[d]ispatched employees are rarely seen at general photography materials retailers. There are dispatched employees in the DPE departments of large retailers; however, few are systematized practices and the dispatch is made only in special cases". Ibid. See para. 2.19 above.

[1370]MITI, Guidelines for Improving Business Practices, 25 June 1990, US Ex. 90-5, p. 6.

[1371]Affidavit of Ishikawa Sumio, Nagase official, US Ex. 97-10.

[1372]"Trial Pack Acclaimed in America, but in Japan …?". Shukan Shashin Sokuho, 29 July 1983, p. 2, quoting Nagase Kodak Deputy Yokoyama, US Ex. 83-19, p. 2.

successful if somewhat abbreviated VR campaign. Finally, we note that this 14 year-old incident is the only one cited by the United States.

10.309 Accordingly, given this lack of evidence of how the Self-Regulating Measures on Fairness in Trade have nullified or impaired legitimate market-access expectations accruing to the United States, we do not find that the United States has met its burden in this regard.

10.310 Thus, the Self-Regulating Measures on Fairness in Trade and the establishment of the Fair Trade Promotion Council may be viewed as measures for purposes of Article XXIII:1(b) and the United States has shown that it should not be held to have anticipated them in respect of its expectations on black and white film and paper from the Kennedy Round and on the full range of products at issue in respect of the Tokyo Round. It has not shown, however, that they nullify or impair benefits within the meaning of Article XXIII:1(b). In respect of the Uruguay Round, it has only shown one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(f) 1984 Self-Regulating Standards

10.311 The seventh promotion "measure" cited by the United States is the Promotion Council's issuance in May 1984 of "Self-Regulating Standards Concerning Display of Processing Fees for Colour Negative Film" ("1984 Self-Regulating Standards").[1373] These standards prescribe the manner in which prices for film developing and printing may be represented. Specifically, they define the information that film processing businesses ("those who receive colour film directly from the general consumer for processing") should use in connection with representations of prices for colour film developing and printing, including the printing fee, developing fee, processing time, and paper manufacturer. The standards mandate "provisions in regard to the representation of photo processing fees for colour negative film … and printing fee[s] for service-size prints for direct orders from general consumers until the Fair Competition Code is established".[1374] According to the standards,

> "businesses should properly list fees such as the developing fee of colour film and should not make representations that might mislead the general consumer or possibly lead them to have excessive expectations. … This standard should not be used to limit or restrain businesses freedom to set fees".[1375]

The standards also provide that the "Fair Trade Promotion Council shall conduct investigations and provide guidance on the operation of these standards if necessary".[1376]

10.312 The United States asserts that because the 1984 Self-Regulating Standards cover "representation[s] of the photo processing fee for colour negative film", there is a relationship between this "measure" and photographic materials. Japan argues that these standards were adopted to deal with the problem of when service providers who displayed inexpensive printing charges but charged customers a high developing fee. The intention of the guidelines was to give consumers adequate information about both developing and printing charges. As such, according to Japan, the guidelines were not related to sales of film, and the JFTC's role was limited.

[1373]National Photography Industry Fair Trade Promotion Council, 15 May 1984, "The Self-Regulating Standards Regarding Representation of Developing Fees for Colour Negative Film", US Ex. 84-4; Kosei Torihiki Joho, No. 993, 28 May 1984, "Photo Industry to Establish Self-Regulating Standards Regarding Representations of Development and Printing Price, etc.", US Ex. 84-3.

[1374]US Ex. 84-4.

[1375]Ibid.

[1376]Ibid.

10.313 *Application of measure.* The United States claims that the 1984 Self-Regulating Standards are, effectively, a governmental measure because the Fair Trade Promotion Council "is the creation of Japanese law", and because these standards were developed under the instruction of, and in close collaboration with the JFTC. The United States further argues that the "measure" is still in effect. Japan's response is that because (i) the Fair Trade Promotion Council, which issued the 1984 Self-Regulating Standards, is a private-sector organization, and (ii) the JFTC played only a limited role in the elaboration of these standards, the standards are not a governmental measure.

10.314 In analyzing whether or not the 1984 Self-Regulating Standards should be assimilated to governmental action, we recall that whereas the Fair Trade Promotion Council is clearly a grouping of private-sector trade associations, it nonetheless has elaborate links to the JFTC. We also note that an article appearing in a specialized industry publication just two weeks after the issuance of the 1984 Self-Regulating Measures states that "[t]he Council established 'Self-Regulating Standards Regarding Development and Printing Price Representations' on May 15, and *reported them to the Japan Fair Trade Commission*" (emphasis added).[1377] The article goes on to state that "[t]he self-regulating standards are only a temporary measure until a fair competition code is established", and that "[i]t took the Council a long time and *instructions from JFTC to establish these self-regulating standards*" (emphasis added).[1378] Even though the 1984 Self-Regulating Standards were apparently not formally approved by the JFTC, in view of these express references to the dependence of the Fair Trade Promotion Council on liaison with the JFTC for the establishment of these standards, we consider that there is a sufficient likelihood that private parties will act in conformity with the 1984 Self-Regulating Standards to consider them administrative guidance attributable to the Japanese Government. Thus, the 1984 Self-Regulating Standards, as such, have sufficient connection to the Japanese Government to warrant a finding that they are a measure within the ambit of Article XXIII:1(b).[1379] This finding is consistent with past GATT practice. In this regard, we note the characterization of the similar "fair competition codes" approved by the JFTC as "legal regulations" in the 1987 *Japan - Liquor Taxes* case.[1380] As to whether or not this measure is still in effect, given that the text of the measure itself indicates that the measure is only temporary "until the Fair Competition Code is established", we are not persuaded, but shall assume for the following analysis, that it is still in effect.

10.315 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that, in particular, it could not have anticipated that in May 1984, after both the Kennedy and Tokyo Rounds, the domestic photographic industry, through the Fair Trade Promotion Council, would respond to JFTC guidance in promulgating its second set of self-regulating measures, the 1984 Self-Regulating Standards. The United States similarly argues that even as of the conclusion of the Uruguay Round it was not aware of the impact of this measure on the film and paper market. We further recall the Japanese response that the 1984 Self-Regulating Standards are irrelevant to the reasonable expectations of the United States because this action of the Fair Trade Promotion Council represents private conduct and was an "outgrowth" of the previously applied policies.

10.316 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy and Tokyo Rounds, we note that this measure applies only to colour film. Thus, the Kennedy Round is not relevant. Additionally, we recall our conclusion that normally a Member should not be considered to have anticipated a measure taken after the conclusion of a negotiating round, absent some reason to reach a contrary result. Here, we see no reason why the United States should have anticipated this particular consumer protection measure simply because fair competition codes and fair

[1377]US Ex. 84-3.
[1378]Ibid.
[1379]See *Japan - Agricultural Products*, BISD 35S/163, 242.
[1380]Panel Report on *Japan - Liquor Taxes*, BISD 34S/83, 87; See also paras. 2.7 and 5.509-5.510 above.

trade councils as such already existed in Japan prior to the Tokyo Round. Thus, we find that in relation to the 1984 Self-Regulating Standards, the United States has legitimate expectations of improved market access emanating from the Tokyo Round.

10.317 With respect to Japan's Uruguay Round concessions, which were granted subsequent to 1984, it is difficult to conclude that the United States could not reasonably anticipate this already existing measure. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure or of a possible differential impact on imports until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. This lack of evidence is especially telling in light of the fact that the Self-Regulating Standards relate specifically to colour film. Accordingly, we find that the United States has not demonstrated that in relation to the 1984 Self-Regulating Standards, it has legitimate expectations of improved market access emanating from the Uruguay Round concessions.

10.318 *Impairment and causality.* The United States argues that by regulating the use of price-related representations through the 1984 Self-Regulating Standards, the Fair Trade Promotion Council serves to restrict competition for film and paper, and that the council's enforcement record reflects the extraordinary range of its activities and the potency of its enforcement powers. Japan responds that the 1984 Self-Regulating Standards are private-sector regulation directed at ensuring fairness in regard to the representation of processing and printing fees for colour film, and that the United States has not demonstrated how this alleged "measure" upsets competitive market-access conditions for imported colour film in the Japanese market. Japan further argues that the purpose of the Self-Regulating Standards is consumer protection, without regard to the origin of the product.

10.319 Addressing the issue of impairment and causality, we note that the 1984 Self-Regulating Standards regulate the type of information that photo processing firms are required to provide when advertising colour film processing and printing. In essence, this measure appears directed at consumer protection, in particular, preventing misleading price representations in the film-processing industry. We also note that the United States has not suggested to the Panel, nor demonstrated where or how operation of the 1984 Self-Regulating Standards of the Fair Trade Promotion Council, which seem to be neutral as to the origin of colour film, have impacted Kodak or otherwise upset the competitive relationship between domestic and imported colour film in Japan. Accordingly, we find that the evidence of record does not demonstrate that application of the 1984 Self-Regulating Standards -- to the extent that this has occurred -- nullifies or impairs benefits accruing to the United States.

10.320 Thus, the 1984 Self-Regulating Standards may be viewed as a measure for purposes of Article XXIII:1(b) and the United States has shown that it should not be held to have anticipated the standards in respect of its expectations on colour film and (indirectly) paper from the Tokyo Round. It has not shown, however, that they nullify or impair benefits within the meaning of Article XXIII:1(b). In respect of the Uruguay Round, it has shown only one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(g) 1987 The Retailers Fair Competition Code and the Retailers Council

10.321 The eighth and final promotion "measure" cited by the United States is the JFTC approval, in March 1987, of the Retailers Fair Competition Code ("Fair Competition Code") and its enforcement body, the Retailers Fair Trade Council ("Retailers Council").[1381] On 31 March 1987, acting pursuant to Article 10(1) of the Premiums Law, the JFTC approved the Fair Competition Code and its enforcement body, the Retailers Council. The objectives of the Fair Competition Code are stated to be "to protect

[1381]Fair Competition Code Regarding Representations in the Camera and Related Products Retailers Industry, Kanpo, (Official Gazette), 11 April 1987, US Ex. 87-4; Fair Competition Code Regarding Representations in the Camera and Related Products Retailers Industry, Kampo, 11 April 1987, p. 1-3, Japan Ex. D-66.

the general consumers' appropriate product selection, prevent the unfair inducement of customers, and thereby to secure fair competition".[1382] By its terms, the code applies to "camera category" (as translated by Japan) or "cameras and related products" (as translated by the United States)[1383], not explicitly including film or paper, and sets out rules regarding representations made by retailers of these products, including in relation to storefront displays, fliers, price comparisons ("representation of dual prices"), instalment sales, the use of expressions such as "very best", "cheapest" and "new release", comparative representations of quality, performance and transaction terms, and prohibitions on misleading representations and loss-leader advertising. These objectives, definitions and standards are covered in Articles 1 through 12 of the code. Article 13 establishes the Retailers Council "to achieve the objectives of this code", and Article 14 lists the activities of the Retailers Council, including those pertaining to making adjustments to how the code is being observed, investigating suspected violations of the code, taking necessary steps against those who have violated the code, processing complaints received from general consumers, making the Premiums Law and "other laws and ordinances pertaining to fair trade widely understood and preventing violations thereto", and "liaison with the competent authorities". Articles 15 through 17 then deal with investigation and decisions on violations. Finally, Article 18 states that the Retailers Council may establish regulations to execute and operate the code, and that "[p]rior to establishing or making amendments to the regulations … [the Retailers Council] shall obtain approval from the Japan Fair Trade Commission".[1384]

10.322 The US view is that the Japanese Government, in approving the Fair Competition Code and the Retailers Council, has delegated authority to the Retailers Council to take enforcement actions under both the code and the Premiums Law. The United States also argues that the standards established by the Fair Competition Code apply to the activities of all businesses selling photographic items, and that although it does not explicitly include film within its scope, the code has been applied to promotions for film and paper products. According to the United States, this expansive application arises from Article 2.2 which provides: "To attain the objectives outlined in the above Article, businesses are to respect the spirit of this code even when the products being dealt with do not correspond exactly to Cameras and Related Products". The United States goes on to say that application of the code to film and developing and printing was fundamental to securing Zenren's (the retailers association) support for the code and the Retailers Council.

10.323 Japan responds that the Fair Competition Code by its terms does not apply, and never has been applied, to film or paper. Rather, according to Japan, the code (and the Retailers Council established therein) consists of 47 prefecture-wide retailers associations, representing 6600 individual business entities, and deals only with representations pertaining to the retail sale of cameras and related products; premiums are completely outside its scope. Japan submits that the JFTC has never allowed and has no intention to allow application of the code to film or paper.

10.324 *Application of measure.* The issue here is not whether the JFTC's approval of the Retailers' Fair Competition Code and its enforcement body, the Retailers Council, in and of itself should be viewed as a governmental measure. Clearly, the act of approval by a governmental body -- the JFTC -- is a government measure. Rather, the issue is whether such approval by the JFTC means that actions taken by the Retailers Council under the code and the provisions embodied in the code may be assimilated to governmental measures.

10.325 On this point, the United States alleges that, just as Japan did in the case of the Fair Trade Promotion Council, Japan has deputized the Retailers Council as an enforcement surrogate for the JFTC under the Premiums Law. It argues that the Retailers Council is particularly illustrative of the

[1382]Ibid, p. 1.

[1383]We note that the Panel's translation experts agree with Japan's translation of the Japanese term "kamera-rui" as "camera category". See Translation Issue 17 in Part XI.

[1384]US Ex. 87-4; Japan Ex. D-66, p. 9.

relationship between a trade association and a fair trade council, and demonstrates the powers effectively delegated to a trade association by the Japanese Government. The United States further argues that the Japanese Government should be held accountable for the effects of fair competition codes and the activities of fair trade councils, including trade associations acting under the aegis of a code or council because the codes and councils are the creation of Japanese law, specifically Article 10 of the Premiums Law, subsection (1) of which provides:

> "Businesses or a *trade association* may, upon obtaining authorization from the Fair Trade Commission in accordance with the Rules of the Fair Trade Commission, with respect to matters relating to premiums or representations, conclude or establish an agreement or a code, aiming at preventing unjust inducement of customers and maintaining fair competition. The same shall apply in the event alterations thereto are attempted" (emphasis added).[1385]

The US position is that Article 10(1) makes clear that the establishment of the code is subject to approval by the JFTC. Similarly, that Article 10(3) of the Premiums Law states that the operation of the codes and councils is subject to JFTC supervision. The United States emphasizes, moreover, that the power of the Retailers Council and Zenren is even greater because Article 10(5) of the Premiums Law states that Japan's Antimonopoly Law "shall not apply to the fair competition code that has been authorized … and to such acts of entrepreneurs or a trade association as have been done in accordance therewith". The United States also argues that in a previous panel, that on *Japan - Liquor Taxes*, Japan claimed that fair competition codes promulgated by fair trade councils in Japan were "legal regulations" of the Japanese Government.[1386]

10.326 Japan responds that the Retailers Council's Fair Competition Code constitutes self-regulation among business entities approved by the JFTC in accordance with the Premiums Law, and that the Retailers Council is a voluntary organ established by the code to implement this self-regulation. Japan contends that the Retailers Council is merely responsible for the observance of the code against misleading representations and has no authority to enforce the Premiums Law, nor may it restrict low price offers. According to Japan, whereas the Retailers Council may take private enforcement action against code members, it may not apply the code to non-members: outsiders are not subject to any action of the council for any non-compliance with the code. Japan further contends that council actions under an approved code are not exempt from the operation of the substantive provisions, e.g., prohibitions of unfair trade practices, of the Antimonopoly Law; in the same way that activities of other associations are subject to the Antimonopoly Law, anything a council does is actionable. The only legal consequence of JFTC approval, Japan argues, is that the JFTC must first revoke the approval before it enforces the Antimonopoly Law against an approved code or implementation thereof.

10.327 In analyzing the extent to which actions taken by the Retailers Council under the Fair Competition Code may be assimilated to governmental measures within the meaning of Article XXIII:1(b), we consider that it may be helpful to focus on the status these actions are given in the eyes of the Japanese Government and the photographic industry. On this issue, we note the references made by the United States to Article 10 of the Premiums Law, particularly Article 10(1) which states that trade associations may obtain JFTC approval to set up fair competition codes, Article 10(3) which states that the operation of codes and councils is subject to JFTC supervision, and Article 10(5) which states that Japan's Antimonopoly Law shall not apply to fair competition codes that have been authorized or to the actions of businesses or trade associations under the codes.[1387] Viewed in the context of the JFTC having approved the Fair Competition Code and the Retailers Council, and of Article 10(5) appearing to give a governmental exemption from certain provisions of the Antimonopoly Law to actions by the Retailers

[1385]Premiums Law, US Ex. 62-6; Japan Ex. D-1.
[1386]BISD 34S/83, 86-87, para. 2.7.
[1387]US Ex. 62-6; Japan Ex. D-1.

Council and code members under the code, it is difficult to conclude that investigation, enforcement and governmental liaison actions of the Retailers Council under the code are purely private actions of a private trade association. The likelihood that such actions have governmental or quasi-governmental character is reinforced by the reference in the Fair Competition Code, in Article 1 thereof, to the "objective" of "establishing rules regarding representations made in retail transactions for cameras and related products based on [Article 10(1) of the Premiums Law]", and the further reference in Article 18(2) to the requirement that "[p]rior to establishing or making amendments to the regulations in accordance with Clause 1 above, [the Retailers Council] shall obtain approval from the Japan Fair Trade Commission".[1388]

10.328 Accordingly, we find that in light of the JFTC approval of the Fair Competition Code and the Retailers Council and the JFTC sanctioning of actions taken by the Retailers Council under the Fair Competition Code, those actions have sufficient connection to administrative guidance of and approval by the Japanese Government to warrant a finding that they are measures attributable to the government within the meaning of Article XXIII:1(b). In view of the above-described involvement of the JFTC, we consider that there is a sufficient likelihood that private parties will act in conformity with the Fair Competition Code as if it were a legally binding measure.[1389] This finding is consistent with past GATT practice. In this regard, we recall the characterization of "fair competition codes" approved by the JFTC as "legal regulations" in the 1987 *Japan - Liquor Taxes* case.[1390] Finally, we note that a finding to the contrary would create a risk that WTO obligations could be evaded through a Member's delegation of quasi-governmental authority to private bodies. In respect of obligations concerning state trading, the provisions of GATT explicitly recognize this possibility. In this regard, an interpretative note to Articles XI, XII, XIII, XIV and XVIII states: "Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations". The existence of this note demonstrates that the drafters of the General Agreement recognized a need to address explicitly one aspect of the government-delegation-of-authority problem. In our view, it supports our finding that *measure* for purposes of Article XXIII:1(b) should be interpreted so as to prevent actions by entities with governmental-like powers from nullifying or impairing expected benefits.

10.329 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy and Tokyo Rounds, and that, in particular, it could not have anticipated that in March 1987, well after both the Kennedy and Tokyo Rounds, the JFTC would create the Fair Competition Code and the Retailers Council to set and enforce standards for misrepresentations in advertising related to price and promotional terms. Similarly, the United States maintains that it was still unaware of the breadth of impact of this measure on the Japanese film market as of the conclusion of the Uruguay Round. Japan responds that the 1987 JFTC approval of the Fair Competition Code and the Retailers Council is irrelevant to the reasonable expectations of the United States because this action relates only to cameras and related photographic hardware. Moreover, in Japan's view, the JFTC approval of the code in 1987 was an application of the pre-existing Premiums Law, and brought about no change to the implementation of policy under that law.

10.330 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy and Tokyo Rounds, we recall our conclusion that normally a Member should not be considered to have anticipated a measure taken after the conclusion of a negotiating round, absent some reason to reach a contrary result. Here, we see no reason why the United States should have anticipated these particular measures. The fact that fair competition codes and fair trade councils existed in Japan prior to the Uruguay Round, and were authorized by Article 10 of the Premiums Law, does not imply

[1388]Retailers Fair Competition Code, US Ex. 87-4; Japan Ex. D-66.

[1389]See *Japan - Agricultural Products*, BISD 35S/163, 242.

[1390]BISD 34S/83, 87, para. 2.7.

that specific embodiments of codes and councils should be foreseeable. Thus, we find that in relation to the Fair Competition Code and the Retailers Council, the United States has legitimate expectations of improved market access emanating from the Kennedy and Tokyo Rounds

10.331 However, with respect to Japan's Uruguay Round concessions, which were granted subsequent to 1987, it is difficult to conclude that the United States could not reasonably anticipate this already existing measure. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure or of a possible differential impact until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to the Fair Competition Code and the Retailers Council, it has legitimate expectations of improved market access emanating from the Uruguay Round concessions.

10.332 *Impairment and causality.* In considering the issue of causality, we will address three issues. First, whether the Fair Competition Code applies to film and paper products at all. Second, whether Articles 3 and 4 of the Code on origin nullify or impair benefits. Third, whether the application of the Code impairs benefits.

10.333 As to the first issue, the US position is that the code applies, both *de jure* and *de facto*, to film and paper. The United States points out that Article 2.2 of the code provides that "[t]o attain the objectives outlined in the above Article, businesses are to respect the spirit of this code even when the products being dealt with do not correspond exactly to Cameras and Related Products".[1391] The United States goes on to say that an industry member explained that it would "indeed have been impossible to persuade Zenren members whose main line of business is development printing to contribute if [the regulations] only [apply to] hardware".[1392] In the US view, Japan has invited its photographic industry to devise and enforce rules in their self-interest, and market realities associated with such industry cooperation should not be ignored.

10.334 Japan, on the other hand, argues that the code, by its terms and in its application, does not cover film or paper, and that observance of the "spirit of the code", as provided for in Article 2.2 thereof, may not extend to items not included in the "camera category". According to Japan, even if the industry were to decide to expand the scope of the code to include these products, such a decision would have no impact on the operation of the Premiums Law or the Antimonopoly Law, unless it were approved by the JFTC. Japan argues that the JFTC has never allowed and has no intention of allowing application of the code to film or paper.

10.335 Our assessment of this initial issue is that the code clearly covers cameras but that it is unclear from the evidence submitted whether the code's stipulations extend and have been applied to film and paper. However, for the purpose of the rest of our analysis, we shall assume that the code does extend to those products.

10.336 In respect of Articles 3 and 4 of the code, the United States argues that those articles on their face discriminate against imports with respect to representations concerning the country of origin of the product. Article 3, pertaining to storefront displays, and Article 4, governing fliers, require advertisements to indicate the country of origin for imported merchandise; such indication is not required of products of Japanese origin, unless such domestic merchandise looks similar to (i.e., may be confused with) imported products.

[1391]Cf. Japan's translation of "kamera rui" as "camera category", not "cameras and related products". Japan Ex. D-68. We note that the Panel's experts agree with Japan's translation. See Translation Issue 17, Part XI.

[1392]Discussion on Progress of Fair Trade Council Focuses on Making Competition Codes Fully Known, Zenren Tsuho, August 1987, pp. 16-20, US Ex. 87-7, Japan Ex. D-70. Cf. Japan's differing translation of this phrase. We note that the Panel's translation experts appear to agree that the US translation is the more accurate. See Translation Issue 18, Part XI.

10.337 Japan responds that the intention behind the requirement of providing country-of-origin designations for imported products is simply to provide adequate information to consumers. Moreover, Japan argues, the United States has not shown how the application of this provision has upset the competitive conditions of imported film or paper.

10.338 On this issue, while being sensitive to the possibility that a discriminatory country-of-origin designation requirement could result in impairment of competitive relationships, we initially note that GATT Article IX specifically allow origin-*marking* requirements. Thus, we hesitate to condemn automatically the requirements in the code, although they go beyond marking. Moreover, we note that the code requires indications of origin in respect of certain domestic, as well as imported products, and that Japan has provided an explanation for treating domestic and imported products differently with respect to country-of-origin designations. More significantly, the United States has failed to demonstrate how such a designation requirement in the code has upset competitive relationships between domestic and imported film or paper.

10.339 In respect of the third issue -- the applications of the code -- the United States argues that the Fair Competition Code provides the Retailers Council with authority to take enforcement actions for misrepresentations in promotions not only under the code itself, but also under the Premiums Law and related competition laws. Specifically, Article 14.7 of the code states that the Retailers Council shall perform, *inter alia*, "[a]ctivities pertaining to making the [Premiums Law] and other laws and ordinances pertaining to fair trade widely understood and preventing violations thereto". In the US view, the Retailers Council acts as a substitute enforcement body for the JFTC. The United States goes on to argue that the Retailers Council applies the code to promotional activities of non-members, not just those businesses that have agreed to adhere to the code. This practice, according to the United States, comports with what the United States says is the position of the Japanese Government that competition codes must apply industry-wide in order to have their intended effect. The United States goes on to state that the JFTC has confirmed that it relies upon fair competition codes when applying the Premiums Law to "outsiders".[1393] In addition, the United States argues that the JFTC, through its approval of the code, confers not only broad authority on private parties to act as surrogate enforcers, but also exempts them from prosecution for their activities. On this point, the United States cites the JFTC Secretary General as stating that "even if the contents of the codes or the actions based on the codes violate the Antimonopoly Law, no proceedings to restrict them will be taken based on the Antimonopoly Law".[1394] The United States also cites the director of the JFTC's division on premiums and representations guidance as stating that "[t]he approval of the Code means that the role we play to take enforcement actions[1395] on violations will be left to the Fair Trade Council. If this expectation is not met, [the approval] will have no meaning".[1396]

10.340 Japan responds that the Retailers Council may take self-regulation measures under the Fair Competition Code against insiders, but may not apply the code to non-members. According to Japan,

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[1393]On this point, the United States cites a Zenren circular from February 1988, entitled "Don't Give Up Exposing and Forwarding Materials [Regarding Violations] - Japan Fair Trade Commission Probing Non-Members' 'Representations Violations'", Zenren Tsuho, US Ex. 88-2; Japan Ex. D-83. This circular mentions that "[a]lmost all who have received repeated caution or warnings were non-members, that is, while a member's stance is rectified by a verbal caution, a more severe warning in writings is issued to a non-member". The circular also presents "some recent good examples in which outsiders who have been exposed [for violations] many times, in particular, have been silenced or for which the Japan Fair Trade Commission has already initiated investigations". Ibid.

[1394]Competition Policy Law, Itoga Shogo, JFTC Secretary General, Jirei Dokusen Kinshi Ho, 15 December 1995, US Ex. 95-20, p. 5.

[1395]Japan translates "teki-hatsu" as "discovery", not "enforcement actions", Japan Ex. D-82. The Panel's translation experts do not agree on the appropriate translation in context, but lean towards a translation suggesting an action that is more active than that of "discovery". See Translation Issue 20, Part XI.

[1396]Fair Trade Council Established, Operated by Zenren, Will Respect "Fair Competition Code" - Urgent Need to Have Code Known by October Start, Zenren Tsuho, July 1987, p. 3, US Ex. 87-5.

outsiders are not subject to any action of the council for non-compliance with the code. The JFTC, on the other hand, makes its own judgment about the conduct of outsiders, but will only take action if it is determined that the conduct is a violation of the Premiums Law. Japan further argues that because the rules on misleading representations in the codes are based on the Premiums Law, there is no fundamental difference between the concept of misleading representations under the Premiums Law and under the codes. However, Japan emphasizes, the enforcing authority of the JFTC under the Premiums Law may not be delegated to a private body.

10.341 We note initially that the evidence put forward on this issue, in particular the February 1988 circular of Zenren, indicates that even though the terms of the Fair Competition Code do not expressly apply to "outsiders", the Retailers Council has in fact encouraged members to report suspected "violations" by non-members and has succeeded in pressuring non-members to comply with the code, relying on the fact that non-members that do not comply with the code are subject to Antimonopoly Law enforcement actions. The evidence also suggests that this action by the Retailers Council is accomplished with the full knowledge -- and at least tacit approval -- of the JFTC.

10.342 We then recall Japan's claim that the United States has failed to indicate which specific provisions of the code or which specific activities of the Retailers Council have upset the competitive conditions of imported photographic film and paper. For Japan, the reason for this US omission is that no "code" or "council" has ever affected the importation of film or paper.

10.343 On this basic issue of demonstrating impairment and causality, we recall the US statement that the effect of Japan's overlapping enforcement mechanisms -- the JFTC, the Promotion Council, the Retailers Council and other "fair trade councils" and trade associations -- coupled with the numerous legal provisions that could stymie a promotion, have had a significant "chilling effect" on importers like Kodak. The United States argues that Kodak has developed many ideas for premiums and prizes, but that, according to a general manager of Kodak, "they were removed from the plans if they potentially conflicted with government regulations or the industry's self-regulation … we tried to regulate ourselves before receiving such measures [from the JFTC or the Fair Trade Council]".[1397]

10.344 The United States also mentions several examples involving premiums in connection with film developing, prizes and other promotions which, it claims, Kodak attempted to launch but had to cancel. Specifically, according to the United States:

- In 1979, i.e., before the measure, Kodak conducted a contest offering video cassette recorders as prizes worth approximately 100,000 yen. The JFTC allegedly informed Kodak that its contest was improper.[1398]

- In 1987, Kodak attempted to devise joint promotions with McDonald's but was frustrated by the ten-percent limitation on premiums that may be offered to general consumers. Kodak wanted to give away free Kodak Panorama single-use cameras with McDonald's meals. Because of the ten-percent rule, Kodak allegedly had to settle for a promotion in which purchasers of a McDonald's meal got a 'luck draw' which gave them a chance to win a Panorama camera through a drawing.[1399]

- Also in 1987, Kodak had negotiated an arrangement with the Ministry of Posts and Communications according to which Kodak would sell photographic post cards at post offices across Japan at prices undercutting the going retail price. Consumers would be able to charge the cost of the postcards against their savings deposits at the post offices. However, the ministry

[1397]Affidavit of Sumi Hiromichi, 27 November 1996, US Ex. 96-10, para. 24 ff.
[1398]Affidavit of Yasuyuki Suzuki, 13 February 1997, US Ex. 97-6.
[1399]Affidavit of William Jack, 13 February 1997, US Ex. 97-2, pp. 7-8.

withdrew from the arrangement, allegedly because of pressure exercised by Zenren, and allegedly issued administrative guidance to Kodak to withdraw from the plan. Kodak allegedly was forced to comply because of commercial risks involved in disobeying the ministry's guidance.[1400]

- In 1990, the JFTC allegedly intervened in a promotion conducted by a Kodak-affiliated photofinishing laboratory, Nakamurabashi Photo Station. Nakamurabashi offered a premium of a photo album, worth around 200 yen, in connection with film developing. The JFTC allegedly found this promotion to be too radical and gave guidance to take sufficient precautions on subsequent promotional activities.[1401]

10.345 To this, Japan responds that in the cases of which it is aware, actions were taken because premiums involved were in excess of the lawful ceiling. Japan argues that origin of the product had nothing to do with the JFTC's actions, and similar campaigns for domestic products would have been equally held unlawful. Also, according to Japan, premiums regulations have been further relaxed, in particular since 1994, and are subject to continuous JFTC review. The "new general premiums rule" has been applied to all industries as of April 1996, and that since that time the JFTC has been reviewing premiums regulations applicable to individual industries, including industry-specific JFTC notifications and private "fair competition codes", in order to ensure consistency with the new general premiums rule. As a result, out of 29 industry-specific notifications, ten have been abolished or amended as of March 1997.[1402] Notification 17 on Premiums to Businesses was abolished on 16 February 1996. According to Japan, no one in the relevant Japanese government office remembers the alleged 1987 incident, recounted by the United States, involving Kodak's attempted "post card" campaign. Japan argues that, in any case, the above alleged actions taken by the JFTC and the Ministry of Post and Telecommunications have nothing to do with the 1987 JFTC approval of the Fair Competition Code and the Retailers Council. Finally, Japan submits, since film and paper fall outside the scope of any fair competition code, and are not subject to any action by a fair trade council, the US arguments on the "chilling effect" of these codes and councils could make sense only in relation to Kodak cameras, and not to film products on which the United States bases its complaint in the present proceeding.

10.346 Reviewing the arguments and evidence on the specific examples of alleged impairment put forward by the United States, we note that none of these appears to have a clear connection to the 1987 JFTC approval of the Fair Competition Code and the Retailers Council, nor to any actions taken by the Retailers Council under the code. Specifically, the 1979 offer of video cassette recorders as prizes predated the measure by approximately eight years and allegedly involved direct intervention by the JFTC, not the Retailers Council; the 1987 plan to give away Kodak Panorama cameras with McDonald's meals allegedly came up against the JFTC's ten percent rule on premiums, not any action by the Retailers Council; the 1987 plan for Kodak to sell photographic post cards through Japanese post offices allegedly fell through due to pressure from Zenren and guidance from the Ministry of Posts and Telecommunications, not any action by the Retailers Council; and the 1990 promotion conducted by a Kodak-affiliated photofinishing laboratory, Nakamurabashi Photo Station, allegedly was terminated as the result of direct intervention by the JFTC, again not because of any action by the Retailers Council. Moreover, we are not convinced that any of these actions by the JFTC or the Ministry of Posts and Telecommunications has upset the competitive relationship between domestic and imported film or paper. Finally, we consider that the US claim of "chilling effect" is made as a very general argument, and is not supported by sufficient evidence.

[1400]Affidavit of Mikio Suzuki, 13 February 1997, US Ex. 97-3, pp. 1-4.
[1401]Affidavit of Isshi Norito, 13 February 1997, US Ex. 97-5, pp. 1-3.
[1402]Kampo, 16 February 1996, Japan Ex. D-30; Kampo, 10 December 1996, Japan Ex. D-31.

10.347 For the above reasons, we find that the United States has not demonstrated that the JFTC approval of the Fair Competition Code and the Retailers Council in March 1987, or any subsequent action by the Retailers Council, nullifies or impairs benefits accruing to the United States in terms of Article XXIII:1(b).

10.348 Thus, the JFTC approval of the Fair Competition Code and the Retailers Council may be viewed as a measure for purposes of Article XXIII:1(b) and the United States has shown that it should not be held to have anticipated it in respect of US expectations on black and white film and paper from the Kennedy Round and on the full range of products at issue in respect of the Tokyo Round. It has not shown, however, that the measure nullifies or impairs benefits within the meaning of Article XXIII:1(b). In respect of the Uruguay Round, it has shown only one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(h) Concluding observations on promotion "measures"

10.349 We note that among the promotion "countermeasures" cited by the United States, the evidence points to only isolated instances of enforcement actions taken by the JFTC and the Retailers Council pursuant to JFTC Notifications and the Fair Competition Code. The evidence also confirms that neither the JFTC Notifications nor the Fair Competition Code meaningfully limits advertising or price competition. Accordingly, we have found that the United States has failed to demonstrate that any of the promotion measures upsets the competitive relationship between imported and domestic film and paper in the Japanese market.

6. COMBINED EFFECTS

10.350 We recall the US claim that the distribution "countermeasures", Large Stores Law and related "measures", and promotion "countermeasures" *in combination* nullify or impair benefits accruing to the United States, within the meaning of Article XXIII:1(b). More specifically, the United States claims that: the distribution "countermeasures", as a set, nullify or impair benefits within the meaning of Article XXIII:1(b); the Large Stores Law and related "measures" also nullify or impair benefits within the meaning of Article XXIII:1(b), in the context of the restrictive distribution structure in Japan; and the promotion "countermeasures", as a set, nullify or impair benefits within the meaning of Article XXIII:1(b), in the context of the restrictive distribution structure in Japan.

10.351 The United States argues that the distribution "measures" work together as an "organic whole". In the US view, the individual studies, reports, surveys, guidelines or other distribution "measures" standing alone may not have been sufficient to accomplish Japan's goal of restructuring the distribution system. The United States claims that MITI expected government and industry to work together to set targets for industrial restructuring, and for businesses to make efforts to achieve these targets, supported by government fiscal and other incentives. According to the United States, leading scholars in Japan agree that one way that administrative guidance is made effective is by a continuing process of studying, surveying, cajoling, and targeting the use of fiscal incentives that keeps the private sector focused on the goals set by the government, assesses their achievement of those goals, and builds peer pressure on those who are falling behind in their achievement.

10.352 We recall the Japanese response that since none of the alleged distribution "measures" individually adversely affect imported products or alter the conditions of competition faced by importing products, considering them as a "set of measures" in no way alters the fact that the measures do not upset competitive market-access conditions for imported film or paper. Japan argues, in brief, that "nothing combined with nothing is still nothing".

10.353 In our view, it is not implausible that individual measures which do not impair benefits when considered in isolation, could nonetheless have an adverse impact on conditions of competition when

considered collectively. However, for such a legal theory to be shown to have factual relevance in the present case, the United States must adduce relevant specific evidence and provide a detailed justification showing how this evidence supports the theory. In considering the US allegations in relation to "combined effects", we recall our discussion of the facts that (i) the various "measures" cited by the United States -- distribution and promotion "measures" and restrictions on large stores -- were introduced over a period of several decades, and (ii) a number of these "measures" are no longer in effect. We also recall our discussion of the timing problems as between the issuance of the "measures" and the emergence of standard transaction terms and single-brand distribution in the Japanese market. Against this background, to the extent that the United States claims that various "measures" in the areas of distribution, promotion and large stores set in motion policies which are said to have a complementary and cumulative effect on imported film and paper, we consider that it is for the United States to provide this Panel with a detailed showing of how these alleged "measures" interact with one another in their implementation so as to cause effects different from, and additional to, those effects which are alleged to be caused by each "measure" acting individually.

10.354 We recall our findings in relation to the alleged distribution "measures", in particular our findings that the United States has not demonstrated that any of the alleged distribution "measures" -- individually -- has upset the competitive market-access conditions for imported film or paper. In particular, we recall that we found in respect of each of the individual distribution "measures" cited by the United States that there was a "timing" problem, i.e., the vertical integration and single-brand distribution complained of by the United States had largely occurred prior to the adoption of the various "measures". This timing problem obviously applies to the distribution "measures" as a set. In light of these earlier findings and the fact that the United States has not presented additional argument or adduced additional evidence as to how these same "measures", "operating as a set", have negatively impacted the distribution of imported film and paper in Japan, we find that the United States has not demonstrated that the combined effects of the distribution "measures" impair competitive market-access expectations for imported US film or paper in the Japanese market.

10.355 The United States further argues that the Large Stores Law and related "measures", in the context of the restrictive distribution structure in Japan, nullify or impair competitive market-access conditions for imported film or paper. In particular, the United States alleges that the Large Stores Law and related "measures" have operated to support the vertically aligned distribution system fostered by the Government of Japan in the photographic film and paper sector. The United States points to a 1969 MITI survey regarding transaction terms which, the United States maintains, demonstrates that MITI viewed large stores as a threat to Fuji and Konica's oligopolistic distribution systems. According to the United States, this survey cites as two threats to this oligopolistic system, first, the "growth of retail routes (especially regular chains and supermarkets) other than the photo retail route and changes in transaction terms due to this leadership", and second, the "effects of full participation of Eastman Kodak". The guidance allegedly explained why large stores threatened oligopolistic distribution: "When this share [the share of film sales by supermarkets] becomes larger, influence over manufacturers will grow, and the market system controlled by manufacturers will be shaken". Without the measures to restrict the growth of large stores, the United States contends that large stores would have brought sufficient bargaining power and competition into the Japanese distribution system to erode the exclusive vertical control over distribution exercised by Japanese manufacturers. Therefore, the United States takes the position, the Large Stores Law and related "measures" should be considered as important "measures" in Japan's overall efforts to create and support manufacturer-dominated, vertically aligned distribution in Japan.

10.356 To this, Japan responds that the United States takes a statement out of context to construct its argument that the Large Stores Law has "operated to support" the distribution system allegedly fostered by the government in the photographic film and paper sector. Specifically, Japan notes that the United States selects a few sentences from the residual category "other" at the end of a several-

hundred-page MITI survey report on transaction terms.[1403] Japan argues that comments in the report about "future problems" are a discussion about the threat of the reintroduction of irrational business terms, not the possible threat of large stores to some supposed oligopolistic distribution system that the government was allegedly trying to protect. Japan points out that the MITI report spoke of "free competition" as a positive development. In this regard, Japan notes that the United States left out a key portion of the quote: "the market system controlled by manufacturers will be shaken, *this leading to an environment of free competition*" (emphasis added). Japan also claims to have inadvertently made a translation error in leaving out the phrase "and this effect is desirable" at the end of the above quote.[1404] Finally, Japan argues that the fear expressed regarding the increase in sales by supermarkets was not a fear over the threat to some established domestic oligopoly, but rather a fear that these new retail channels would introduce irrational business practices, such as abnormally long payment periods, product returns, and dispatched employee practices.[1405]

10.357 Again, for the US theory of "measures" acting in combination to be shown to have factual relevance in the present case it must be based on a detailed justification and convincing evidence. On the basis of the evidence and arguments presented by the two parties, and taking into account the additional portion of the MITI Survey Report mentioned by Japan, we consider that the MITI survey report cited by the United States, when correctly translated and read in context, does not sufficiently support the US proposition in relation to the alleged role of the Large Stores Law (and related "measures") in supporting what the United States claims is an oligopolistic distribution system for film and paper in Japan. Rather, the evidence would seem to suggest that MITI was mostly concerned with avoiding the reintroduction of what MITI viewed as irrational business terms. To the extent that the US claim is that the Large Stores Law "created" manufacturer-dominated, vertically integrated distribution in Japan, it suffers from the timing problem referred to above, i.e., such a distribution structure existed prior to the adoption of the Large Stores Law in 1973. The United States offers insufficient evidence as to how the Large Stores Law played a role in keeping this already-existing vertically integrated structure in place. In the absence of other evidence and argument to support the US claim, and in light of our earlier findings that the United States has not demonstrated that the Large Stores Law and related "measures" have upset the competitive market-access conditions for imported film or paper, we find that the United States has not demonstrated that the Large Stores Law and related "measures" have operated to support a vertically aligned distribution system in Japan for film and paper.

10.358 The United States also claims that independently of the role that the Large Stores Law plays in supporting the oligopolistic distribution system in the Japanese film and paper market, the restrictions on large stores have limited market access by curtailing an alternate channel to market foreign products. The United States argues that even if unrestricted growth in large stores would not alter the exclusive manufacturer domination over Japanese wholesalers, it still would allow expansion of a sales channel that, according to the United States, has been more friendly to imports in Japan. The United States offers the example of Agfa which allegedly makes at least half its film sales in Japan to the Daiei supermarket chain, Japan's largest retailer. If Daiei's growth had not been retarded for three decades by repressive Japanese government regulation, the United States maintains, it might be an even larger chain today and Agfa's sales to it would be greater. On the other hand, the United States argues, if Japan's primary wholesalers were not in exclusive relationships with Japanese manufacturers and were willing to carry foreign film, the need to rely on large stores as an alternative would be much reduced. Thus, in addition to the alleged action of the Large Stores Law in combination with the distribution "measures", the United States claims that the Large Stores Law (and related "measures") *by itself*, in the context of a closed distribution system, nullifies or impairs benefits with the meaning of Article XXIII:1(b).

[1403]MITI's 1969 Survey Report on Transaction Terms, Japan Ex. B-1, p. 309; US Ex. 15.

[1404]Ibid. Japan argues that although it is unlikely that the initial quote would be viewed as identifying a threat, the corrected quote clearly indicates that "free competition" was viewed as "desirable". Ibid.

[1405]Ibid.

10.359 Japan refutes the US claims of impairment with respect to the effects of the Large Stores Law and related "measures" acting in combination in the context of the "closed" Japanese distribution system, restating its view that none of the alleged "measures" individually adversely affect imported products or alter the conditions of competition facing imported products. According to Japan, large stores are not more likely to carry imported products. What counts is sales volume, regardless of whether one is speaking of smaller or larger stores. Japan further argues that large stores have increased in number regardless of the existence of the Large Stores Law. Japan reiterates that there is no evidence of a combined effect of the Large Stores Law and related "measures", in the context of a closed distribution system, because combining nothing with nothing still produces nothing.

10.360 As noted earlier, for the notion of combined effects to be shown to have factual relevance in the present case the United States must clearly demonstrate how the evidence supports this claim. We recall in this regard our findings in relation to the Large Stores Law and related "measures", which we examined together, in particular our findings that the United States has not demonstrated that any of these alleged "measures" has upset the competitive market-access conditions for imported film or paper. In light of these earlier findings and the fact that the United States has not presented additional argument or adduced additional evidence as to how these same "measures", "operating as a set", have negatively impacted the distribution of imported film and paper in Japan, other than an anecdotal reference to Agfa's use of the Daiei supermarket chain as a major means of film distribution in Japan (an argument which, if factually correct, could be seen as indicative of the availability of such alternative source of distribution in the Japanese context), we find that the United States has not demonstrated that the combined effects of the Large Stores Law and related "measures", in the context of an alleged closed distribution system, impair competitive market-access conditions for imported US film or paper in Japan.

10.361 We next recall the US claim that the promotion "countermeasures" also have supported the closed distribution system. According to the United States, JFTC Notification 17 under the Premiums Law took away an important means for foreign manufacturers to offer Japanese distributors a more attractive deal to handle foreign products. JFTC Notification 17, in the US view, essentially ruled out all manner of premiums from manufacturers to wholesalers, except those of token value that could be considered reasonable in light of normal business practice. The United States maintains that limiting the ability to offer premiums restricted the ability of foreign manufacturers to use their financial and marketing strengths to entice Japanese distributors from their exclusive relationships with Japanese manufacturers, or to solidify their relationships with Japanese distributors. And because, in the US view, Notification 17 directly supported the Japanese manufacturer dominated distribution system, it should be considered both as a distribution "countermeasure" and a promotion "countermeasure". Other promotion "countermeasures", the United States argues, also helped to restrict market access for foreign photographic film and paper in Japan. When a foreign manufacturer has limited access to the distribution system, it is especially important that it be able to reach Japanese consumers with attractive premiums and promotions. Taken individually, the United States believes, any one of the limits on premiums and promotions might not have substantially impaired the ability of foreign firms to compete in Japan. But taken as a group, the United States argues, the promotion "countermeasures" did have a significant chilling effect, particularly in the context of the system of enforcement through the fair competition codes and councils and the actions of the Fair Trade Promotion Council.

10.362 Japan rebuts the US claim that the alleged promotion "measures", as a set, have impaired benefits accruing to the United States, since, in the Japanese view, none of the alleged "measures" individually adversely affect imported products or alter the conditions of competition facing imported products. Japan reiterates that even when the distribution policies and the "measures" related to the Premiums Law are individually considered as a "set of measures", they do not in any way disadvantage imports because, in Japan's view, combining nothing with nothing still produces nothing.

10.363 Again we note that for the US theory of combined effects to be shown to have factual relevance in the present case, it must be based on a detailed justification and convincing evidence of record. We recall in this regard our findings in relation to the alleged promotion "measures", in particular our findings that the United States has not demonstrated that any of these alleged "measures" -- individually -- has upset the competitive market-access conditions for imported film or paper. While a few specific promotional activities (e.g., false advertising, certain premiums) are regulated on a nondiscriminatory basis, tools such as truthful advertising and price competition are permitted. Altogether, the United States offers only a few examples, spread over many years, where Kodak promotional activities were limited in any way. In light of these earlier findings and the fact that the United States has not presented additional argument or adduced additional evidence as to how these same "measures", "operating as a set", have negatively impacted the distribution of imported film and paper in Japan, we find that the United States has not demonstrated that the combined effects of the promotion "measures", in the context of an alleged closed distribution system, impair competitive market-access conditions for imported US film or paper in Japan.

10.364 Finally, the United States claims that the promotion "countermeasures" as a set have operated *in combination* with Japanese Government efforts to restructure the distribution system through the distribution "countermeasures" and large stores "measures" to nullify or impair benefits within the meaning of Article XXIII:1(b).

10.365 Japan responds that the US claims of the three categories of "measures" acting in combination with each other are factually and logically flawed. In Japan's view, the United States has not submitted credible evidence that the "measures" were intended to act or in fact did act in combination. Japan also alleges that the United States has not provided evidence that the Large Stores Law in any way sought to affect foreign product given that the law currently applies and has always applied uniformly to all entities seeking to provide retailing services. Similarly, Japan contends that the United States has not provided evidence of JFTC actions adversely affecting foreign products (para. 4.27).

10.366 Here again, we recall our findings that the evidence presented by the United States fails to show that any of the individual "measures" -- distribution "measures", "measures" restricting large stores, or promotion "measures" -- nullifies or impairs benefits accruing to the United States in respect of competitive market-access expectations for imported film or paper. In light of these earlier findings and the fact that the United States has not presented additional argument or adduced additional evidence in support of its claim that all these "measures" have worked in concert to upset US market-access expectations, we find that the United States has not demonstrated that the three categories of "measures" *in combination* nullify or impair benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.367 In the final analysis, it is not incumbent upon this Panel to engage in its own extensive, unaided investigation into the potential applicability in this case of the US theory of combined effects. Rather, it is for the United States, as the complaining party, to make a detailed showing of the relevance of this theory to the matter at hand. We consider that the United States has failed to make such a showing here.

F. ARTICLE III:4 - NATIONAL TREATMENT IN RESPECT OF LAWS, REGULATIONS AND REQUIREMENTS

10.368 The United States claims that the same distribution "measures" it has cited as nullifying or impairing benefits under Article XXIII:1(b) also accord less favourable treatment to imported film and paper in violation of Article III:4. Specifically, the United States claims that Japan's application of the following eight distribution "measures" violate Article III:4:[1406]

(1) 1967 Cabinet Decision on Liberalization of Inward Direct Investment;
(2) 1967 JFTC Notification 17 on premiums to businesses;
(3) 1968 Sixth Interim Report on Distribution Modernization Outlook and Issues;
(4) 1969 Seventh Interim Report on Systemization of Distribution Activities;
(5) 1969 Survey Report regarding Transaction Terms;
(6) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film;
(7) 1971 Basic Plan for the Systemization of Distribution; and
(8) 1975 Manual for Systemization of Distribution by Industry: Camera and Film.

Before examining these eight distribution measures in light of Article III:4[1407], we wish to make several general observations concerning this GATT provision and its proper interpretation in the instant case.

10.369 Article III:4 provides in relevant part as follows:

> "4. The products of the territory of a Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

We consider that in line with GATT/WTO precedent, under this provision the United States is required to demonstrate the existence of: (a) a law, regulation or requirement affecting the internal sale, offering for sale or distribution of imported film or paper; and (b) treatment accorded in respect of the law, regulation or requirement that is less favourable to the imported film or paper than to like products of national origin.[1408] We note that the parties do not disagree on this point.

10.370 In examining the relevance of Article III:4 in the present dispute, we consider that we also need to take into account the general principle enunciated in Article III:1, which reads:

> "1. Members recognize that internal taxes and other internal charges and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production".

[1406]We found in paragraph 10.21 above that three additional distribution "measures" cited by the United States -- specifically, application of the international contract notification provisions of JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (April 1971), JDB funding for Konica's wholesalers (1976) and SMEA funding for photoprocessing laboratories (July 1977) -- are not within the terms of reference of this Panel because they were not raised in the request for the establishment of the Panel in a manner consistent with Article 6.2 of the DSU. We have therefore excluded them from further consideration.

[1407]Because the arguments of the European Communities under Article III:4 largely coincide with those of the United States, we do not address the EC's arguments separately.

[1408]See, e.g., *US - Gasoline*, WT/DS2/9, p. 33.

As the Appellate Body stated in *Japan - Alcoholic Beverages*:

> "Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs".[1409]

Essentially, as reiterated by the Appellate Body in *Japan - Alcoholic Beverages*, "Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products".[1410]

10.371 We note that the specific national treatment issue addressed by the Appellate Body in *Japan - Alcoholic Beverages* was that of internal tax differentials under Article III:2 and that although the Appellate Body clearly indicates that the general principle articulated in Article III:1 informs the rest of Article III and should be used as a guide to understanding and interpreting the other paragraphs of Article III, in *Bananas III* the Appellate Body stated that "a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure 'afford[s] protection to domestic production'".[1411] Accordingly, and in line with the Appellate Body's most recent stipulation in *Bananas III*, we shall use the general principle articulated in Article III:1 as a guide to interpreting Article III:4 but shall not give separate consideration to whether the measures cited by the United States "afford protection to domestic production".

10.372 As for the burden of proof, as stated earlier (section D), we note that it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof. Once that party has put forward sufficient evidence to raise a presumption that what is claimed is true, the burden of producing evidence shifts to the other party to rebut the presumption.[1412] Thus, in this case, including the claims under Articles III and X, it is for the United States to bear the burden of proving its claims. Once it has raised a presumption that what it claims is true, it is for Japan to adduce sufficient evidence to rebut any such presumption.

(a) Laws, regulations or requirements

10.373 Turning to the eight distribution "measures" cited by the United States, we must first determine whether these constitute "laws, regulations [or] requirements" within the meaning of Article III:4. On this issue, we first recall that in addressing the interpretation of the term *measure* in the context of Article XXIII:1(b), including in relation to the same eight distribution "measures" at issue here, we concluded that that term should be given a broad construction.[1413]

10.374 We further recall our reference in that same section to previous GATT cases dealing with what may constitute "all laws, regulations and requirements" under Article III:4. There we noted that, in

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[1409]WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 18.

[1410]Ibid, p. 16, citing *US - Taxes on Petroleum Products and Certain Imported Substances*, BISD 34S/136, para. 5.1.9 and *Japan - Liquor Taxes*, BISD 34S/83, para. 5.5(b). See *US - Section 337*, discussed below, which was the first panel to state that "[t]he words 'treatment no less favourable' in paragraph 4 [of Article III] call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products" (emphasis added). Adopted on 7 November 1989, BISD 36S/345, 386-387, para. 5.11. See also *EEC - Parts and Components*, BISD 37S/132; *Canada - FIRA*, BISD 30S/140.

[1411]WT/DS27/AB/R, p. 92 (emphasis in original).

[1412]See *US - Wool Shirts and Blouses*, WT/DS33/AB/R, p. 14.

[1413]See paras. 10.47-10.50.

these previous cases, the conclusion that there is a law, regulation or requirement that exists and violates GATT rules gives rise to a presumption of nullification or impairment. Even so, panels have taken a broad view of when a governmental action is a law, regulation or requirement. For example, in 1984 a panel examined written purchase and export undertakings under the Foreign Investment Review Act of Canada (FIRA), submitted by investors regarding the conduct of the business they were proposing to acquire or establish, conditional on approval by the Canadian government of the proposed acquisition or establishment. These written undertakings were considered legally binding under FIRA. The panel determined that the undertakings were to be considered "laws, regulations or requirements" within the meaning of Article III:4, even though FIRA did not make their submission obligatory.[1414] Similarly, the panel on *EEC -- Parts and Components* considered that the term "laws, regulations or requirements" included requirements "which an enterprise voluntarily accepts in order to obtain an advantage from the government.[1415]

10.375 We note that the parties disagree as to the breadth of interpretation to be given to the phrase "all laws, regulations and requirements" in Article III:4. The United States argues that the phrase speaks to government actions, i.e. action taken in the name of a WTO Member, by government officials or parties authorized to act on the government's behalf, in pursuit of government policies. According to the United States, the very language of Article III:4 indicates that it was intended to cover "all" government action which would include the formulation of government policy and its implementation. The United States maintains that a Member should bear responsibility if its governmental action accords less favourable treatment to imported products than to domestic products, regardless of the method used by the Member to achieve this result. In the US view, no single or set of criteria should be dispositive, an approach which, the United States asserts, comports with the Appellate Body's admonition in *Japan - Alcoholic Beverages* to take a case-specific approach and to refrain from applying WTO rules in a way that ignores "real facts and real cases in the real world".[1416] Japan responds that for a party to be subject to a government requirement, it must either (i) be legally obligated to carry out the request, or (ii) receive some advantage from the government in exchange for compliance. In other words, there must be either a government sanction or the withholding of a government benefit that is attached, formally or substantively, to non-compliance.

10.376 A literal reading of the words *all laws, regulations and requirements* in Article III:4 could suggest that they may have a narrower scope than the word *measure* in Article XXIII:1(b). However, whether or not these words should be given as broad a construction as the word *measure*, in view of the broad interpretation assigned to them in the cases cited above, we shall assume for the purposes of our present analysis that they should be interpreted as encompassing a similarly broad range of government action and action by private parties that may be assimilated to government action. In this connection, we consider that our previous discussion of GATT cases on administrative guidance in relation to what may constitute a "measure" under Article XXIII:1(b), specifically the panel reports on *Japan - Semi-conductors* and *Japan - Agricultural Products*, is equally applicable to the definitional scope of "all laws, regulations and requirements" in Article III:4.

10.377 Of the eight distribution "measures" at issue, we recall our earlier findings that only four of these "measures" -- the 1967 Cabinet Decision, the 1967 JFTC Notification 17, the 1970 Guidelines and the 1971 Basic Plan -- are or were measures within the meaning of Article XXIII:1(b). Of these four, we found that JFTC Notification 17 is no longer in effect. Thus, of the eight distribution

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[1414]*Canada -- FIRA*, BISD 30S/140, 158, para. 5.4.

[1415]*EEC -- Parts and Components*, BISD 37S/132, 197, para. 5.21. See also *Bananas III*, WT/DS27/R, paras. 7.179-7.180. We also note that the Illustrative List of Trade-Related Investment Measures (TRIMs) contained in the Annex to the Agreement on TRIMs indicates that TRIMs inconsistent with Articles III:4 and XI:1 include those which are "mandatory or enforceable under domestic law or under administrative rulings, *or compliance with which is necessary to obtain an advantage*" (emphasis added).

[1416]Citing *Japan - Alcoholic Beverages*, p. 31.

"measures" cited by the United States, we have already found that only the 1967 Cabinet Decision, the 1970 Guidelines and the 1971 Basic Plan are to be considered as measures within the meaning of Article XXIII:1(b). Applying the assumption outlined above as to the similarity of *laws, regulations and requirements* in Article III:4 to *measures* in Article XXIII:1(b), we shall accordingly assume that these three measures meet the definition of *laws, regulations [or] requirements* within the meaning of Article III:4. Further, for the sake of completeness of our analysis, in examining whether less favourable treatment is accorded to imported products, we shall assume that the other five distribution "measures" cited by the United States are also *laws, regulations [or] requirements* under Article III:4.

(b) No less favourable treatment

10.378 We recall the US claim that the eight distribution "measures" in issue accord less favourable treatment to imported film and paper than to like domestic film and paper in the Japanese market. In contrast, Japan argues that the United States has failed to show that the alleged "measures" extend less favourable treatment to imported film or paper.[1417]

10.379 Recalling the statement of the Appellate Body in *Japan - Alcoholic Beverages* that "Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products"[1418], we consider that this standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the "no less favourable treatment" standard in Article III:4. We note in this regard that the interpretation of equal treatment in terms of effective equality of competitive opportunities, first clearly enunciated by the panel on *US - Section 337*[1419], has been followed consistently in subsequent GATT and WTO panel reports.[1420] The panel report on *US - Section 337* explains the test in very clear terms, noting that

> "the 'no less favourable' treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as *an expression of the underlying principle of equality of treatment* of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III. The words "treatment no less favourable" in paragraph 4 call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis" (emphasis added).[1421]

10.380 We recall our earlier findings that none of the eight distribution "measures" cited by the United States had been shown to discriminate against imported products, either in terms of a *de jure* discrimination (a measure that discriminates *on its face* as to the origin of products) or in terms of a *de facto* discrimination (a measure that in its application upsets the relative competitive position between domestic and imported products, as it existed at the time when a relevant tariff concession was granted).

[1417]Neither party contests the fact that imported film and paper are "like products" to domestic (i.e., Japanese) film and paper, and we see no reason to examine this particular requirement of an Article III:4 case.

[1418]*Japan - Alcoholic Beverages*, p. 16, citing *US - Taxes on Petroleum Products and Certain Imported Substances*, BISD 34S/136, para. 5.1.9 and *Japan - Liquor Taxes*, BISD 34S/83, para. 5.5(b).

[1419]*US - Section 337*, BISD 36S/345, 386-387, para. 5.11.

[1420]See, e.g., *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted on 18 February 1992, BISD 39S/27, paras. 5.12-5.14 and 5.30-5.31; *US - Malt Beverages*, BISD 39S/206, para. 5.30; *US - Gasoline*, WTO/DS2/R, para. 6.10; *Canada - Periodicals*, WT/DS31/R, adopted on 30 July 1997, p. 75; *Bananas III*, WT/DS27/R, paras. 7.179-7.180.

[1421]*US - Section 337*, BISD 36S/345, 386-387, paras. 5.11.

In this connection, it could be argued that the standard we enunciated and applied under Article XXIII:1(b) -- that of "upsetting the competitive relationship" -- may be different from the standard of "upsetting effective equality of competitive opportunities" applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e., when the concession was granted and currently.

10.381 Here, as in our examination of the same measures in light of the US claim of non-violation nullification or impairment, the evidence cited by the United States indicates that the measures neither (i) discriminate on their face against imported film or paper (they are formally neutral as to the origin of products), nor (ii) in their application have a disparate impact on imported film or paper. As previously noted in the non-violation analysis, we are not persuaded that the 1967 Cabinet Decision or the 1970 Guidelines are directed at promoting vertical integration in the photographic materials distribution sector with a view to impeding market access for foreign products. Further, there are serious difficulties of timing in the US arguments on causation such that we are not persuaded that there is a meaningful nexus between the 1967 Cabinet Decision or the 1970 Guidelines and the largely pre-existing market structure. Moreover, the recommendations of the 1971 Basic Plan appear to be neutral as to the source of the products, promoting standardization and modernization of business practices and management techniques, including computerization. Additionally, as we also noted earlier, single brand wholesale distribution is the common market structure -- indeed the norm - -in most major national film markets, including the US market. It is unclear why the same economic forces acting to promote single brand wholesale distribution in the United States would not also exist in Japan.

10.382 Accordingly, and essentially for the reasons already stated in our findings on non-violation nullification and impairment, we find that the United States has failed to demonstrate that any of the distribution "measures" in issue accords less favourable treatment to imported film and paper than to film and paper of Japanese origin. The US claim under Article III:4 must therefore be rejected.

G. ARTICLE X:1 - PUBLICATION OF ADMINISTRATIVE RULINGS OF GENERAL APPLICATION

10.383 The United States claims that the following two alleged actions by the Government of Japan are inconsistent with GATT Article X:1:[1422]

> (1) in the context of the Premiums Law and relevant fair competition codes, Japan's failure to publish the JFTC's and the fair trade councils' enforcement actions that establish or modify criteria applicable in future cases; and
>
> (2) in the context of the Large Stores Law and relevant local regulations, Japan's failure to publish guidance through which regional MITI offices, prefectural governmental and local authorities make applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review, and continue to impose a "prior explanation" requirement.

[1422]We note that whereas the US request for the establishment of this Panel (WT/DS44/2) makes reference to violations of both Article X:1 and Article X:3, the United States has made no legal claims under Article X:3 in its submissions to the Panel. Accordingly, we limit our examination of claims under Article X to claims made under paragraph 1 thereof.

1. GENERAL CONSIDERATIONS ON THE LEGAL TEST UNDER ARTICLE X:1

10.384 Prior to examining each of these claims, we shall address some more general points in relation to the legal test under Article X:1. The text of Article X:1 provides in relevant part as follows:

> "Laws, regulations, judicial decisions and *administrative rulings of general application*, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfers of payments therefore, or *affecting their sale, distribution*, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use *shall be published promptly in such a manner as to enable governments and traders to become acquainted with them*" (emphasis added).

We note that the US claims relate not to laws, regulations or judicial decisions, but to *administrative rulings* and that the main issue presented by the US claims in this area is whether the administrative rulings, which the United States maintains Japan has failed to publish, are administrative rulings *of general application*. In particular, the United States maintains that Japan enforces the Premiums Law and the Retailers Fair Competition Code as well as the Large Stores Law primarily through informal, *unpublished* enforcement actions in a manner inconsistent with Article X:1.

10.385 The meaning of "general application" was addressed in the recent WTO panel report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*.[1423] That panel considered that "[i]f, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application".[1424] We agree with this analysis and consider that, consistent with the plain meaning of Article X:1, the publication requirement of Article X:1 does not extend to administrative rulings addressed to specific individuals or entities.

10.386 There are, however, no other GATT or WTO precedents directly on point.[1425] In particular, there are no precedents on whether or not the Article X:1 publication requirement with respect to administrative rulings of general application extends, as argued by the United States, to the disposition of individual matters by an administrative agency that establish or substantially revise criteria or principles which may be applied in future cases. This said, Japan apparently made a very similar argument to the panel on *EEC - Parts and Components* in challenging the EEC's practices regarding the acceptance of undertakings pursuant to the EEC's anti-dumping regulation and the determination of the origin of parts used in assembly operations.[1426] Because the *EEC - Parts and Components* panel decided the case on other grounds, it did not address the Article X claim.

10.387 We recall that Japan stands by its argument made to the panel in *EEC - Parts and Components*, but contends that this argument is inapposite to the present case. Specifically, Japan contends that it has duly published all laws, regulations, judicial decisions and administrative rulings of general application relating to the Premiums Law and Large Stores Law in a manner enabling governments and traders to become acquainted with them. Japan maintains that the United States fails to identify

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[1423]Panel Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear* ("*US - Restrictions on Underwear*"), WT/DS24/R, adopted on 25 February 1997, para. 7.65.

[1424]Ibid. This finding was upheld by the Appellate Body. Appellate Body Report on *US - Restrictions on Underwear*, WT/DS24/AB/R, adopted on 25 February 1997.

[1425]In a number of cases where panels examining quantitative restrictions have found those restrictions to be inconsistent with Article XI:1, the panels have declined to make findings with respect to "subsidiary claims" raised concerning the consistency with Article X of the administration of the quantitative restrictions, stating, for instance, that Article X "dealt with the administration of quotas that may be *applied consistently* with the General Agreement" (emphasis added). *Japan - Agricultural Products*, adopted on 2 February 1988, BISD 35S/163, 242, para. 5.4.2.

[1426]BISD 37S/132, 155, para. 3.53.

any particular unpublished enforcement or other actions that fall under the definition of "general application" and, therefore, has failed to discharge its burden of proof.

10.388 In our view, it stands to reason that inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases. At the same time, we consider that it is incumbent upon the United States in this case to clearly demonstrate the existence of such unpublished administrative rulings in individual matters which establish or revise principles applicable in future cases. We shall now proceed to examine in turn the two claims made by the United States.

2. "MEASURES" TAKEN IN THE CONTEXT OF THE PREMIUMS LAW

10.389 The United States claims that in the context of the Premiums Law and relevant fair competition codes, Japan's failure to publish the JFTC's and the fair trade councils' enforcement actions that establish or modify criteria applicable in future cases violates Article X:1. We shall first examine this claim in relation to the Premiums Law enforcement actions by the JFTC.

(a) Premiums Law enforcement actions

10.390 The United States argues that Japan's enforcement of its premium and representation provisions is "shrouded in secrecy" resulting from the use of informal, unpublished enforcement actions. According to the United States, the problem is exacerbated due to the multi-tiered nature of Japan's enforcement system, with the JFTC, the prefectural governments and deputized private sector councils all having authority to enforce the Premiums Law. The confusion for companies attempting to do business in Japan primarily arises from Japan's failure to publish a large percentage of administrative rulings and enforcement actions and the difficulty in obtaining what information may be available. The United States submits that since the Premiums Law was enacted in 1962, the JFTC has initiated relatively few formal enforcement actions but has issued many "administrative guidances" or warnings, the overwhelming majority of which are unpublished. The lack of transparency is compounded, the United States maintains, by the fact that Japan's 47 prefectural governments take thousands of informal actions.

10.391 Japan responds that the enforcement system of the Premiums Law is sufficiently transparent and consistent with Article X:1. According to Japan, the Premiums Law itself and enforcement regulations for the Premiums Law, as well as numerous general and specific notifications interpreting the Premiums Law have been published. Japan contends that there is an ample public record, readily available to governments and traders, from which one can discern how the Premiums Law will be applied. Japan points out that the United States itself specifically identifies and refers to numerous JFTC notifications which explain how the Premiums Law is applied. Moreover, Japan maintains, the JFTC has published detailed notifications whenever it has announced significant restrictions or modifications in its enforcement policy. For Japan, the relevant issue is not whether informal enforcement actions are taken but whether any new policy is being applied without adequate disclosure. Japan considers as significant that the United States does not make a single specific allegation of any JFTC enforcement action at odds with already published policies.

10.392 Addressing this claim, we note that the primary difference between the parties is on whether or not such enforcement actions -- i.e., unpublished enforcement actions that establish or modify criteria applicable in future cases -- exist. Whereas Japan argues that it has consistently published all administrative rulings of general application as well as numerous cease and desist orders, general and specific notifications interpreting the Premiums Law, and outlines of major cases where warnings were given, the United States argues that it is not credible that none of the unpublished enforcement actions -- more than 90 per cent of all enforcement actions, according to the United States -- involves the establishment or modification of criteria that may be applied in future cases.

10.393 We agree with the United States that the vast majority of individual enforcement actions are unpublished. However, we note that there is a pronounced lack of evidence as to the nature of any alleged unpublished enforcement actions effecting changes to JFTC enforcement criteria. We agree with Japan that the record is devoid of any specific allegation by the United States as to any JFTC enforcement action that is at odds with already published policies. We acknowledge that the nature of the US claim makes it difficult to cite examples -- if a ruling is unpublished how can the United States know that it effects such changes? The United States maintains it has made repeated requests for information on enforcement activities from the Japanese Government, the respective enforcement councils and relevant photographic trade associations, but that, almost without exception, these requests have been denied. Nonetheless, it would seem that the United States should be able to cite examples of changed policies that it believes were in fact implemented first in unpublished decisions. Otherwise, we have no basis for finding that there are such decisions. Even if the rate of published-to-unpublished actions is low, we have nothing before us that suggests what it should be. We cannot find that Japan should publish "more" decisions in the absence of specific examples of the types of decisions that should be published, i.e., administrative rulings establishing or modifying criteria applicable in future cases. In these circumstances, we find that the United States has failed demonstrate the existence of any such administrative rulings establishing or modifying criteria applicable in future cases, the non-publication of which could be viewed as a violation of Article X:1.

(b) Actions under "Fair Competition Codes"

10.394 The United States also argues that none of the four private sector enforcement bodies to which the JFTC allegedly delegates authority, i.e., (1) the Retailers Fair Trade Council ("RFTC"), (2) the Promotion Council, (3) the Manufacturers Fair Trade Council, or (4) the Wholesalers Fair Trade Council, publishes its enforcement actions so that traders and governments may become familiar with them. The United States maintains that these "fair trade councils" and "fair competition codes" are creations of Japanese law, in particular Section 10 of the Premiums Law, and they remain under the supervision of the JFTC. As such, the United States urges that Japan should take responsibility for the enforcement actions of these councils under the codes, including those unpublished enforcement actions establishing or modifying criteria applicable in future cases.

10.395 Japan responds that no fair competition code covers photographic film or paper and that there have been no actions under these codes even addressed to the film or paper industry. Japan also argues that these private sector councils are engaged in industry self-regulation and have no power as enforcement bodies under the Premiums Law. Moreover, Japan states that although the fair competition codes are published in the Official Gazette once approved by the JFTC, as industry self-regulation codes they fall outside the scope of Article X:1. Finally, Japan argues that the United States has not even alleged that any action taken by any of the councils is at odds with the basic principles set forth in the codes.

10.396 We note that this US claim is not limited to film or paper. Assuming that the enforcement actions of the various "fair trade councils" under the various "fair competition codes" are to be assimilated to "administrative rulings" of the Japanese Government[1427] under Article X:1, we must still determine whether any of these administrative rulings are of the type requiring publication under Article X:1. On this issue, we are again confronted with a lack of evidence as to the nature of any alleged unpublished enforcement actions effecting changes to JFTC or code enforcement criteria. The record is devoid of any specific allegation by the United States as to any action taken by any of the councils that is at odds with the basic principles set forth in the codes. In these circumstances, we find that the United States has failed demonstrate the existence of any such administrative rulings by

[1427]We recall in this connection our findings that certain actions of the Promotion Council and the Retailers Council may be assimilated to governmental measures within the meaning of Article XXIII:1(b).

any of the councils, establishing or modifying criteria applicable in future cases, the non-publication of which could be viewed as a violation of Article X:1.

3. "MEASURES" TAKEN IN THE CONTEXT OF THE LARGE STORES LAW

10.397 The United States claims that in the context of the Large Stores Law and relevant local regulations, Japan's failure to publish guidance pursuant to which regional MITI offices, prefectural governmental and local authorities make applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review, and continue to impose a "prior explanation" requirement, is inconsistent with Article X:1. Although MITI issued an administrative directive in January 1992 formally abolishing the "prior explanation" requirement under the Large Stores Law, the United States argues that MITI did so through the circulation of a pamphlet which, in the US view, did not amount to a publication "in such a manner as to enable governments and traders to become acquainted with [the directive]", as required by Article X:1. Moreover, the United States argues, MITI regional offices and prefectural and local governments continue in many cases to give administrative guidance requiring or requesting large store owners to undertake prior consultations and effectively to make adjustments with local retailers and small store competitors before submitting their formal notifications under Article 3 of the Large Stores Law to the government. The United States maintains that in numerous cases, retailers proposing to open or expand large stores continue to feel compelled to negotiate with small retailers because the law and MITI guidance give the local retailers ample possibility to force severe adjustments on large retailers who do not negotiate with them in advance.

10.398 Japan responds that in January 1992 MITI issued a directive to MITI branches and prefectural governments, formally eliminating the "prior explanation" requirement under the Large Stores Law. According to Japan, procedural requirements for notifications of new stores were published in, e.g., the 1992 and 1994 Public Briefing Circulars.[1428] Japan states that these describe in detail what is expected of large store owners under the law and reflect the 1992 policy decision to abolish the previous "prior explanation" procedures. As a result of the abolition of this provision, Japan contends, none of the MITI branches, prefectural governments, or other local governments may either require or recommend that large store owners provide prior explanation to, or undertake prior consultations with, local retailers. Japan emphasizes that it is prepared to take corrective action against any entity acting in violation of this decision. In addition, Japan states that, based on its authority under Article 15(5) of the Large Stores Law, it has explicitly prohibited all prefectural and local governments from requiring or recommending prior explanation through additional local regulations based upon their regulatory authority delegated by the Local Autonomy Law. In sum, Japan argues that (i) the United States has not pointed to any administrative rulings of general application which have not been published, and (ii) because the central government has either corrected or will correct any local policies that may deviate from published policy, such local deviations do not constitute general rules "made effective" by the government, as required by Article X:1.

10.399 Considering the above, we note that we are faced with conflicting argument and evidence on whether or not there is unpublished administrative guidance promoting continuation through informal means of the formally abolished government policy requiring "prior explanation" by large stores. However, the issue under Article X:1 is not whether or not unpublished administrative rulings are being issued, but rather, whether or not such administrative rulings are rulings of "general application". As we indicated in our analysis of the Article X:1 claims with respect to enforcement actions under the Premiums Law, we consider that the concept of administrative rulings of "general application" may in principle encompass administrative rulings in individual cases which establish or modify criteria applicable in future cases. The key issue here, therefore, in respect of alleged continuing unpublished

[1428]Instructing Parties Filing Notifications of New Type-I Large Scale Retail Stores to Hold Public Briefing, Sankyoku, Nos. 25 and 26, MITI, 29 January 1982, Japan Ex. C-17, Nos. 93 and 94, MITI, 1 April 1994, Japan Ex. C-18.

guidance under the Large Stores Law, is whether or not any such guidance, assuming its existence, establishes or modifies criteria applicable in future cases, or is otherwise a ruling of "general application".

10.400 On this more specific issue, the United States argues that according to a 1995 survey by Japan's Management and Coordination Agency ("MCA"), several MITI regional offices and prefectural governments continued to require or recommend such prior explanations as a matter of general policy.[1429] The MCA surveyed the prior consultation practices at six MITI regional offices and six prefectural or local governments. According to the United States, the report indicates that nine of the twelve jurisdictions regularly required or urged large stores to undertake prior consultation and adjustment. The United States identified seven specific instances in which the "prior explanation" policy was imposed after it had purportedly been revoked. Japan responds that nothing in the MCA survey suggests that any MITI branch or prefectural government suggests either prior explanation or prior consultation as a general policy. Moreover, according to Japan, the MCA survey indicates that guidance by MITI branches and local governments to provide "prior explanations" occurred only in exceptional cases when the survey was conducted in 1995. Japan argues that it has recently taken corrective measures against all inappropriate practices identified in the MCA report.

10.401 On the basis of our own appreciation of the evidence and arguments submitted by the parties, we consider that (i) the Japanese Government at the national level has published a directive formally eliminating the "prior explanation" requirement under the Large Stores Law, but (ii) there is anecdotal evidence of certain continued guidance at the sub-national level in Japan urging large stores owners to continue the practice of prior explanation and adjustment. However, we also consider that the United States has not demonstrated that such guidance amounts to -- or should be assimilated to -- rulings which establish or modify criteria applicable in future cases, or is otherwise in the nature of administrative rulings of "general application". We therefore find that in relation to Japan's administration of the Large Stores Law and relevant local regulations, the United States has not provided sufficient evidence of a violation of Article X:1.

H. CONCLUSIONS

10.402 In light of our findings in sections E.3, E.4, E.5 and E.6 above, we conclude that the United States has not demonstrated that the Japanese "measures" cited by the United States individually or collectively nullify or impair benefits accruing to the United States within the meaning of GATT Article XXIII:1(b).

10.403 In light of our findings in Section F above, we conclude that the United States has not demonstrated that the Japanese distribution "measures" cited by the United States accord less favourable treatment to imported photographic film and paper within the meaning of GATT Article III:4.

10.404 In light of our findings in Section G above, we conclude that the United States has not demonstrated that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1.

[1429]Results of the Survey Regarding the Liberalization of Regulations, MCA (1995), US Ex. 95-15, p. 15.

XI. ANNEX ON TRANSLATION PROBLEMS

A. LIST OF TRANSLATION ISSUES

Issue 1: ***"taisaku"***.

United States: "*countermeasure*" (used in many contexts e.g., as liberalization, distribution, or promotion *countermeasures*).

Japan: In many contexts, the Japanese word *"taisaku"* should be more appropriately translated as *"measure"* or *"policy in response to."* The English word "countermeasure" has a negative connotation not conveyed by the Japanese original. For example, an expression such as "shou-enerugi (energy-saving) taisaku" is quite common in Japanese, and it would be awkward to translate it into "energy saving countermeasure. … "] (fn. 11, p. 19 of Japan's First Submission).

Issue 2: **MITI's distribution policies as described in the First Interim Report, (US Ex. 64-6, p. 8)**.

United States: "The First Interim Report identified a central theme that would underlie MITI's distribution policy: the need *to limit competition in distribution in order to create stability and high prices for the benefit of domestic manufacturers*" (para. 78 of the US First Submission).

Japan: "In fact, the [first interim] report notes that only *establishment of appropriate competition conditions would stimulate the modernization of distribution mechanism*. Moreover, the report draws no connection at all between competitive conditions in the distribution sector and the manufacturing sector. Instead, the report noted that vertical integration did not necessarily mean that distribution systems would be rationalized." (fn. 88, p. 45 of Japan's First Submission).

Issue 3: **Translation of a quote from the article: Distributors in Tough Environment, The Distribution Structures Continue to Change, Nihon Shashin Kogyo Tsushin, 1 May 1994, (US Ex. 94-10, p. 7)**.

United States: "In 1994, a Japanese industry journal noted changes in the Japanese film distribution system, such as a revision of the rebate schemes and the opening of more discount stores, but concluded that 'a limit to the expansion of sales channels seems to be appearing' and that 'the actual *network* has not changed much'" (para. 159 of the US First Submission).

Japan: "'Network' should actually be translated as '*net prices*' and the United States has failed to recognize that the first passage actually relates to the camera distribution industry, not to film." (fn. 123, p. 57 of Japan's First Submission).

Issue 4: ***"keiretsuka"*** **as used in the First Interim Report, (US Ex. 64-4)**.

United States: "… *Keiretsu-nizing* sales channels does not necessarily mean, from a national economic perspective, that each of the distribution structures will be rationalized; the direct objective is said to be to secure and expand the [market share] of individual manufacturers." (First Interim Report, US Ex. 64-6, p. 10).

Japan: "Please note that we do not agree with the US construction of the term 'keiretsu-nizing' as this term can have many meanings depending upon the context. Thus, we have translated this term based upon the proper context, in this case, '*vertically integrating*'" (fn. 139, p. 61 of Japan's First Submission).

Issue 5: ***"keiretsuka"*** **as used in the Second Interim Report, (US Ex. 65-2)**.

United States: "… For example, manufacturers' increased distribution activities leads to '*vertical keiretsunization*' which can create the harm of a monopoly." (Second Interim Report, US Ex. 65-2, p. 5-6).

Japan: "Again, the US construction of the term 'keiretsunization' is better translated in this case as '*vertical integration*'" (fn. 140, p. 62 of Japan's First Submission).

Issue 6: ***"keiretsuka"*** **as used in the 1971 Basic Plan (US Ex. 71-10)**.

United States: "Furthermore, due to the late emergence of the distribution sector, manufacturers have advanced [their] control of distribution by '*keiretsu-nizing*'. When this is done excessively, the distribution sector will lose its autonomy, and buying activities are hindered." (1971 Basic Plan, US Ex. 71-10, p. 8).

Japan: "Again, the US construction of the term 'keiretsunization' is better translated in this case as '*vertical integration*'" (fn. 144, p. 63 of Japan's First Submission).

Issue 7: **Quote: "(fuji to konika wa)** ***kourino dankaimade seibishite ikitai tokorono yôdearu*****" from: Let's All Have Cameras - Film, Printing Paper Promotion of Trading Normalization Triggered by a Monochrome Photosensitive Materials Price Increase, Zenren Tsuho, December 1967, (US Ex. 67-15)**.

United States: "The manufacturers are taking this opportunity to start taking action on the distribution channel as well as to strengthen transaction terms with the tokuyakuten. '*[Fuji and Konika] want [distribution] all the way to the retail level*', not just between Fuji's tokuyakutens and resellers, and between Konica's tokuyakutens and resellers." (US Ex. 67-15, p. 3).

Japan: "'*Fuji and Konika want to rationalize transactions all the way to the retail level*.' The US translation implies that Fuji and Konica were trying to vertically integrate, which mischaracterizes the article." (fn. 145, p. 64 of Japan's First Submission).
Japan notes that one source the United States cites to prove its allegation that the distribution policies were designed to encourage single-brand distribution does not support this claim] (Wholesale: So-called Keiretsu-ka Problem - Course Unclear, Nihon Shashin Kogyo Tsushin, 1 November 1967, p. 8, US Ex. 67-14).

Issue 8: **Quote: *"ribêto hitotsu wo toriagete mitemo gyoukaitoshiteno kankôga dekiagatte ireba dokkinhôno unyôniyori gaishino yukisugi wo chekkudekiru"* from: Draft Standard Contract for Film with Criteria for Standardization of Transaction Terms, Zenren Tsuho, August 1971, p. 5, (US Ex. 71-11, p. 1).**

United States: "The article elaborated that 'the guidelines themselves may be described as an attempt to equalize the conditions of competition.' For instance, '*rebates were adopted so that once they become common practice in the industry, the influx of foreign capital may be checked by the application of the Antimonopoly Law*'." (para. 110 of the US First Submission).

Japan: "'*the abnormal use of rebates by foreign capital may be checked by the application of the Antimonopoly Law*.' In addition, the US reference to rebates becoming "common practice in the industry" has no basis in the original text. (fn. 152, p. 67 of Japan's First Submission).

Issue 9: **Quote: *"masani 'kenzenka' wa susunda"* from: Fuji Film's Result of Stricter Policy on Receivables, Zenren Tsuho, March 1968, p. 5-7, (US Ex. 68-2, p. 1)**.

United States: "Just as this practice of forcing goods [on tokuyakutens] was ended, ultimately 'Fujifilm tightened its policy on receivables' … '*Consequently, [Fujifilm's financial] soundness has indeed progressed*. The well established photosensitive materials tokuyakuten have finally been done in." (para. 115 of the US First Submission).

Japan: "The US translation implies that Fujifilm improved its financial position by pressuring the tokuyakuten. A more accurate translation is that '*the soundness of transactions has indeed progressed*'." (fn. 163, p. 71 of Japan's First Submission).
Japan notes that the contention in para. 119 of the US First Submission that "shortly after the new transaction terms went into effect, Misuzu's financial situation deteriorated" finds no support in the Zenren Tsuho article cited. (Relationship Between Major Photo Materials Wholesalers and Manufacturers From the Standpoint of Industry's Photo Materials, Zenren Tsuho, June 1968, p. 5-7, US Ex. 68-5).

Issue 10: **Reference to: Four Fuji-Group Distributors Reported Unimpressive Results in Spite of Low Interest Rates, Shukan Shashin Sokuho, 24 June 1994, p. 2-4 (US Ex. 94-11, p. 1)**.

United States: "*Other Japanese analysts have concluded that distributors remain highly dependent on manufacturers*." (para. 159 of the US First Submission). As one financial analyst wrote when he reported the primary wholesalers' profitability for 1994, "The ratio of net profits to total capital gives out a distressing series of zeros after the decimal point." (fn. 163 of the US First Submission).

Japan: "However, the source cited in support of this proposition states only that *primary wholesalers have low rates of return*, and offers no basis on which to support the US claim." (fn. 164, p. 71 of Japan's First Submission).

Issue 11: **The use of quantitative standards by the Large Scale Retail Store Council in making its adjustment determinations according to Article 7 of the Large Scale Retail Store Law, Law No. 80, 24 May 1991, (Japan Ex. C-1; US Ex. 74-4)**.

United States: "The examination of a new store by the Large Store Council is based upon mathematical formulas for comparing the Commercial Population and large scale retail store Occupation Rate of one city with similar cities. The quantitative approach '*allows the Large Store Council to ration retail space.*' Large Store Council Decision, "Investigatory Procedures for the Adjustment of the Business Activity of Large Scale Retail Stores, 14 November 1991, US Ex. 91-4." (fn. 190, p. 68 of the US First Submission).

Japan: "The standards used by the large Scale Retail Store Council in determining whether to recommend one of these limited adjustments also do not result in a restriction on the opening of large stores. The US wrongfully implies that the use of quantitative standards by the Large Scale Retail Store Council in making its adjustment determinations '*allows [it] to ration retail space.*' These quantitative factors are never determinative. They are simply some of the factors taken into account, along with a variety of quantitative factors in the overall Large Scale Retail Store Law process. (fn. 328, p. 120 of Japan's First Submission).

Issue 12: **Reference to the JFTC ad hoc study group report: Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, p. 23, (US Ex. 95-11)**.

United States: "The JFTC Council also found that, as of March 1995, a number of local government bodies were still imposing their own written guidelines on store openings, so-called augmenting or supplementary regulations, which are beyond the scope and requirements of the Large Stores Law, in that they apply to stores with a floor space of less than 500 square meters. It concluded that: 'These excessive regulations and non-transparent administrative guidance on the part of local government bodies and public entities make those planning to open stores continue to bear unreasonable burdens in the form of demands requiring very intricate store opening plans to be submitted and other similar demands.'" (para. 218 and fn. 268 of US First Submission).

Japan: "The United States cites surveys by the MCA and the JFTC ad hoc study group that allegedly document the existence of excessive local restrictions. These surveys, however, are not representative of current conditions. The MCA Survey was conducted in 1995. The JFTC ad hoc study group survey, meanwhile, presented only 3 cases of excessive local regulations. In addition, the United States erroneously translates the JFTC ad hoc study group report, suggesting the report confirmed that many excessive local regulations exists, resulting in a significant burden on store openers." (fn. 329, p. 120 of Japan's First Submission).

Issue 13: **Reference to: Concerning Immediate Measures Regarding Notification to Establish Large Scale Retail Stores, Sankyoku No. 36, issued by DG, MITI, 30 January 1982 (US Ex. 82-2, Japan Ex. C-16).**

United States: "MITI instituted, through Directive No. 36, a 'prior explanation' requirement to precede the builder's Article 3 Notification, which *obligated the notifier to consult with, and obtain the consent of, local retailers before submitting its Article 3 Notification*. (para. 202 US First Submission).

Japan: Japan cannot find any phrase to that effect in the Circular. (fn. 338, p. 123 of Japan's First Submission).

Issue 14: ***"jimotosetsumei"*** **under the Large Scale Retail Stores Law**.

United States: "In 1992, MITI replaced the 'prior explanation' process with a procedure for *'local explanation'*. … Local explanation was implemented by Directive No. 25 'Guidance for Local Explanation to Those Who Submitted a Notification for New Construction of a Class I Large Scale Retail Store, 29 January 1992'." (para. 213 and fn. 259 of the US First Submission).

Japan: "[Under the Large Retail Stores Law, since 1992] 'all that is required is that the large store planner make a *public briefing* after the Article 3 notification (new store construction) but before the Article 5 notification (new store opening)'." (fn. 340, p. 123 of Japan's First Submission).

Issue 15: **Quote from the JFTC Ad Hoc Study Group Report: Concerning the Reevaluation of Government Regulations in the Distribution Sector, Government Regulation and Competition Policy Research Council, JFTC, June 1995, p. 17, (US Ex. 95-11)**.

United States: "According to the June 1995 report to the JFTC from its Government Regulation and Competition Policy Research Council, the *Large Store Council*'s consideration of a large store notification can easily reflect the views of local retailers.' According to this JFTC Council, 'existing local retailers remain influential members of *these organizations*' and even 'consumer and academic representatives *[on the Councils]* have close ties to local retailers'" (para. 228 of the US First Submission).

Japan: "The US misleadingly cites this phrase as to suggest that '*these organizations*' refer to the '*Large Scale Retail Store Council*.' However, the Japanese text of the report clearly shows that '*these organizations*' refer to the '*Chamber of Commerce and Industry*." Moreover, Japan submits that the US insertion "*[on the Councils]*" into the same sentence is erroneous. (fn. 344, p. 124 of Japan's First Submission).

Issue 16: **Translation of the Premiums Law, Futo Keihinrui Oyobi Futo Hyoji Boshiho, Law Against Unjustifiable Premiums and Misleading Representation, Law No. 134, 15 May 1962); See Appendix to Issue 16**.

United States: US translation of the Premiums Law of 1962 (US Ex. 62-6).

Japan: A number of points were indicated on a copy of the US translation of the Premiums Law by Japan in handwriting. Premiums Law of 1962, Japan Ex. D-1. (fn. 363, p. 130 of Japan's First Submission).

Issue 17: ***"kamera-rui"***.

United States: "The JFTC soon acted to protect the camera cartel from competition on premium offers. On October 15, 1965, the JFTC issued a notification entitled, 'Restrictions on Premium Offers in the Camera Industry' … The camera notification did not clearly distinguish what the term 'related products' meant, nor did it explain whether its prohibition applied only to premiums connected to transactions directly involving *'cameras and related products'* or any transaction by a covered business … ." (para. 288 of the US First Submission).

Japan: "The Japanese expression 'kamera-rui' should be translated as the *'camera category'* and not as 'camera and related products'. As a matter of Japanese language it cannot cover photographic film and paper. A leading Japanese dictionary "Dai-Jirin" defines "*rui* (category)" to be a "collection of similar items. Japan Ex. D-68" (para. 457 and fn. 431, p. 158 of Japan's First Submission).

Issue 18: **Quote from the Zenren article: Discussion on Progress of Fair Trade Council Focuses on Making Fair Competition Code Fully Known, Zenren Tsuho, August 1987, pp. 16-20, (US Ex. 87-7 and Japan Ex. D-70)**.

United States: "… application of film and developing and printing was fundamental to securing support for the Retailers Code and the [Camera and Related Products Retailers Fair Trade Council] from the retailers association. '… we first understood photosensitive materials and development printing to also be included. … It would, '*indeed, have been impossible to persuade Zenren members whose main line of business is development printing to contribute if [the regulations] only [apply to] hardware'*." (para. 348 of the US First Submission).

Japan: "Instead it should be translated as follows *'many people expressed the view to the effect that, since [the code] applies only to hardware, it is impossible to persuade members [of Zenren] whose main line of business is developing and printing [to contribute]'*." (fn. 435, p. 160 of Japan's First Submission).

Issue 19: **Translation of the editorial: Fair Competition Codes, Sweet Fantasies and Illusions Ought to be Taboo, Shashin Kogyo Junpo, 1 August 1987; <u>See Appendix to Issue 19</u>.**

United States: Original US translation in: US Ex. 87-8.

Japan: Version with Japan's corrections: "… A photo industry journal editorial in the US Evidentiary Appendix (Editorial: Fair Competition Codes; Sweet Fantasies and Illusions Ought to be Taboo, Syashin Kogyo Junpo, 1 August 1987, US Ex 87-8), although not quoted in the US submission, appears as if the translation was rewritten in order to blur a main theme of the editorial; who is responsible to the fact that the retailers' code does not cover film and paper?" (fn. 437, p. 161 of Japan's First Submission).

Issue 20: **"*teki-hatsu*": quote of statement of a director of the JFTC's Premiums and Representations Office in: "Fair Trade Council Established" Operated by Zenren, Will Respect "Fair Competition Code" - Urgent Need to Make Code Known by October Start, Zenren Tsuho, July 1987, p. 6-11, (US Ex. 87-5, p. 3; Japan Ex. D-82, p. 3)**.

United States: "The approval of the Code means that the role we play to take *'enforcement actions'* on violations will be left to the Fair Trade Council. If this expectation is not met, [the approval] will have no meaning." (para. 351 of US First Submission).

Japan: "The quotation of a Director of the JFTC (Zenren Tsuho, July 1987) in the US submission erroneously translates *'teki-hatsu' (discovery)* as '*enforcement action*'. Japan Ex. D-82." (fn. 449, p. 166 of Japan's First Submission).

Issue 21: **Quote "… sarani kibishiku bunshoniyoru keikokuga hasserareru" from: Don't Give up on Exposing and Forwarding Materials [Regarding Violations] - JFTC Probing Non-Members' 'Representation Violations', Zenren Tsuho, February 1988, pp. 10-11, (US Ex. 88-2; Japan Ex. D-83)**.

United States: "By the end of last year, the number of 'Code violations' handled by the Fair Trade Council had reached 294 cases. … Almost all who have received repeated caution or warnings were non-members, that is, while a member's stance is rectified by a verbal caution, *'a more severe warning in writing*' is issued to a non-member."

Japan: "The article in Japanese does not speak of '*more severe warning in writing*', but '*a more strict step issuing a written warning*'." (fn. 451, p. 167 of Japan's First Submission).

Issue 22: **Statement by a JFTC official: Suggestions on How the Fair Trade Promotion Council Should Be, Yamada, Director of the Premiums and Representation Guidance Division, JFTC, Zenren Tsuho, May 1983, p. 14, (US Ex. 83-9)**.

United States: "In May 1983, the Director of the JFTC's Premiums and Representations Guidance Division pressed the Promotion Council to expand its operation into new areas: '*it is of critical importance to develop rules one by one against dumping and loss-leader advertising*'." (para. 325 of the US First Submission).

Japan: "The proper translation should be '*Also, with regard to unjustifiable low prices and bait advertising, it is important to pile up one by one.*' The original Japanese sentence does not refer to any 'rules', To 'pile up' what? is not clear even from the context" (fn. 454, p. 168 of Japan's First Submission).

Issue 23: **"*jishu-kisei*" as referred to in "Self-Regulating Measures Regarding Making Business Dealings with Trading Partners Fair" of 22 June 1982, (US Ex. 82-8)**.

United States: "The domestic photographic industry responded to the JFTC's guidance in June 1982 when it promulgated '*Self-Regulating Measures'* Regarding Making Business Dealings With Trading Partners Fair." (para. 321 of the US First Submission).

Japan: "Japanese word *'jishu-kisei'* means simply '*self-regulation*' and not self-regulating measures'." (fn. 1, p. 6 of Japan's Written Responses to the Panel's Initial Questions).

Issue 24(1): **Quote from "Consumer Life and the Fair Competition Codes" (Shohisha no Kurashi to Kosei Kyoso Kiyaku) 1995 edition, All Japan Fair Trade Council Federation, (US Ex. 95-9, p. 2)**.

United States: "The JFTC will directly regulate those who do not participate in the Codes, *but as long as the Codes are observed and recognized as having been established in accordance with normal business practices,* the JFTC uses the Fair Competition Codes as reference when it applies the law." (para. 360 of the US First Submission).

Japan: "The quote should be translated as '*but when it is recognized that the Codes have been observed and established as normal business practices*'." (fn. 1, p. 12 of Japan's Responses to the Panel's Additional Questions).

Issue 24(2): **The quotation from "Fair Competition Code Regarding Representations in the Camera Category Retailers Industry", a JFTC commissioned pamphlet, 1987, (US Ex. 87-1)**.

United States: "*[B]y virtue of the fact that this Code has been established as normal practice in the photographic industry to be strictly obeyed, the Japan Fair Trade Commission uses it as reference when it applies the Premiums Law to outsiders.*" (para. 360 of the US First Submission).

Japan: "The correct translation should be '*The code, by being strictly observed and established as the normal practices of the photographic industry, is used as reference when the JFTC applies the Premiums Law to outsiders*'." (fn. 1, p. 12 of Japan's Responses to the Panel's Additional Questions).

1. APPENDIX TO TRANSLATION ISSUE 16:

United States: original version [text in brackets]:
Japan: corrected version *[in italics]*

LAW AGAINST UNJUSTIFIABLE PREMIUMS AND MISLEADING REPRESENTATIONS
(Law No. 134 of May 15, 1962)

Amendment: Law No. 44 of May 30, 1972
(First Amendment)

Article 1 (Purpose)

This Law, in order to prevent inducement of customers by means of unjustifiable premiums and misleading representations in connection with transactions of a commodity and service, by establishing special provisions for the Law Concerning Prohibition of Private Monopoly and the Maintenance of Fair Trade (Law No. 54 of 1947), aims to secure fair competition, and thereby to protect the interest of consumers in general.

Article 2 (Definitions)

(1) The term "Premiums" as used in this Law shall mean any [goods] *[article]*, money or other kinds of economic benefits which are given as means of inducement of customers, regardless of whether a direct or indirect method is employed, or whether or not a [prize competition] *[lottery]* method is used, by [a business] *[an entrepreneur]* to another party in connection with a transaction involving a commodity or service (transactions relating to real estate shall be included in this Article and throughout the rest of this Law), and which are designated by the Fair Trade Commission as such.

(2) The term "representations" as used in this Law shall mean advertisement or any other [representation] *[description]* which [a business] *[an entrepreneur]* makes or uses as means of inducement of customers, with respect to the substance of the commodity or service which he supplies or the terms of sale or any other matter concerning the transaction, and which are designated by the Fair Trade Commission as such.

Note:
Clause 1 and Clause 2. "designation" = establishment of premiums and representations under the provisions of Article 2 of Unjustifiable Premiums and Misleading Representations

Article 3 (Restriction or prohibition of premiums)

The Fair Trade Commission may, when it finds it necessary to prevent unfair inducement of customers, limit either the maximum value of a premium or the [sum total] *[aggregate]* amount of premiums, the kind of premiums or method of offering of a premium or any other matter relating thereto, or may prohibit the offering of a premium.

Note: Restriction on Premium Offers by Lotteries or Prize Competition (FTC Notification No. 3 of 1972)
[Restriction on Premium Offers to Businesses (FTC Notification No. 17 of 1967)]
~~*[Restriction on Premium Offers to Businesses (FTC Notification No. 17 of 1967)]*~~
Restriction on Premium Offers to General Consumers (FTC Notification No. 5 of 1977)
Restriction on Premium Offers in Newspaper Industry (FTC Notification No. 15 of 1964)
Restriction on Premium Offers in Chocolate Industry (FTC Notification No. 8 of 1965)
Restriction on Premium Offers in Camera Industry (FTC Notification No. 33 of 1965)
Restriction on Premium Offers in Instant Noodle Industry (FTC Notification No. 11 of 1966)
Restriction on Premium Offers in Curry and pepper Industry (FTC Notification No. 11 of 1967)
Restriction on Premium Offers in Processed Tomato Food Industry (FTC Notification No. 39 of 1967)
Restriction on Premium Offers in Wheat Cleaning Industry (FTC Notification No. 89 of 1968)
Restriction on Premium Offers in Magazine Industry (FTC Notification No. 4 of 1977)
Restriction on Premium Offers in Frozen Bean Curd Industry (FTC Notification No. 40 of 1970)
Restriction on Premium Offers in Chewing Gum Industry (FTC Notification No. 4 of 1971)
Restriction on Premium Offers in Biscuit Industry (FTC Notification No. 36 of 1971)
Restriction on Premium Offers in Soy Sauce Industry (FTC Notification No. 45 of 1977)
Restriction on Premium Offers in Cosmetic Soap Industry (FTC Notification No. 82 of 1971)
Restriction on Premium Offers in Bean Paste Industry (FTC Notification No. 47 of 1977)
Restriction on Premium Offers in Household Electric Appliances Industry
(FTC Notification No. 2 of 1979)
Restriction on Premium Offers in Sauce Industry (FTC Notification No. 3 of 1979)
Restriction on Premium Offers in Margarine and Shortening Industry (FTC Notification No. 4 of 1979)
Restriction on Premium Offers in Match Industry (FTC Notification No. 5 of 1979)
Restriction on Premium Offers in Agricultural Machinery Industry (FTC Notification No. 43 of 1979)
Restriction on Premium Offers in Automobile Industry (FTC Notification No. 44 of 1979)
Restriction on Premium Offers in Liquor Industry (FTC Notification No. 6 of 1980)
Restriction on Premium Offers in Tire Industry (FTC Notification No. 19 of 1980)
Restriction on Premium Offers in Rubber and Synthetic Resins Footwear Industry
(FTC Notification No. 25 of 1982)*

*[This list of JFTC Notifications issued pursuant to Article [13] *[3]* is not exhaustive.]

Article 4 (Prohibition of Misleading Representations)

No business shall make such representation as provided for in any one of the following paragraphs in connection with transactions regarding a commodity or service which he supplies:

(i) Any representation by which the quality, standard or any other matter relating to the substance of a commodity or service [shall lead the general consumer to believe that it is] *[will be misunderstood by consumers in general to be]* much better than the actual one or than that of other businesses who are in a competitive relationship with the business concerned, and thereby which is found likely to induce customers unjustly and to impede fair competition;

(ii) Any representation by which price or any other terms of transaction of a commodity or service will [lead the general consumer] *[will be misunderstood by consumers in general]* to be much more favourable to the [other transacting parties] *[customer]* than the actual one or than those of other businesses who are in a competitive relationship with the business concerned, and thereby which is found likely to induce customers unjustly and to impede fair competition; or

(iii) In addition to those stipulated in the preceding two sections, any representation by which any matter relating to transactions as to a commodity or service is likely to be misunderstood by the general consumer and which is designated by the Fair Trade

Commission as such, finding it likely to induce customers unjustly and to impede fair competition.

Note:
Section 3 "designation" Representations on Soft Drinks without Juice, etc., (FTC Notification No. 4 of 1973) Misleading Representations on Country of Origin of Goods (FTC Notification No. 34 of 1973), Misleading Representations on Cost of Consumer Credit (FTC Notification No. 1 3 of 1980), Misleading Representations on Loss-Leader Advertising of Real Estate (FTC Notification No. 14 of 1980), Misleading Representations on Loss-Leader Advertising (FTC Notification No. 13 of 1982).

Article 5 (Public Hearing and Notification)

(1) When the Fair Trade Commission takes action to [limit or prohibit in accordance with] *[effect designation ~~Article 2 (definition) or designation]~~* under the provisions of *[Article 2 of]* Section [3] *[iii]* of the preceding Article (restriction and prohibition of premiums), *[or to limit or prohibit under the provisions of Article 3]* or to change or abolish them, it shall hold a public hearing based on the Fair Trade Commission Rules and shall hear the opinions of the related businesses and the public.

(2) Designation, restriction, prohibition as well as amendment and abolition thereof under the provisions of the preceding clause shall be made by notification.

Note:
Clause 1 "Rules of the Fair Trade Commission" = Rules Concerning Public Hearing Under the Provision of Sec. 5 (1) of Act Against Unjustifiable Premiums and Misleading Representation (FTC Rules No. 2 of June 1, 1962).

Article 6 (Cease and Desist order)

(1) The Fair Trade Commission may, in the event there is an act violating the restriction or prohibition under the provisions of Article 3 (restriction or prohibition of premiums) or violating the provisions of Article 4 (prohibition [on] *[of]* misleading representations), order the [business] *[entrepreneur]* concerned to cease such an act, or to take the measures necessary to prevent the occurrence of the said act, or to take any other necessary measures including making *[the matters relating to]* the implementation of such measures public. Such an order may be issued even when the said violation has already ceased to occur.

(2) The Fair Trade Commission shall, in the event it has issued an order as stipulated in the preceding Clause (hereafter, "Cease and Desist Order"), make a Notification on the said order in accordance with the Rules of the Fair Trade Commission.

(Previous Clause 2 deleted; earlier Clause 3 amended in part and inserted into current Clause 2 (Law No. 89 of November 12, 1993, the Administrative Procedures Law)

Note:
Clause 2 of "Rules of the Fair Trade Commission": Notification on cease and desist orders in accordance with Article 6 (2) of Law Against Unjustifiable Premiums and Misleading Representations; and Article 1 concerning the request for the opening of [adjudgment] *[hearing]* procedure in accordance with the provisions in Clause 8(1) of the Law thereof.

Article 7 (Relationship with the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade)

(1) Acts in violation prescribed in [Section] *[Clause]* (1) of the preceding Article shall be deemed to be unfair trade practices as provided for in *~~[the (Relationship with]~~* the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade) for the purpose of applying the provisions of Article 8 (1) (prohibited acts of trade associations) and Article 25 (absolute liability) of the said Law and, for the purpose of applying the provisions of Division 2 (procedures) [or] *[of]* Chapter

VIII (excluding the provisions of Article 48 (recommendation, recommendation decision) of the said Law, such acts shall be also deemed as acts in violation of Article 19 (prohibition of unfair trade practices) of the said Law.

(2) In a decision against acts in violation as provided for in the preceding [Section] *[clause 1 of Article 7],* "the matters provided for by the first sentence of the said [subsection] *[clause]* may be ordered.

(3) The Fair Trade Commission, in the event it has initiated hearing procedures against acts in violation as provided for by [Section] *[Clause]* (1) of the preceding Article, or it has filed an application under Article 67 (1) (immediate injunction) of ~~*[the Law (Relationship with]*~~ the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade), shall not issue a cease and desist order against the said acts.

Article 8 (Hearing Procedures, etc.)

(1) A person who complains about a cease and desist order may request the Fair Trade Commission to initiate hearing procedures on the act involved in the said order, within thirty days from the day on which the notification has been made under the provisions of Article 6 [(3)] *[(2)]* in accordance with the *[rules of the]* Fair Trade Commission [Rules] ~~*[Rules]*~~.

(2) The Fair Trade Commission shall, in the event a request under the provisions of the preceding clause has been made, initiate hearing procedures on the said act without delay. In this case the provisions of [Section] *[Article]* 50 (4) (date of the first hearing proceeding) of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade shall not apply.

(3) Except in the case provided for by the preceding clause, the Fair Trade Commission shall not, with respect to an act against which a cease and desist order has been issued, initiate hearing procedures nor file an application as stipulated in [Section] *[Clause]* (3) of the preceding Article.

Note:
Clause 1"Rules of the Fair Trade Commission" = Sec. 2 of the Rules on Notification of Cease and Desist Order under the Provisions of Sec. 6 (2) of the Law Against Unjustifiable Premiums and Misleading Representations Request for Initiation of Hearing Procedures under the Provisions of Sec. 8 (1) of the Law.

Article 9 (Effect, etc. of Cease and Desist Orders)

(1) A cease and desist order (except for the case in which a request was made in accordance with Clause (1) of the preceding Article) shall be, after the period provided for in the said Clause has elapsed, construed as the final *[and conclusive]* decision for the purpose of applying the provisions of Article 26 (restriction on exercise of the right to claim for damages in court and prescription) and Article 90 (iii) (penalties against violations of final *[and conclusive]* decision) of the Law Concerning Prohibition of Private Monopoly and for maintenance of Fair Trade.

(2) In case a decision on an act, for which a request has been made under the provisions of Clause (1) of the preceding Article, has been rendered (excluding a decision dismissing the said request on account of its irregularity) the cease and desist order concerning the said act shall lose its effect.

(3) The provisions of Article 64 (compulsory measures after decision) and Section 66 (2) (cancellation or alteration of decisions) of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade shall apply mutatis mutandis to a cease and desist order.

Article 9-2 (Instruction by Prefectural Governors)

A prefectural governor may, where he finds existence of violation of either the restriction or prohibition prescribed in the provisions of Article 3 (restriction [and] *[or]* prohibition of premiums) or Article 4 (prohibition of misleading representations), instruct the [business] *[entrepreneur]* concerned to cease such violation, or to publicize the matters relating to the said effect.

Addition of this Article to the Law (law No. 44 of 1972)

Article 9-3 (Request for Measures to FTC)

(1) A prefectural governor may, in a case where the [business] *[entrepreneur]* concerned does not comply with the instruction issued under the provisions of the preceding Article, or in cases where a prefectural governor finds it necessary in order to put an end to any violation as prescribed in the said Article, or to prevent the occurrence of such violation as prescribed in the said Article, request the Fair Trade Commission to take appropriate measures in accordance with the provisions of this Law.

(2) The Fair Trade Commission [shall] *[should],* when requested under the provisions of the preceding Clause, notify the said prefectural governor of the measures which the Fair Trade Commission has taken with respect to the said violation.

Article 9-4 (Collection of reports and inspection, etc.)

(1) A prefectural governor may, where he finds it necessary for an instruction under the provision of Article 9-2 [instruction of prefectural governors] or a request under the provision of [Subsection] *[Clause]* (1) of the preceding [Section] *[Article],* ask [an] *[the]* entrepreneur *[concerned]* or other entrepreneurs who have business relationship with him to submit a report on the premiums he offers or the representations he makes, or may have his staff enter offices or other places of business of the entrepreneur concerned or [related] *[other]* entrepreneurs *[who have business relationship with him],* inspect accounting books, documents and other matters, or ask questions of the persons concerned.

(2) The staff who conduct an inspection or ask questions in accordance with the provision of the preceding [Subsection] *[Clause]* shall carry their identification cards and show them to the persons concerned.

(3) The authority under the provision of Subsection (1) shall not be construed as being granted for the purposes of criminal investigation.

Article 9-5 (FTC's direction and supervision over prefectural governors)

The Fair Trade Commission may give directions or exercise supervision over prefectural governors with regard to the matters under the provisions of this Law.

Addition of this Article Law (Law No. 44 of 1972))

Article 10 (Fair Competition Codes)

(1) [Businesses] *[Entrepreneurs]* or a trade association may, upon obtaining authorization from the Fair Trade Commission in accordance with the Rules of the Fair Trade Commission, with

respect to matters relating to premiums or representations, conclude or establish an agreement or a code, aiming at prevention of unjust inducement of customers and maintaining fair competition. The same shall apply in the event alterations thereto are attempted.

(2) The Fair Trade Commission, unless it finds that an agreement or a code under the preceding [Section] *[Clause]* (hereinafter referred to as ,fair competition code,,) meets each of the following [paragraphs] *[sections],* shall not grant authorization under the preceding [Subsection] *[Clause]:*

(i) That it is appropriate to prevent unjust inducement of customers and to maintain fair competition;

(ii) That it is not likely unreasonably to impede the interests of consumers in general or the related [businesses] *[entrepreneurs]*;

(iii) That it is not unjustly discriminatory; and

(iv) That it does not restrict unreasonably the participation in or withdrawal from the fair competition code.

(3) The Fair Trade Commission, when it finds that the fair competition code as authorized under [Subsection] *[clause]* (1) has ceased to meet each paragraph of the preceding [Subsection] *[clause]* shall cancel the said authorization. [In this case, the provisions of Section 6 (2) (summary hearing for cease and desist orders) shall apply mutatis mutandis.] ~~*[In this case, the provisions of Section 6 (2) (summary hearing for cease and desist orders) shall apply mutatis mutandis.]*~~

(4) The Fair Trade Commission, in case it has taken a measure under the provisions of Clause (1) or the preceding Clause, shall make the said measure public by a notification in accordance with the Rules of the Fair Trade Commission.

(5) The provisions of Article 48 (recommendation, recommendation decision) and Article 49 (initiation of hearing procedures), Article 67 (1) (immediate injunction) and Article 73 [(prosecution)] *[accusation]* of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade shall not be applied to the fair competition code that has been authorized under Section (1), and to such acts of [businesses] *[entrepreneurs]* or a trade association as have been done in accordance therewith.

(6) Any person who complains about a measure taken by the Fair Trade Commission under the provisions of [Section] *[Clause]* (1) or (3) may file an objection with the Fair Trade Commission [in] *[within]* thirty days from the day on which the notification *[has been made]* under the provisions of [Subsection] *[clause]* (4) [was issued] ~~*[was issued]*~~. In this case the Fair Trade Commission shall dismiss the said objection, or shall cancel or alter the said measure [through] *[by a decision after taking]* hearing procedures.

Note:
Clause (1) and (4) "Rules of the Fair Trade Commission" = the Rules Concerning Application, etc. for Authorization of Fair Competition Code under Provisions of Section 10 of the Act Against Unjustifiable Premiums and Misleading Representations Partially amended by Law No. 89 of 1993.

Article 11 (Exemption from the Administrative Complaint Review Law)

(1) With respect to a measure taken by the Fair Trade Commission in accordance with the provisions of this Law, an appeal under the Administrative Complaint Review Law (Law No. 160 of 1962) shall not be made.

(2) A *[law suit relating to a]* request under the provision of Article 8(1) ([adjudgment] *[hearing]* procedures) or a matter that a person may complain about [in accordance with Section] *[under clause]* 6 of the preceding Article *[only]* may be brought [if not] ~~*[if not]*~~ against the decision.

Article 12 (Penalties)

(1) Any person who failed to submit a report or submitted a false report, or refused, obstructed or evaded inspection, or failed to answer or made false answers to the questions, as provided in Article 9-4 (1) (collection of reports, and on-site inspection, etc.) , shall be fined not more than thirty thousand yen.

(2) *[When]* A representative of a [corporation or a representative of either a corporation or an individual, employee or other operator, who violates] *[juridical person, or an agent or any other person in the service of such juridical person or of an individual has violated]* the provision of the preceding [section] *[clause]*, with respect to the business of the said [corporation] *[juridical person]* or said individual, *[the said juridical person or said individual]* shall be fined as provided for in the preceding [section] *[clause]* in addition to the punishment of the offender.

Legislative history: Addition of this section (Law No. 44 of 1972)

2. APPENDIX TO TRANSLATION ISSUE 19:

Editorial: Fair Competition Codes, Sweet Fantasies and Illusions ought to be taboo, Shashin Kogyo Junpo, 1 August 1987, (Japan Ex. D-71; US Ex. 87-8)

United States: original version [text in brackets]:

Japan: corrected version *in italics*

"… The second illusion is one which has arisen from the expectation that photosensitized materials and development printing are [naturally] included with cameras under the codes. *Judging from the simple fact that* [even though] the name of the codes itself-"Fair Competition Code Regarding Representations in the camera *category* [and Related Products] Retailers' Industry" - clearly refers to the "camera *category* [and related products] retailers, *it should be self-evident whether or not* [alone, there seem to be the implication that] photosensitized materials and development printing can [might] be included. Saying that "[This is because] camera shops *always* [must] handle photosensitized materials and development printing as well" is *just* [goes the argument, and this leads to some] quibbling among retailers. Legally, such an interpretation should not be allowed. *"In spite of that, Mr. Eiji Hashimoto, Vice Chairman of the Board, has stirred up expectation by saying that this code naturally includes photosensitized materials and development printing" Such criticism* [The tragedy of this statement itself] was even heard about from the standing board members of Zenren, but *this* [that fact] is rather strange. After all, the codes have already been in working draft from for two years or more. They have prepared the "original bill" including the name, from an early stage and had carried out an investigation concerning the details. It is a fact that *Vice Chairman* [Deputy Director] Hashimoto repeated *statements suggesting that* [this query,] "[Shouldn't] both photosensitized materials and development printing are [naturally be] included.[?]" to the general membership. However, wouldn't it [ultimately] be the job of the executives - namely, the standing board of Zenren - to strictly check *in the process of the preparation of the codes* whether or not these two areas *are* [can be] included as expected ? Organizationally, Zenren and the Fair Trade Promotion Council (FTPC), previously known as *Suishinkyo* [Kotorikyo] but now known as *Kotorikyo* [Suishinkyo]), *which has been working on the formulation of the codes but [the] job of code formulation* [regulation], however, *has involved* [involves] other Zenren *executive* in addition *to Vice Chairman* [Deputy Director] Hashimoto. Moreover, even with Zenren *Chairman* [Director] Kimura's proud claims, "These are codes which we retailers created," it would indeed be strange if Zenren executives (standing board), which have neglected even to check whether or not photosensitized materials and development printing are included, were to blame Vice Chairman [rely only upon Deputy Director] Hashimoto alone.

B. RESPONSES BY THE TRANSLATION EXPERTS

The Panel, in consultation with the parties, has appointed as translation experts:

- Professor Michael Young (Centre for Japanese Legal Studies, Columbia University School of Law, New York, USA); and

- Professor Zentaro Kitagawa (Kyoto Comparative Law Centre, Kyoto, Japan).

The "Procedures for the Resolution of Possible Translation Issues" are discussed in Part I on "Procedural History" (see para. 1.9 *supra*).

The responses by the two experts to the translation issues raised by the parties are contained in the following table (pages 493-526 *infra*).

Item No.	Michael Young	Zentaro Kitagawa
1	The word *taisaku* can be variously translated as “measure,” “countermeasure,” “counterplan,” “countermove,” etc., depending on the context.	For the reasons explained below "taisaku"' should be translated as "measure."
	The Japanese government is quite correct in pointing out that when the *taisaku* is designed to further some affirmative goal, such as the acceleration of the provision of electrical power, “measure” is probably the most appropriate translation. The same is true when referring to something like “energy conservation measures.”	"Taisaku" can mean "countermeasure," however, because "taisaku" has no direct English language equivalent, translation requires consideration of the circumstances. In light of the context here, it is awkward to translate "taisaku" as "countermeasure" because the subject "policy" consists of promoting positive goals of rationalization and market development.
	At the same time, when the *taisaku* is taken in response to something that might either be undesirable in and of itself or might create undesirable effects, then the translation “countermeasure” is probably most appropriate. For example, the Japanese Federation of Bar Associations set up a committee to study and recommend responses to the desire of foreign attorneys to practice in Japan. This committee, a *Taisakui’inkai*, was often translated as a “Countermeasures Committee.” *Taisaku* taken in the context of the appreciation of the yen or inflation might also well be translated as “countermeasures.”	In different contexts one may appropriately translate "taisaku" as "countermeasure." For example, Japanese speakers may use "taisaku" in expressions such as earthquake countermeasures (jishin taisaku) or pollution countermeasures (kougai taisaku). In the latter cases, "taisaku" connotes a policy "against" something undesirable, or to be contained, such as the ill effects of earthquakes and pollution.
	Of course, to some extent, the appropriate translation may depend on the phraseology. For example, if one is referring to “anti-inflationary” *taisaku*, then the appropriate translation is probably “measures,” as in “anti-inflationary measures.” If, on the other hand, one is referring to “inflationary” *taisaku*, then the most appropriate translation is “inflationary countermeasure.”	
	In short, the critical question is whether the *taisaku* is designed, on the one hand, to advance some cause or interest that is considered generally desirable or, on the other, to counter some unhappy societal or economic developments. In the former case, “measures” is probably the best translation. In the latter case, “countermeasures” is a perfectly appropriate translation.	
	Thus, in the instant case, the critical question is whether the “liberalization” *taisaku* were taken to advance the cause of liberalization or whether the *taisaku* were taken either to slow down or reverse the tendencies towards liberalization or to counter the dislocations that might be occasioned by liberalization. In the former case, “measures” is the appropriate term; in the latter case, countermeasures might more accurate capture the nuances of the term.	
	Without examining every document submitted by both parties, it is impossible to determine definitively whether “measures” or “countermeasures” is the most accurate translation in this particular case. More important than the precise word, however, is the specific content of these measures. That determines whether they are measures to advance the liberalization and opening of a market or measures to slow down liberalization or counter the dislocations that liberalization might occasion.	

Item No.	Michael Young	Zentaro Kitagawa
2	I believe the GOJ has mischaracterized this particular issue as a translation problem, when, upon my reading of both the USG and GOJ submissions, that does not appear to be the problem at all. Rather, it seems the parties simply characterize the content of the MITI's First Interim Report differently. Or, put slightly differently, the Parties appear to draw quite different conclusions from the report. The GOJ points to no specific instance in Para. 125, fn 88, where the USG mistranslated something. Rather, the GOJ appears to disagree with the conclusions the USG draws from the report. Allow me to be somewhat more specific.	For the reasons stated below, I am of the opinion that the U.S. statement (i.e., "to limit competition in distribution in order to create Stability and high prices.....) does not accurately describe the position of MITI as stated in the cited Japanese language document.
	Based on its reading of the Report, the USG characterizes the report as articulating the central principle that will later underlie MITI's distribution policy, namely, "the need to limit competition in distribution in order to create stability and high prices for the benefit of domestic manufactures." I do not read the USG Submission as suggesting that its precise articulation of this "central principle" is a direct quotation from the First Interim Report or that it is anywhere quoting directly from the report for that precise conclusion. Rather, this appears to be the conclusion the USG draws from its examination of the report. It supports that reading in that same paragraph (p. 21, Para. 78), by offering specific points from the First Interim Report of MITI that the USG believes supports the basic position offered in the first sentence of the paragraph. The USG might have even embellished this point more by highlighting the extent to which the authors of the Report seem concerned about goods being sold "extremely cheaply" and the "wide variety of prices [offered] within the same consumer area" and the failure of all that to bring about rationalization (or perhaps even elicit rationalization efforts by companies -- the Report is slightly ambiguous on this point). But, it does not appear that the USG is quoting directly from the Report in the statement that the GOJ has highlighted.	The document does not mention any policy "to create stability and high prices for the benefit of domestic manufacturers." The term "limit competition" also does not appear in the document. Instead, in the document MITI discusses conditions of "appropriate competition" and focuses generally upon rationalization" issues. Although MITI indicates that vertical integration can result in the establishment of distribution systems, MITI also recognized that vertical integration was not necessarily the best way to rationalize every market,
	The GOJ, on the other hand, asserts that the report draws no connection between competitive conditions in the distribution and manufacturing sector, but rather that it notes only that the "establishment of appropriate competition conditions would stimulate the modernization of distribution mechanisms" and that "vertical integration did not necessarily mean that distribution systems would be rationalized." Of course, the GOJ does not indicate what the Ministry believes to be "appropriate" competitive conditions. But, again, it appears that the GOJ is asserting what it believes is contained in the report, not disagreeing about a precise translation, at least as I read it.	
3	The USG has translated *netto* as "network," while the GOJ insists that the proper translation is "net prices." In this instance, the GOJ is correct. In this particular context, the word *netto* most correctly refers to "net prices," not "network." The word *nettowaaku* is sometimes used to refer to network, but not in this article. This article uses other words to refer to the distribution structure (*ryutsu kozo*) or distribution network (*ryutsumo*). *Netto* refers to net prices or net profits.	"Netto" is in Japanese business practices an abbreviation of the English word "net prices."
	Regarding the second point, as a technical matter, I believe the GOJ is correct in that the phrase quoted in the USG Submission -- ""a limit to the expansion of sales channels seems to be appearing" (USG Submission, p. 58) -- refers specifically to the distribution industry for cameras. The context of the specific discussion of "expansion" in that paragraph is that of the increase in distribution outlets by camera manufacturers which are opening their own stores. The very next sentence then notes that a "limit to the expansion of sales channels seems to be appearing," thus technically referring to those sales channels that are opened by the manufacturers of camera equipment and those sales channels that compete with such stores.	

Item No.	Michael Young	Zentaro Kitagawa
3 (contd)	It is not entirely clear, however, that the author believes such sales channels are exclusively limited to camera hardware or that they effect only the pricing patterns of camera equipment. In the remainder of the paragraph, following the phrase in question, the author seems to focus on both cameras and film, thus suggesting that such new outlets (and the concomitant limitation on the increase in such new outlets) also effect the distribution structure for sales for film and other camera related products. Indeed, if anything, the remainder of the paragraph focuses more on film than on cameras.	
	Thus, in sum, a strictly technical linguistic reading of the disputed sentence is that it refers to "sales channels" for cameras. At the same time, the author appears to assert that such sales channels also effect the pattern of distribution and price structure for sales of film and related products. Thus, he may intend to include film, etc., in comment about how limitations in the increase in sales channels are appearing.	
4	The GOJ is certainly correct that the term *keiretsuka* can have a variety of meanings, depending on context. It is most commonly used in two relatively distinct contexts. First and perhaps best known are the groups of loosely affiliated companies that, for the most part, produce distinct products, but, nevertheless, are connected by relatively small amounts of cross-ownership and a common, usually pre-war, history. The myriad companies that bear the Mitsui, Mitsubishi or Sumitomo name are examples of this form of *keiretsu*. These *keiretsu* are often the successors to the pre-war conglomerates or *zaibatsu* that were broken up after World War II. However, unlike the pre-war *zaibatsu* or conglomerates, these companies are not held together by a common holding company which holds large shares of stock in all of them. Rather, they are very loosely affiliated with small amounts of cross-ownership and frequent structured arrangements whereby the Presidents and other officers of the companies gather to network, exchange information and otherwise discuss matters of common interest.	Items 4-6 For the following reasons, the Japanese submissions translation of "keiretsuka" as "vertical integration" more accurately and objectively conveys the meaning of "keiretsuka" in this context.
	The second common usage of *keiretsu* is in reference to a group of companies that are largely in one chain of production, including both up-stream and down-stream producers. Often included in the *keiretsu* of auto manufactures, for example, are up-stream parts producers and down-stream distributors, in addition, of course, to the auto manufacturers themselves.	Items 4-6 (contd) "Keiretsu" relationships might include horizontal and vertical relationships. "Keiretsuka" means the establishment of such inter-firm or intra-firm relationships. In this document "keiretsuka" does not refer generally to establishment of such relations, but specifically to the establishment of vertical relationships or integration.
		Therefore "vertical integration" is technically the better translation. Also, vertical integration is more easily understandable in an English language document. Outside of Japan the word "keiretsu" may be misunderstood as it is often used in contexts wherein it has negative implications. In the Japanese language document at issue, however, "keiretsu" simply objectively describes a specific structure or organization of firm relationships in the Japanese economy, i.e. vertical integration.

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4 (contd)	In normal course, one might be inclined to consider this second type of *keiretsu* as merely a form of "vertical integration" and, to some extent, it is certainly that. However, the companies may be related in a stock ownership way in tighter or looser ways. In some cases, both the up-stream and down-stream companies are largely or exclusively owned by the manufacturer. In other cases, only the down-stream or, on rarer occasions, only the up-stream are wholly or largely owned subsidiaries and the other half of the production stream are bound more by contract and expectation than stock ownership. In these cases, the non-wholly owned subsidiary may still be bound to the main company by some degree of stock ownership, though generally far less than necessary to exercise control. In still other cases, none of the companies may be wholly (or largely) owned subsidiaries of the other. Rather, all are bound more by contract and mutual cooperative expectations, along perhaps with a small amount of cross-ownership of stock, than by complete parent-subsidiary relationship.	I would also like to note that Item 159 (at p.61 of The First Submission of the Government of Japan) could be better translated as: "Vertical integration of distribution channels does not always mean, from the perspective of the national economy, that vertical integration is the best way to rationalize each of the distribution structures."
	It appears that the various reports refer to this second kind of *keiretsu*. Thus, to an extent, the GOJ is correct, in that the reports refer to a rationalization of the distribution system that takes the form of creating more exclusive vertical relationships between manufacturers and distributors (at the wholesale or retail levels or, perhaps, at both). On the other hand, the USG is also correct to an extent because referring to this merely as "vertical integration" may suggest perhaps a degree of parent-subsidiary relationship in terms of ownership and control that is not necessarily inherent in the term *keiretsu*.	
	Accordingly, I think either term entirely appropriate. The term "vertical integration" is acceptable, as long as the Panel understands that the term "vertical integration," when used to refer to *keiretsu*, should not be understood to mean precisely the kind of vertical integration of which we think when considering vertical integration in most U.S. or Western European economic situations. That is, in this context, "vertical integration" does not necessarily mean wholly-owned subsidiaries or even a situation in which one party exercises substantial control over the other through the exercise of corporate rights inherent in the ownership of certain percentage of the other corporation's stock. It may mean that, of course, but, as described above, it may also mean a much more flexible, loose relationship that may nevertheless be quite exclusive and function fully as an unalterable sole distribution relationship.	
	Alternatively, "keiretsu-nizing" or "keiretsunization" is also entirely appropriate, as long as the Panel understands the range of forms that such distribution cooperation might take, including everything from wholly-owned parent-subsidiary relationships to loose affiliations, based perhaps on relatively small amounts of cross-ownership (though not necessarily), that generate exclusive dealing relationships that are very stable and relatively unalterable.	
5	Having reviewed these materials in both English and Japanese, I refer the Panel to my discussion regarding Item No. 4. I think that same analysis applies to this Item.	
6	Having reviewed these materials in both English and Japanese, I refer the Panel to my discussion regarding Item No. 4. I think that same analysis applies to this Item.	

Item No.	Michael Young	Zentaro Kitagawa
7	Before I analyze this issue, I would like to note that the First Submission of the Government of Japan seems to cite the wrong article for the relevant translation problem at issue. Footnote 145 states, "The U.S. translates a *November 1, 1967, Nihon Shashin Kogyo Tsushin article* as...." (emphasis added.) However, the relevant section is not in the November 1, 1967 article cited as "Ex. 67-14", but rather seems to be in the December, 1967 (pp. 5-8) article from *Zenren Tsuho*, titled "Let's All Have Cameras - Film, Printing Paper Promotion of Trading Normalization Triggered by a Monochrome Photosensitive Materials Price Increase" (in the "Provisional" English translation).	1) In my opinion, the better translation is: "...want to rationalize distribution channels all the way to the retail level, ...".
	In addition, the GOJ has not cited the precise footnote of the USG Submission in which the USG supposedly cites either of the articles in question. Furthermore, the GOJ does not cite to any particular section of the article(s) which may negate the USG's claim due to any translation errors. Nor does this claim by the GOJ seem to raise a translation issue, at least in the conventional sense. Accordingly, I have not reviewed the GOJ's claim that the article(s) in question do not support the USG claim.	2) Exhibit 67-14 does not support the U.S. allegation that the Government of Japan designed distribution policies to encourage a single-brand distribution system. I find no mention of government policy in this document. Exhibit 67-14 consists of a neutral statement from the perspective of one having business interests in the wholesaler industry. The author has apparently assumed that manufacturers preferred a single brand distribution system, or a distribution system with a few large distributors. The author states that distributors need to focus on the issue of how to successfully do business in such an environment rather than on the issue of whether such a distribution system is good or not.
	Turning to the translation issue, the main question is what Fuji and Konika want; in other words, whether Fuji and Konika want "distribution" all the way to the retail level, as the USG suggests, or whether they want "to rationalize transactions," as the GOJ urges. The original Japanese section does not make apparent the object of the verb, *seibi*, so there is a need to look at the context of the sentence in order to understand which meaning is implied.	
	Before addressing the main question of what the "object" of the clause is, there is need to look at the verb of the clause. The USG translation is phrased so that "want" is the verb of the relevant clause, whereas, the GOJ translation uses the verb, "want to rationalize." The verb in the original Japanese text is *seibi shite ikitai*, which can be translated as, "want to 'adjust' or 'restructure.'" Since the USG and the GOJ do not seem to argue about the translation of *hanbai ru-to no seibi mo*, the subtitle of this section, as "*restructuring* of sales channels as well" (emphasis added), it may be more consistent to use the translation, "restructure" here, too.	
	So, what is it that Fuji and Konika want to restructure? I believe that the author of the article addresses this question in the subtitle of the section: "Restructuring of Sales Channels, as well," or "Also Restructuring of Sales Channels." I think this strongly suggests that the object of restructuring is "sales channels," which is relatively close to the USG translation of "distribution."	

Item No.	Michael Young	Zentaro Kitagawa
7 (contd)	In addition, as a side issue, there is a question as to Fuji and Konika should be put in brackets or not. In this case, since the subject of the clause is not directly stated, but can nevertheless be inferred from the first part of the sentence, Fuji and Konika should be in brackets, as the USG suggests. Thus, the most appropriate translation would be as follows: "[Fuji and Konika] want to restructure [sales channels] all the way to the retail level..."	
8	I start by noting that the GOJ has slightly mischaracterized the nature of this issue by implying that the phrase they cite from the USG Submission is, in its entirety, a "translation of a journal article...." In fact, the USG Submission directly cites from the translation only the second half of that sentence, "the influx of foreign capital may be checked by the application of the Antimonopoly Law." The first half of the sentence in the USG brief, starting with "For instance," is not in quotation marks and thus does not indicate that the USG is directly quoting from the article. Moreover, the part of the sentence not in quotation marks differs slightly from the provisional translation of the article provided by the USG, further supporting the view that the absence of quotation marks around the first half of the sentence is not accidental, but rather that the USG intended to quote only the second half of the sentence directly from the provisional translation. Accordingly, I will compare not what the GOJ mistakenly characterizes as "the U.S. translation", but rather the Provisional translation provided (presumably by the USG) and the GOJ translation contained in Footnote 152 on Page 67 of the GOJ Submission. I do also note, by the way, that even regarding that part of the USG sentence that is contained within the quotation marks is not drawn directly from the Provisional translation, but rather differs slightly. I will note when such differences occur and their relevance.	I would translate the subject text as follows: "Assuming that the trade usage of rebates, as one example, has been established within the industry, excessive practices by foreign capital can be checked by operation of the Antimonopoly Law."
	The Provisional translation and the GOJ differ only very slightly with respect to the latter half of the sentence that may be read " ~ foreign capital may be checked by the application of the Antimonopoly Law." The Provisional translation states that " ~ foreign capital could by checked", while the GOJ translates that phrase as " ~ foreign capital may be checked". In light of the original Japanese, I think "could" is the preferable translation. However, since the USG does use the word "may" in the text of its submission as an exact translation, it appears that both the USG and the GOJ agree that "may" is the most appropriate translation. Accordingly, I will use "may" for purposes of this analysis.	
	The USG and the GOJ do disagree on the translation of the phrase immediately preceding the above, the Japanese original of which reads: *gaishi no yukisugi*. Or, more precisely, the parties seem to disagree whether the object of *yukisugi*, which is translated as either "influx" or "excess," is merely *gaishi* ("foreign capital"), as the USG suggests, or something broader, such as "the use of rebates," as the GOJ suggests. (The Provisional translation translates *yukisugi* as "excess," while the USG Submission uses the word "influx." As will be indicated shortly in the text, the GOJ takes a somewhat different approach and thus does not directly dispute the use of either of these words. "Excess" seems a better translation to me, but since the USG uses "influx" in its formal Submission and the GOJ does not offer a different view, I will use the word "influx," rather than "excess.")	

Item No.	Michael Young	Zentaro Kitagawa
8 (contd)	It is very difficult to resolve this issue because the original Japanese text is very vague and ambiguous. With respect to earlier translation issues, the GOJ has constantly urged the Panel to not fill in missing phrases, words or ideas from the surrounding text, but rather to translate strictly as a matter of word substitution, to the extent possible. The contention seems to be based on the idea that when the USG fills in the missing phrase or word by drawing inferences from the surrounding text, the inference is invariably favourable to the U.S. case and undermines the GOJ's contentions. Taking that particular tack, the USG translation is probably the more accurate, though it requires some refinement. If, on the other hand, we consider the surrounding sentences, it becomes somewhat more difficult to be sure what the author had in mind. Let me examine this sentence from each of those perspectives.	
	Let me start with a somewhat strict translation, based largely on word substitution. The first part of the sentence, as contained in the Provisional translation, reads: "For instance, rebates were planned so that if they were to become common practice in the industry...." I believe a better translation would be: "Even if we take up rebates [for example], if they become common practice in the industry...." The particular Japanese phrase in question is "~toriagete mite mo" and does not generally suggest, particularly in this context, that such rebates "were" adopted or even "were planned," but rather suggests that we will now take this issue up and examine it for purposes of illustrating some point to the reader. In other words, the author appears to be examining, as an illustrative example, what use might be made of the relevant law (or guidelines, as I will discuss shortly) in the event rebates become common industry practice.	
	Regarding insertion of the phrase "if they become common practice in the industry," the GOJ assertion in Footnote 152 might initially be read as a claim that this phrase is not found in the Japanese original. However, the phrase is clearly found in the Japanese original and is correctly translated much as the USG translates it in the Provision translation.	
	On the other hand, the GOJ might be asserting in Footnote 152 that the USG Submission claims that the article stands for the proposition that "rebates were adopted" and then goes on to give the reason for such adoption, namely, "so that once they become common practice in the industry, 'the influx of foreign capital may be checked by the application of the Antimonopoly Law.'" In this regard, the GOJ may have a more legitimate complaint. The sentence in dispute clearly references "common practice in the industry," but does so in a conditional way, indicating that certain consequences would follow if rebates became a common industry practice. In the original Japanese, the sentence in question does not indicate whether rebates had or would become a common practice, but rather only examined the possibilities if they became a common industry practice.	

Item No.	Michael Young	Zentaro Kitagawa
8 (contd)	Turning now to the most controversial part of the sentence, whether the "influx of foreign capital" may be checked or "the abnormal use of rebates by foreign capital" may be checked. Taking the approach generally urged by the GOJ in other translation issues, a strict reading of the original Japanese suggests only that the "influx of foreign capital" may be checked. There is nothing else in the sentence like "the abnormal use of rebates." The use of rebates is mentioned only in the context described above. Accordingly, taking this view, the best translation would be: "Even if we take up rebates [for example], if they become common practice in the industry, the influx of foreign capital may be checked by the application of the Antimonopoly Law." (As a minor matter, not directly addressed in either the USG or GOJ claims, I would like to mention that the original English translation of the August 1971 article of *Zenren Tsuho* might be slightly misleading regarding the very last phrase of the sentence in question, which reads: "...the Antimonopoly Law, a measure that has been devised and put in place." The original Japanese text reads, *toiu koto kara sakutei sareta mono nano dearu.* The USG translation might be read to suggest that it is the Antimonopoly Law which has been devised and put in place. However, it seems apparent from the sentence immediately preceding that it is the guidelines that have been devised and put in place, not the Antimonopoly Law.)	
	At the same time, using a slightly broader, contextual approach to translation, the result might be different. In the context of this sentence and the paragraph within which it sits, it is not entirely clear that the author meant this phrase -- "influx of foreign capital" -- to be read so narrowly. Given that the context of the sentence is the use of rebates and how wide spread they might become, it would not be unacceptable to consider that the thing that might be checked by the Antimonopoly Law is the excessive use of rebates. The principal question then becomes what *gaishi* means in this context. Normally, *gaishi* means foreign capital, but it can occasionally be a short-hand term for foreign investors. Thus, this sentence could be read as follows: "Even if we take up rebates [for example], if they become common practice in the industry, foreign investors going too far [in the use of rebates] may be checked by the application of the Antimonopoly Law." Given that the article is talking mainly about ways to prevent foreigners from coming into the Japanese market and disrupting the settled distribution system by introducing competition within the industry, it is entirely possible to consider that what is to be checked is not, technically speaking, the actual influx of foreign capital, but rather the extensive use of rebates by the foreign investors. I am inclined to think this translation captures the meaning of the Japanese.	
	I make two additional observations, however. First, I think the sentence is very ambiguous and, while I lean to the latter interpretation, it is by no means certain. Second, the GOJ use the word "abnormal" to describe foreign capital's use of rebates. That is not a particular accurate or good translation and I have not used it in the translation, but rather have used "going too far."	
9	The dispute here seems to focus on the difference in interpretation of the object of progression: whether Fuji Film's financial soundness has progressed or whether the soundness of transactions progressed. In this case, the latter interpretation (that of the GOJ) is correct.	Neither (a) nor (b) is entirely correct. The original text states that "soundness' has indeed progressed,". The term "financial" does not appear in the text and the text does not further explain the meaning of "soundness."

Item No.	Michael Young	Zentaro Kitagawa
9 (contd)	The sentence at issue emphasizes the word *kenzenka*, which means "soundness" or "health," by putting it in quotation marks. Use of these quotation marks suggests that the author is using *kenzenka* in the same context as before. Earlier in the article, in the first sentence of the third paragraph, the author first mentions *kenzenka* by saying, "*...Fuji Firumu ga kaishu oyobi soreni tomonau shukka kenzenka hoko ni ho wo fumidashita....*" (USG translation: "...Fuji Film started to try to improve its receivables and related shipments"). Here, the object of *kenzenka* is the receivables and related shipments. The author then goes on to explain how Fuji Film went about improving the soundness of such transactions in the paragraphs, focusing in the paragraph at issue on the period of payment for receivables. Immediately after describing the shortened time frame for payment of receivables, the author concludes that because of these changes the "soundness" (which is *zenkenka* in brackets) has indeed progressed. In this context, the author is almost certainly referring to the soundness of the receivables and related shipments. The GOJ has combined the improvements of receivables and related shipments and called it "transactions."	
	The GOJ also contends that paragraph 119 of the USG Submission, in which the USG asserts that "shortly after the new transaction terms went into effect, Misuzu's financial situation deteriorated," finds no support in the *Zenren Tsuho* article cited in footnote 100, which is the June 1968 *Zenren Tsuho* article entitled *Relationship Between Major Photo Materials Wholesalers and Manufactures From the Standpoint of Industry's Photo Materials* [USG translation}. This article does discuss how businesses have reacted to Fuji Film's tightening of credit and also how Fuji Film's assistance has helped some businesses', including apparently, Misuzu's, financial situation to improve. At the same time, it does not state in any explicit way the existence of a direct causal relationship between the new transaction terms and Misuzu's financial deterioration. One might infer that at least some of these companies' financial problems are related to Fuji's changing transactional policies from certain assertions, such as the need for the *tokuyakuten* to undertake more stringent collection procedures because of the change in Fuji's policies. In addition, the author mentions other changes that the *tokuyakuten* must take in response to the general tightening of credit, perhaps implying that these changes are necessary to avoid deterioration in their financial situation or to improve a deteriorating situation, but the author no where explicitly states any casual connection.	

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9 (contd)	At the same time, such a casual connection is implied much more strongly in the *Zenren Tsuho* article cited in Fn 98 or Paragraph 115 of the USG Submission (*Fuji Film's Result of Stricter Policy on Receivables*, *Zenren Tsuho*, march 1968, Ex. 68-2). This particular article does not explicitly state$ that Misuzu's financial situation deteriorated shortly after the new transaction terms went into effect, but the author certainly seems to imply that the new transaction terms adversely effected some of the *tokuyakuten* and other business. For example, in the second full paragraph on p. 3 of this article (USG translation), the author notes: "As mentioned in the previous section, in April 1966 Fuji Film made its payment terms for photosensitive materials *tokuyakuten* more strict in an effort to normalize their business relationships. These moves were stepped up in April of last year." The paragraph goes on to note steps Fuji Film took to help businesses that "could not handle the tighter payment deadlines." Then, the very next paragraph starts out: "Some *tokuyakuten* naturally could not keep up with the pace of such a payment cycle. Businesses that were faced with mounting troubles, just as Chuo Photo was (even if this was not what Fuji intended), thus found themselves in dire straits." Thus, the author clearly describes a causal connection between the tightening of payment terms and a deterioration in the financial condition of some of the businesses. He does not mention Misuzu specifically in that paragraph, but that Misuzu might well be included in that group can be inferred by statements the author makes earlier in the article. Specifically, in the last paragraph of p. 2 of the article (USG translation), the author states that Fuji and Konica are "burdened with some of the *tokuyakuten* that have a significant number of problems." He then goes on to note that "[i]n Fuji's case, these used to include Omiya and Ueda, and now Shikijima and Misuzu, who are considered to have been able to continue their [business] activities until now due to special support from the manufacturer...." Thus, it is certainly possible to infer that from the way in which the author has described the general cause of problems in these businesses and the author's specific use of Misuzu as an example of a troubled business that Misuzu's financial deterioration is casually related to Fuji Film's stricter policy on receivables. It is not an absolutely necessary inference, but it certainly seems a legitimate one.	
10	The article in question discusses the low rate of return of four distributors, noting that they have low rates of return despite unprecedented low interest rates and, resultingly, reductions in interest payments. The article does note that security money (or, in the case of Misuzu, long-term deposits) deposited with the manufacturer earns slightly better interest rate than the commercial rate. However, that is the only direct reference to any relationship with the manufacturer or any effect the manufacturer might have on the profitability or operations of the distributors.	The correct answer is Japan's translation.
11	Strictly speaking, this does not appear to be a translation issue, at least in the conventional sense. However, let me address it to the extent possible, while also noting a certain limitation on my ability to address it.	This presents an issue of statutory interpretation rather than translation.

Item No.	Michael Young	Zentaro Kitagawa
11 (contd)	[[On its face, the Large Scale Retail Store Law does not impose a requirement of an examination of a new store "based upon mathematical formulas for comparing the Commercial Population and large scale retail store Occupation Rate of one city with similar cities" (USG Submission, p. 68, Fn 190). Rather, it requires the relevant authorities to: "...determine the probability that retail business operations at the Type-I or Type-II large-scale retail store in question will impose considerable effects on the business of small and medium-sized retailers in the vicinity...." (Article 7(1), Large Scale Retail Store Law, Ex. 74-4 [USG translation]). At the same time, in making this determination, the relevant authorities are instructed to take "into consideration factors within the vicinity of the Type-I or Type-II large-scale retail store in question...." (*Ibid.*) Such factors include "the scale and trends of the prefectural population, prospect for the modernization of small and medium-sized retailers, and the proximity and current business activities of other large-scale retail stores." (*Ibid.*)	
	This would certainly permit the relevant authorities to compare the size of the current consuming public (and trends in the growth rate of that public) with the size of the current commercial distribution and the size of commercial distribution in the event a large-scale retail store is permitted to open. Moreover, since this list of factors that might be considered is, as a legal matter, illustrative and not exhaustive, there is nothing to prevent the authorities from comparing the consuming population and the occupation rate of the target city with that of similar cities around Japan. Thus, it is clear that such a comparison as that described by the USG in Fn 190 is permitted under the Law.	
	Even at that, however, it important to note that there is nothing on the face of the Law that would seem to make such a comparison dispositive. Rather, the statutorily mandated determination is the "probability that retail business operations at the ...large-scale retail store ...will impose considerable effects on the business of small and medium-sized retailers in the vicinity...." The comparison described by the USG in Fn 190 may be relevant to that determination and certainly may be considered. But, at the same time, other factors may also be considered and, under the statutory scheme, it appears that the Diet anticipated that other factors would be considered. Thus, at a minimum, one can say that on the face of the statute the comparison described by the USG is certainly permitted. At the same time, it does not appear that the Diet anticipated that that comparison would be the only relevant factor. Nor does it appear from the face of the statute that the Diet anticipated that that comparison would be dispositive in and of itself. Still, this does not mean that such a comparison is not made. Nor does it mean that the use of such a comparison, even if not dispositive and even if not used exclusively, would not, as a matter of general practice, have an effect similar to that described by the USG in its Submission.	
	It is impossible to reach any definitive conclusion on this last matter, however, based solely on an examination of the statute. The USG has cited a particular decision which it implies supports its conclusion, namely, "Large Store Council Decision, 'Investigatory Procedures for the Adjustment of the business Activity of Large Scale Retail Stores,' November 14, 1991, Ex. 91-4" [cited in USG Submission, p. 68, Fn 190]. That may support the USG conclusion, but, from the face of the statute alone, it is not possible to reach any definitive conclusion on this point.	

Item No.	Michael Young	Zentaro Kitagawa
12	The first half of the GOJ complaint about the USG citation -- the degree to which the surveys cited represent current conditions in Japan -- is hardly a translation issue. Both the USG and the GOJ seem to agree that the MA survey is dated 1995. Moreover, the USG also makes clear in both text and footnote that the JFTC citation is dated 1995. Accordingly, there does not appear to be any disagreement about when the surveys were conducted.	Please note that the First U.S. Submission, at para. 218 mistakenly cites the JFTC Council study report at page 23. The correct page is page 25.
		It is not appropriate for me as interpretation expert to comment on whether or not the MA survey and JFTC study report are not representative of current conditions.
	The second half of the GOJ complaint about the USG citation -- that the USG "erroneously translates the JFTC ad hoc study group report, suggesting the report confirmed that many excessive local regulations exist, resulting in a significant burden on store openers" -- is couched in terms of a complaint about the accuracy of translation. However, at least in the materials provided to me, the GOJ does not point to any specific dispositive translation errors.	The U.S. First Submission erroneously cites the JFTC study report. The U.S. First Submission, paragraph 218, states:
	It appears that the parties disagree about what conclusions should be drawn from the survey, rather than about the accuracy of the translation of the survey.	"It [The JFTC Council] concluded that: [T]hese excessive regulations and non-transparent administrative guidance on the part of local government bodies and public entities make those planning to open stores continue to bear unreasonable burdens in the form of demands requiring very intricate store opening plans to be submitted and other similar demands. 269" [Hereinafter I refer to the above conclusion as
		In the original Japanese language text the JFTC Council report only refers to an existing opinion that local regulations are excessive. The JFTC does not conclude therein that such regulations are excessive.
		1) "P", as cited by the U.S. Submission, is not the conclusion of the JFTC Council report. The report only quotes "P," without identifying its source. On the same page of the report, the JFTC Council states "Despite such measures of MITI'S, as "P" is in part being pointed out, it is presumed that some such regulations of their own still remain." (The words "their own" refer to the local government bodies, etc.)

Item No.	Michael Young	Zentaro Kitagawa
12 (contd)		2) On the same page 25, the JFTC Council report concludes: "Some such local regulations of their own, which exceed the framework of the Large Scale Retail Store Law by controlling the opening of large retail stores, lead to interrupt competition among retail stores and to limit customer's freedom to choose. Therefore, such regulations should not be exercised from the standpoint of competition policy."
13	Strictly speaking, this is not a problem of translation, but rather of what conclusions are most appropriately drawn from the materials in question. The USG has stated in Paragraph 202 of its First Submission that the MITI circular "obliged the notifier to ...obtain the consent of local retailers before submitting Article 3 Notification." The GOJ, on the other hand, has argued that it could "not find any phrase to that effect in the Circular." However, the USG statement is not placed within quotation marks and does not appear to be a translation at all, but rather appears to be the conclusion the USG draws from the MITI Circular. The USG is drawing its conclusions and has stated that conclusion in paragraph 202.	The better answer is Japan's translation
	Turning to that conclusion, the most relevant section of the text states, in Japanese: *todokede mae ni shuttenyoteichi no shichoson nado e shuttenkeikaku no naiyo ni tsuite setsumei o okonauyo shido saretai*. The main verb, *setsumei*, is usually translated as "inform" or "explain." Thus, technically read, it appears that the Circular actually guides the notifier to "inform" the local retailers or "explain" to the local retailers before submitting its Article 3 Notification, rather than requiring them to "obtain the consent of the local retailers...."	
	At the same time, it is not uncommon under Japanese administrative practice for the parties involved to understand that the giving of an "explanation" also, to some extent, may entail the obtaining of consent from the parties to whom the explanation is given or, at a minimum, that any reasonable objection of the parties to whom the explanation is given should be accommodated to the extent possible. There is nothing in the Circular that directly states this, however, and the only explicit guidance given in the Circular is to give an explanation or to inform the local retailers.	
	The discussion surrounding Item No. 14 also analyzes this issue in more depth. Please refer to that as well.	
14	As a general matter, *jimoto* is translated as "local" and *setsumei* is translated as "explanation". The USG has combined the two translations. In a casual context, "local explanation" would not be inaccurate. However, in this context, *jimotosetsumei* is used as a legal term within the circular of the Ministry of International Trade and Industry. In other words, the circular is not using the term in its general meaning, but instead, has injected a specific meaning. *Jimotosetsumei* instructs the *shuttenyoteisha* (=store opener) to explain the contents of its store opening plan before the municipal government, the chamber of commerce and industry, or industry and commerce association, small and medium-sized retailers, and consumers in the area.	The US translation is literal, however, Japan's translation is the more descriptive of the two.

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14 (contd)	The USG translation as "local explanation" seems to connote a nuance that is slightly different from the context that it is used in here. Local explanation usually refers to an explanation made by the local people or to the local people (probably by a government entity). In this case, it is not the local people that are giving the explanation or a government entity giving an explanation to the local people, but rather the parties filing notifications for Type-I large-scale retail stores that are subject to hold a *jimotosetsumei*.	
	The GOJ urges that "public briefing" is the correct translation. The term "public briefing" in English connotes the inference that the state or other public entity is briefing the public people. It is important to note here that the store opener may not be a public entity. Furthermore, the briefing is addressed not only to the consumers, but also to the municipal government and the other entities listed above.	
	I believe that it is not so important to determine whether the accurate translation of *jimotosetsumei* is "local explanation" or "public briefing", as it is to understand how the word is used in the circular. As long as the meaning of the term is clear, either translation may be fit.	
15		The corrections made by the Japanese Government to the U.S. reference as well as to the U.S. insertion of [on the Councils] are correct.
16		I reviewed the marked sections of the translation of the "Law Against Unjustifiable Premiums and Misleading Representations." My opinions below are limited to address only those issues indicated in the marked document sent to me. I make no comment herein as to the general integrity of the translation.
		Throughout the translation at issue the word "hearing procedures" is used. For example, see Articles 6, 7, 8, 10, 11 etc. To be consistent "adjudicative procedures" should be used throughout this translation.
Article 2, Clause 1 Premiums Law	1. *Buppin:* The dictionary translation is "an article," "goods," or "commodities." I do not think there is a major difference in this case as to whether one uses the word "article," as the GOJ suggests, or "goods," as translated by the USG. Either would be acceptable as long as one term is used throughout for the sake of consistency. I note, by the way, that the word "commodity" is used in the same paragraph for the Japanese word *shohin*, so it would probably be best not to use that particular word as a translation of *buppin*.	Article 2: Clause 1: The word "buhin" in Japanese should be translated as "article" rather than "goods."

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16 (contd)	2. *Kuji no Hoho:* The literal dictionary translation of *kuji* is "lottery." The USG translates the phrase as "prize competition method," whereas the GOJ would add the words "lottery or" and thus have it read: "lottery or prize competition method." Again, I doubt there is much difference between the two phrases and I see no problem with translating it as: "lottery or prize competition," which would accommodate the GOJ translation and include the USG translation.	Article 2: Clause 1: The word "prize competition" should be translated as "lottery."
	3. *Jigyosha*: The USG translates this word as "business," in contrast to the GOJ's translation as "entrepreneur." To understand fully this word's original meaning, I shall divide it into two parts. *Jigyo* means "business," and *sha* is generally translated as person. When used in a legal context, *sha* is not restricted to natural persons, but may include any juridical person (i.e., corporations) as well. In this particular case, however, I do not think either "business" or "entrepreneur" fully captures the meaning because the law appears to intend to include both businesses and entrepreneurs. In other words, if "business" does not include the concept of the actual business operations, as well as the entrepreneurs who run them, then it is too narrow. If the word "entrepreneur" does not encompass the business entity itself (and its related operational activities), then that is not adequately expansive. However, as long as one understands that the term includes both "businesses" and "entrepreneurs," then I do not think it matters which term one chooses. This analysis applies any time *jigyosha* is used in this law.	Article 2: Clause 1: The word "jigyosha" in Japanese should be translated throughout as "entrepreneur."
Article 2: Clause 2	4. *Hyoji:* The term *hyoji* is used twice in Article 2(2). When first used, *hyoji* is translated as "representations" and both the USG and GOJ seem to agree on this translation. The second translation of *hyoji* is at issue here. The USG continues to used the term "representations" as its translation of *hyoji*, while the GOJ now insists on the term "description" as the most appropriate translation. I do not think there is any need to distinguish the first use of *hyoji* from the second. Therefore, I recommend using the term "representation" for consistency reasons.	Article 2: Clause 2: In the original Japanese version, the word "hyoji" or "representation" appears twice - as it does in the literal translation. The word "description" is too narrow; however, "indication" may perhaps be substituted for "representation" in the second line to avoid using "representation" twice.
Article 3	5. *Sogaku:* The dictionary translation includes: "total," "sum total," and "aggregate," as just a few of this word's translation. I do not think there is any significant difference in this case.	Article 3: The difference between "aggregate" and "sum total" does not appear to be material. The prior term is perhaps preferable as a matter of style.

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16 (contd)	6. *Jigyosha in taisuru keihinrui no teikyo ni kansuru jiko no Seigen* and *Kensho ni yoru keihinrui no teikyo ni kansuru jiko no teikyo:* I cannot be positive from the original text, which does not seem to cite the FTC Notification number, but it appears that perhaps the USG has reversed the first two citations. That is, *jigyosha no...*, the first notification listed in the original Japanese text should correspond to the "restriction on Premium Offers to Businesses," the second listing in the English translation. (N.B.: The USG has translated the word *jigyosha* here as "businesses.") thus, it seems that the USG simply cited the two notifications in different order. Accordingly, I don not think the "Restrictions on Premium Offers to Businesses" should be deleted, but rather the order merely ought to be reversed.	NOTE to Article 3 on Page 226 of Japan Ex D-1: The corrections are right.
Article 4	7. 3 or 13:The GOJ seems to be correct in asserting that the article in question here is Article 3, not Article 13.	Article 4: Although the parties did not raise the issue, I believe the most appropriate translation of the heading is "Prohibition of Improper Representations."
	8. *Ippan shohisha ni gonin sareru tame:* The first issue seems to be whether to translate *ippan shohisha* as "general consumer," as the USG asserts, or "consumers in general" as the GOJ states. I do not understand these two terms to be particularly different in English. Accordingly, I believe either translation would be appropriate. In this case, since *ippan*, which is usually translated as "general," is used to modify *shohisha* ("consumer"), then perhaps the term "general consumer" is technically most accurate and certainly adequately expresses the concept.	Please note that the phrase "ippan-shohisha" appears in paragraph 3 of the Article 4 and in other places as well. It could perhaps also be translated as "consumers in general," however, it is not apparent whether or not any material difference exists between the phrase "general consumer" and "consumers in general" in the present context. Further, "general consumer" is the more literal translation.
	The second issue is whether *gonin sareru* is better translated as "shall lead...to believe," as the USG urges, or as "will be misunderstood," as the GOJ suggests. The word *gonin* is generally translated as "misconceive" or "mistake," and has a negative connotation. I believe that the GOJ's translation -- "will be misunderstood" -- better captures that nuance and is perhaps the best translation. Therefore, I think the better translation is: "will be misunderstood by the general consumer to be..." One could also translate it as "shall mislead the general consumer to believe..."	Second, the appropriate translation of the text at issue in lines 3 and 4 is: "will be misunderstood by the general consumer."
	9. *Torihiki no Aitegata:* The USG translates this phrase as "other transacting parties," while the GOJ urges "customer" as the correct translation. I think neither is precisely correct. The more accurate translation is the "other party in the transaction." The "other party" may well be the "customer," but the original text does not directly so state.	

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16 (contd)	10. *Dainijo teigi moshikuwa senjyo daisango no kitei ni yoru shite moshikuwa daisanjyo (keihinrui no seigen oyobi kinshi) no kite ni yoru seigen moshikuwa kinshi wo shi:* The issue here is the correct position of the conjunction "or." As underlined above, *moshikuwa*, which is translated as "or," appears repeatedly in one sentence. The USG and the GOJ seem to disagree on whether the FTC takes action "to limit or prohibit under" all the article mentioned (which appears to be the USG view) or whether the FTC takes action "to limit or prohibit under" the provisions of Article 3 only (the GOJ view). It appears that the GOJ is correct. "To limit or prohibit under" modifies the provisions of Article 3 only, and "effect designation" modifies both "Article 2 (definition) and Section 3 of the preceding Article." Thus, the correct translation is: "To effect designation under the provisions of Article 2 (definition) or Section 3 of the preceding Article, or to limit or prohibit under the provisions of Article 3. [emphasis added] 11. Section 3 or Section (iii): As a minor point, there seems to be a disagreement on whether to write the number three as "3" or "(iii)." I do not think there is a major difference between the two possibilities, as long as the reader understands the precise section to which the text is referring.	Article 5: The Government of Japan has correctly translated this text as "When the Fair Trade Commission takes action to effect a designation under the provisions of Article 2 or Section (iii) of the preceding Article, or to limit or prohibit under the provisions of the preceding Article..."
	12. Reference to Article 4 (*Futo na hyoji no kinshi*): The USG translates this phrase as "prohibition on misleading representations," whereas the GOJ uses the word "of" in place of "on." Looking back to the translation of Article 4, the USG had translated the same phrase as "Prohibition of misleading representations." Both the USG and the GOJ had agreed on the June 29, 1997 translation of this phrase previously. Thus, I recommend using "prohibition of misleading representations" for reasons of consistency.	Article 6: Changes indicated by the Government of Japan are correct. [If the references to the content of provisions are retained then the word "misleading" in the fourth line should be "improper."]
	13. *Korera no jisshi ni kanren suru koji:* *Kanren suru* can be translated as "be connected with" or "be related to." The USG translation -- "making the implementation of such measures public" -- seems to exclude the fact that the clause is referring to the "matters relating to" the implementation, as the original text (*jisshi ni kanren suru*) indicates. The GOJ translation -- "making the matters relating to the implementation of such measures public" -- is the better translation in this instance.	
	14. *Shinpan tetsuzuki:* Whether we should interpret this as "hearing procedure, " as the GOJ asserts, or "adjudgment procedures," as the USG urges is less important than understanding precisely what a *shinpan tetsuzuki* is. In this case, the text is referring to the quasi-judicial powers given to the Fair Trade Commission. During this process, the FTC certainly conducts a hearing and may render some adjudgment.	The Government of Japan has suggested the word "hearing procedures" in place of the word "adjudgment procedures." The term in Japanese is "shinpan tetsuzuki". I would translate this as "adjudicative procedure." A cease and desist order under the Premium and Representation Act is intended to be an administrative order. The entrepreneur affected by the order may demand an "adjudicative procedure" ("shinpan tetsuzuki" in the Japanese language) under Article 8. (Please see Kitagawa, Doing Business in Japan, Vol. 5, Part 9, Paragraph 9.03[5]).

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Article 7	15. *Ko/Jyo/Go:* The issue is whether to translate *ko* as "section," as the USG does, or as "clause," as the GOJ favours. The GOJ seems to state that *jyo* is "article," *ko* is "clause," and *go* is "section." On the other hand, the USG does not seem to differentiate so clearly among these three terms. Again, as with many other issues in this Item, I do not think it is particularly important which translation is used, so long as there is consistency throughout. The GOJ approach seems to provide adequate consistency (and I note there are places where even the USG translates *ko* as "clause). Thus, I suggest adopting the GOJ approach for purposes of consistency: *ko* = "clause"; *jyo* = "article"; and *go* = "section."	Article 7: Changes suggested by the Government of Japan are acceptable. Also, the reference to "Article 8 (1)" in line 5 should be "Article 8, clause 1, section 5" not "Article 8(1)."
	16. *Shitekidokusen no kinshi oyobi kosei torihiki no kakuho ni kansuru horitsu:* The more common translation of this law is: "in the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade," as suggested by the GOJ.	
	17. *Doho daihassho dainisetsu:* The better translation is: "Division 2 (procedures) of Chapter VII.	
	18. *Zenjo dai ikko*: Using the terms mentioned in # 15, supra, I believe the best translation here is "clause 1 of the preceding article," as suggested by the GOJ, rather than "in the preceding section," as the USG urges.	
	19. *Doko:* As noted in # 15, for coherency reasons, I propose use of the GOJ translation: "said clause."	
	20. *Zenjyo dai ikko:* The best translation is: "Clause 1 of the preceding Article." (Please refer to # 18, supra.)	
	21. *Shitekidokusen no kinshi oyobi kosei torihiki no kakuho ni kansuru horitsu:* Please refer to # 16, supra.	
Article 8	22. *Dairokujo dainiko:* The correct reference is "Article 6(2), as the GOJ urges.	
	23. *Koseitorihiki i'inkai kisoku:* I cannot see any practical or linguistically significant difference between "Fair Trade Commission Rules" and "the Rules of the Fair Trade Commission." Accordingly, either translation seems fine.	Article 8 The difference between the phrase "Fair Trade Commission Rules" and the "Rules of the Fair Trade Commission" for the phrase "kousei torihiki iinkai kisoku" does not seem material as long as it is used consistently throughout the translation.
	24. *Daigojyujo daijonko:* As noted in # 15, for the sake of consistency, I recommend the GOJ translation: "Article 50(4)."	

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16 (contd)	25. *Sanko*: For reasons of consistency, I recommend the GOJ translation of "Clause (3)." (Please see # 18, supra.)	In (2) The word "Section" should be "Article." In (3) "Section" should be "clause."
Article 9-1	26. *kakutei shita shinketsu:* In a legal context, *kakutei* is often translated as "final," as suggested by the USG, or "irrevocable," and occasionally as "final and conclusive," as urged by the GOJ, as well. Since addition of the words "and conclusive" seems to satisfy the lawyer's penchant for verbosity more than for precision, I doubt it matters very much in this context whether "and conclusive" is added. At the same time, precisely because it does not seem to add to, or change the meaning very much, it can be added to the phrase without harm to the meaning.	Article 9-1 In Section (1) the Japanese language the word at issue is "kakutei shita hanketsu." The correct translation should be "final and binding."
	27. *Kakutei shita shinketsu:* Please see # 26, above.	
Article 9-2	28. *Oyobi:* The dictionary translation of *oyobi* is usually "and." At the same time, in the legal context, when *oyobi* is used, it usually indicates that something may fall under, or be controlled by either or both the categories joined together by the word *oyobi*. The linguistic accommodation of that concept in English is sometimes "and/or," which is not a bad translation of the true meaning of *oyobi* in the phrase in question.	Article 9-2: The changes indicated by the Government of Japan are acceptable.
	29. *Jigyosha:* Please see # 3, supra.	
Article 9-3	30. *Jigyosha:* Please see # 3, supra.	Article 9-3: Again, the change to Section 1 is correct.
	31. *Suru mono to suru:* This phrase is probably best translated as "should," as the GOJ suggests, rather than "shall," as urged by the USG. Normally, the language of requirement, command or obligation in Japanese law is *shinakeraba naranai* or some variation of that grammatical form, which would be translated as "shall." When urging or recommending, the form *...mono to suru* is more commonly used. Since this form is used in this sentence, the GOJ translation of "should" is preferable	With respect to Section (2) the word "should" is not the literal translation. The appropriate translation here should be "The Fair Trade Commission, when requested notifies the said prefectural governor
Article 9-4	34. *Ikko:* For consistency's sake, I recommend "Clause (1)," as the GOJ suggests, rather than "Subsection (1)," as the USG translates it. See # 15, supra.	Article 9-4: The suggestions of the Government of Japan are correct with the following exception.
	35. *Zenjyo:* I recommend this be translated as "the preceding Article," as the GOJ suggests, rather than "the preceding Section," as urged by USG. See # 15, supra.	

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16 (contd)	36. *Togai Jigyosha:* The word *togai* is generally translated as "the said" or "the relevant." Use of the word "concerned," as urged by the GOJ is close enough.	
	37. *Sono mono to sono jigyo ni kanshite kankei no aru jigyosha:* The GOJ urges first that the word "other" be used, instead of "related," as the USG suggests. In point of fact, the Japanese version does not use words that directly correspond to either "other" or "related." At the same time, it is clear that the entrepreneurs about which the law is speaking are not the "concerned" or "said" entrepreneur, but rather the other entrepreneurs who have a relationship with the said entrepreneur or business. Thus, insertion of the word "other" seems appropriate, and, in all events, a better word to use than the word "related," which is used by the USG. Accordingly, I recommend use of the word "other" before entrepreneurs, as suggested by the GOJ.	Delete the phrase "related entrepreneurs" from line 8 and insert "of entrepreneurs having relations with such entrepreneurs."
	38. *Sono mono to sono jigyo ni kanshite kankei no aru jigyosha*: The GOJ has urged inclusion of the phrase "who have business relationship with him" after "entrepreneurs," while the USG has left that phrase out. Though this is a slightly awkward (and not entirely complete translation of the phrase), the USG has nevertheless used precisely this translation to translate exactly the same phrase earlier in the sentence. Thus, the GOJ suggestion that it also be included here, where the Japanese text is identical, is entirely appropriate and should be accepted.	
	39. *Zenko:* For reasons discussed in # 15, supra, I recommend the GOJ translation of "Clause," rather than the USG translation of "Subsection."	
	40. *Daiikko:* For reasons discussed in # 15, supra, I recommend the GOJ translation of "Clause," rather than the USG translation of "Subsection."	
Article 10	42. *Jigyosha*: Please see discussion relating to # 3, supra.	Article 10: Changes suggested by the Government of Japan are correct with the following exceptions:

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16 (contd)	43. *Zenko:* For the reasons discussed in # 15, supra, I recommend adoption of the GOJ translation of "the preceding Clause," rather than the USG translation of "the preceding Section."	
	44. *Kakugo:* For the reasons discussed in # 15, supra, I recommend adoption of the GOJ translation of "each of the following sections," rather than the USG translation of "each of the following paragraphs."	
	45. *Zenko:* Please see # 42, supra.	
	46. *Jigyosha:* Please see discussion regarding # 3, supra.	
	47. *Daiikko:* For the reasons discussed in # 15, supra, I recommend adoption of the GOJ translation of "under Clause (1)," rather than the USG translation of "under Subsection (1)."	
	48. *Zenko:* For the reasons discussed in # 15, supra, I recommend adoption of the GOJ translation of "the preceding Clause," rather than the USG translation of "the preceding Subsection."	
	49. The phrase crossed out by the GOJ -- "In this case, the provisions of Section 6(2) (summary hearing for cease and desist orders) shall apply mutatis mutandis." -- is not found in the original text of the law provided.	
Article 10-5	50. *Kokuhatsu:* The word *kokuhatsu* is variously translated in the dictionary as "prosecution," as the USG urges, and as "accusation," as the GOJ suggests, as well as "indictment," "charge," and even "complaint." In this particular context, however, I believe the word "accusation" best captures the meaning. In Article 73 of the Anti-monopoly law, the FTC is required, upon the finding of evidence of a violation of that law, to go to the Prosecutor General and perform a *kokuhatsu.* In this context, the FTC does not have actual prosecutorial power, but rather that is vested in the procuracy. Accordingly, what the FTC is doing is making a "report" or filing a "complaint" of a violation of the law. Thus, the word "accusation" is probably more accurate than "prosecution," which implies an action directly against the alleged malefactor.	1. Article 10, Clause (5). With respect to the reference after Article 73 "(prosecution)", Article 73 both refers to an accusation by the FTC and, in clause 2, a prosecution by the public prosecutor. Therefore, both the words "prosecution" and "accusation" could be inserted.
	51. *Daiikko:* For reasons discussed in # 15, supra, I suggest the GOJ translation of "Clause (1)," rather than the USG translation of "Section (1)."	
	52. *Jigyosha:* Please see discussion of # 3, supra.	
Article 10-6	53. *Daiikko:* For reasons discussed in # 15, supra, I suggest the GOJ translation of "Clause (1)," rather than the USG translation of "Section (1)."	Article 10, Clause (6).

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16 (contd)	54. *Inai ni:* Use of the word "within," as the GOJ suggests, rather than "in," as translated by the USG, probably conveys the meaning slightly more accurately.	Article 10, Clause (6) Neither translation is precise. Delete the words between "in" on line 3 and "issued" on line 5. Insert "within thirty days from the day of a notification under the provisions of Clause (4).
	55. *Ga atta hi kara:* The GOJ insertion of the phrase "has been made" adds clarity and is entirely consistent with the Japanese. It is appropriate and to be preferred.	
	56. *Daiyonko:* For reasons discussed in # 15, supra, I suggest the GOJ translation of "Clause (4)," rather than the USG translation of "Subsection (4)."	
	57. *Shinpan Tetsuzuki wo hete, Shinketsu wo motte:* In this context, the GOJ translation -- "by a decision after taking" -- is to be preferred to the USG translation of "through." (However, one might prefer the word "conducting," as opposed to "taking.")	
Article 11	58. *Daihachijo daiikko no kitei ni yoru seikyu mata wa zenko dairokko no moshitate wo suru koto ga dekiru jiko ni kansuru utae:* In this context, the phrase "*...ni kansuru utae"* is correctly translated as "a lawsuit relating to" or "a lawsuit regarding...," as the GOJ suggests. Moreover, as the GOJ suggests, this phrase modifies the request, etc., so it is a lawsuit only that may be brought to challenge the decision. Moreover, as the GOJ also suggests, at the end of the sentence, the better translation is "may only be brought against the decision," rather than the USG translation of "may be brought if not against the decision."	Article 11: Clause (2) The phrase "A lawsuit relating to" should be inserted. Again, "adjudgment procedures" should be "adjudicative procedures" not "hearing procedures." The word "only" should be inserted.
	59. The GOJ translation of "under Clause" is preferred over the USG translation of "in accordingly with Section."	The change from "in accordance with" to "under" does not appear material.
Article 12	60. In Article 12 (2), the GOJ translation is technically more accurate and I recommend it in all respects.	Article 12: Changes suggested by the Government of Japan are correct with the exception that "individual" should be "person."
17	In this context, *kamera-rui* is probably most correctly translated as "kinds of cameras" or "types of cameras." It might also be translated as "classification category of cameras," which, I think, relatively closely approximates the translation contained in the GOJ Submission, namely, "camera category."	The better explanation is Japan's translation.

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17 (contd)	As a general matter, when the suffix *-rui* is attached after a word in Japanese, it generally means "kind" or "class" or, in the scientific sense, "species" or "genus." Thus, in science, when the suffix *-rui* is attached to some type of animal or insect, such as a frog or spider, it generally means the genus of frog or the genus of spider. It would not generally include things "related" to the frog or the spider, but rather only different kinds, types or "genus" of spiders.	
	In other situations, the word *rui* generally means "of this kind" or "of this type." Thus, if you were referring to records, the use of the word *rui* or the suffix *-rui* would generally mean records "of this type" or "of this kind." In customs classifications as well, the Japanese suffix *-rui* generally means types or kinds of that particular product, not things related to that product.	
18	I believe the most accurate translation of the disputed sentence is: "... the majority opinion was that it is impossible to persuade members [of Zenren] whose main line of business is developing and printing [to contribute] if [the code] only [applies to] hardware." The GOJ is correct that the author is reporting what a "majority" of the people were expressing as their opinion. (That is the part of the sentence in Japanese that reads as follows: *to itta iken ga tasu atta*.) On the other hand, the critical phrase is *Haado dake dewa*, which, in the context of the paragraph and the sentence itself is better translated as "if," rather than "since," "[the code] only [applies to] hardware." In particular, the earlier sentences indicate that executives "first" understood that the code would also include photosensitive materials and developing and printing and that with that understanding, they were able to persuade members of Zenren to contribute. The next sentence, as I have translated it above, then logically follows. Indeed, the translation suggested by the GOJ would not logically follow. Within the sentence itself, moreover, the construction *dewa* suggests "if," rather than "since." *Dewa* can sometimes mean "since," but its much more common usage is "if."	My interpretation of the relevant text is as follows: The business association, whose members are from the camera, film and development printing business, is responsible for its Fair Competition Code. Since the Code applies only to hardware, debate arose in a meeting of this business association with respect to contributions made by members whose main line of business is photosensitized materials or development printing. The meeting concluded by confirming that the scope of the Code in the future should expand to photosensitized materials and development printing.
19	1. "naturally": The literal translation would not include the word, "naturally".	I believe the following translation to be accurate. "The second illusion is one which has arisen from the expectation that photosensitized materials and development printing are also included in the camera category under the Code. Judging from the simple fact that the title of the Code itself - "Fair Competition Code Regarding Representations in the Camera Category Retailers 'Industry" - clearly reads the "Camera Category Retailers," one should understand whether or not photosensitized materials and development printing are to be included.

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19 (contd)	2. "Even though": The literal translation would not include "even though". Nor does *judging from the simple fact that* seem the best translation. Rather, the more accurate translation is: "Even if you only look at...."	Saying that "[This is because] camera shops always handle photosensitized materials and development printing as well" is just quibbling among retailers. Legally, such an interpretation should not be allowed. "Nevertheless, Mr. Eiji Hashimoto, Vice Chairman of the Board, has stirred up expectation by saying that this Code naturally includes photosensitized materials and development printing."
	3. "Category" or "and related products": As I have analyzed before, "kamera-rui" refers to "kinds of cameras," or "types of cameras." Even further support for this proposition is found in the fact that if the USG translation, "and related products" is used, much of the discussion of the second illusion in this editorial loses its meaning.	It is strange that the standing board members of Zenren blamed him for such a statement. After all, the Code had already been in working draft since two or more years ago. From an early stage they had prepared the original draft, including the title, and carried out an investigation concerning the details. It is true that Vice Chairman, Mr. Hashimoto, repeated statements to the general members "that both photosensitized materials and development printing are naturally included."
	4. "it should be self-evident whether or not" or "alone, there seem to be the implication that": I believe a more accurate translation is: "it seems one should be able to tell whether or not". This translation, while not precisely that urged by the GOJ, is probably closer to the GOJ's translation than that of the USG. The latter translation, that of the USG, suggests that the passage is implying that photosensitized materials and development printing would be included, yet, in the original text, it does not talk about whether the inclusion or exclusion is implied.	Wouldn't it be the job of the executives - namely, the standing board of Zenren - to strictly check in the process of preparation of the Code whether or not these two areas can be included as assumed?
	5. "Can" or "might": In this case, "can" would be the literal translation of the text, "sare eruka douka."	Organizationally, Zenren and the Fair Trade Promotion Council (FTPC, previously known as Suishinkyo, but currently as Kotorikyo) has involved other Zenren executives in addition to the Vice Chairman Hashimoto. Moreover, with Zenren Chairman, Kimura's proud claims, "this is a Code which we retailers created," it would indeed be strange if Zenren executives (standing board), which neglected even to check whether or not photosensitized materials and development printing are included, were to blame Vice Chairman Hashimoto alone."
	6. "This is because": I suggest that this phrase suggested by the USG be omitted although it really does not seem to affect the content of the sentence. "This is because" seems to suggest that the quote is referring back to the material previously discussed by the author of the editorial. Since there are ellipses at the end of quote, it is unclear what the retailers are referring to.	

Item No.	Michael Young	Zentaro Kitagawa
19 (contd)	7. "Camera" or "camera": Should the quote begin with "camera", then the word should be capitalized. If not, the word should be in lower case.	
	8. "always" or "must": The literal translation of "kanarazu" is in question. The dictionary translation is "certainly", "surely" or "always". Thus, I suggest the translation, "always". "Must" can also mean "is required to" and can connote different nuances not existing in the original text.	
	9. "just" or "goes the argument, and this leads to some": I prefer the GOJ translation of "just." The original text does not mention that "this leads to some", but rather seems only to refer to the fact that it is "just quibbling among retailers."	
	10. "In spite of that, Mr. Eiji Hashimoto, Vice Chairman of the Board, has stirred up expectation by saying that this code naturally includes photosensitized materials and developing printing." or "Nevertheless, Deputy Director Eiji Hashimoto, has stirred up expectations by his comment, 'Naturally, the code should include photosensitized materials and development printing.'"	
	Issue 1: "In spite of that" or "nevertheless": "nimo kakawarazu" can be translated either way.	
	Issue 2: "Vice Chairman of the Board" or "Deputy Director": Vice Chairman is probably slightly more literal. *Riji* is often translated as Board and Mr. Hashimoto is second in command of the *Riji*. Accordingly, Vice Chairman of the Board is perfectly adequate.	
	Issue 3: "expectation" or "expectations": I believe the USG translation of "expectations" is the more appropriate translation because the retailers may have more than one expectation.	
	Issue 3: "Naturally": In this case, "naturally" directly modifies "includes".	
	Issue 4: "Includes" or "should include": "Includes" is probably the better translation because the original Japanese text says, "fukumeta."	
	Issue 5: Should Mr. Hashimoto's statements be in quotes or not? The original text uses quotation marks when he speaks, so I would set off his remarks in quotation marks, as the USG has done.	
	Therefore, I consider the following the most appropriate translation on the disputed points: "In spite of that (or Nevertheless), Mr. Eiji Hashimoto, Vice Chairman of the Board, has stirred up expectations by saying, "The code naturally includes photosensitized materials and developing printing.""	
	Please note, by the way, Mr. Hashimoto seems to be making an assertion, rather than asking a question, so a period, rather than a question mark, seems most appropriate.	

Item No.	Michael Young	Zentaro Kitagawa
19 (contd)	11. "such criticism" or "the tragedy of this statement itself": The GOJ and the USG have translated the phrase *~ to iu hinan ga* in different ways. The dictionary translation of *hinan* includes "criticism" or "blame." In this case, the GOJ has asserted that *to iu* means "such." I believe this is accurate since *to iu* refers directly to the previous clause in quotations. Accordingly, "such criticism" is an acceptable translation.	
	12. "this" or "that fact": The dictionary translation of *kore*, the word in dispute, is "this" or "this one," so I suggest that the GOJ's translation -- "this" -- be used in this instance.	
	13. "Vice Chairman" or "Deputy Director": For the reasons discussed in No. (10), issue 2, I would use "Vice Chairman."	
	14. "statements suggest that" or "this query": The issue is how to translated *kano hatsugen*. *Hatsugen* is usually translated in the dictionary as "utterance," speaking," speech," or "observation." Since Mr. Hashimoto seems to be making a statement, at least in his original quotation, rather than asking a question, the word "query" does not seem entirely apt. At the same time, the particular grammatical structure used in this case can suggest that "questions like" or something to that effect. Accordingly, it could be "query". I believe the preferable translation is "statement," however, as long as it is understood that *hatsugen* refers to Mr. Hashimoto's earlier comments.	
	Furthermore, while *kano* can be translated as "questions like," as discussed above, in light of the nature of Mr. Hashimoto's first declaration, I think "statement" is the best translation and therefore the word *kano* would imply in this case that Mr. Hashimoto is "suggesting" the statements in question. Therefore, "statements suggest that" seems an appropriate translation.	
	15. "Shouldn't both ...naturally be included?" or "Both ...are included.": As mentioned earlier, Mr. Hashimoto's remarks appear to be affirmative statements, at least when originally made, and thus considering this a statement, rather than a question, seems most appropriate. In that case, the text would not begin with "Shouldn't" and would not end with a question mark. As also discussed above, however, given the grammatically form used, it could certainly be otherwise and one cannot categorically state that "Shouldn't" and the question mark are incorrect. The second question is whether "naturally" is in the sentence. The word in question is *touzen* and is generally translated as "justly," "properly," or "naturally." Accordingly, the word "naturally" should be included as the USG suggests, and, I believe, the best translation is: "Both ...naturally are included."	
	16. "ultimately": The issue in this case appears to be the best meaning of the word *hatashite*. USG has translated it as "ultimately," while the GOJ appears to have left it out altogether. The word does have meaning and content. Accordingly, I would include it in the sentence. At the same time, I do not think "ultimately" is the best translation. *Hatashite* is often translated as "After all" or "As a matter of fact," or "In reality." I think any of those translations would be appropriate, especially the first two, rather than "ultimately."	

Item No.	Michael Young	Zentaro Kitagawa
19 (contd)	17. "in the process of the preparation of the codes": The issue is how to translate *sono katei de*. The USG does not seem to translate this phrase. *Katei de* should be translated as "in the process of ~." It is more difficult to determine the precise matter to which *sono* is referring. The context surrounding this phrase refers to the preparation of the codes, especially the eight sentence in the relevant paragraph (Provisional translation, English). Accordingly, it seems that *sono* refers to the "preparation of the codes," as the GOJ as asserted.	
	18. "are" or "can be": The relevant Japanese text is *dekiruka douka*, which usually connotes a meaning of possibility. Accordingly, I believe the USG translation of "can be" is more correct in this instance.	
	19. "which has been working on the formulation of the codes" or "which is advocating the codes": It is very difficult to follow the precise disagreement the GOJ has with the USG on this point. I see two points of major disagreement. First, the GOJ seems to have left out the phrase that refers to the two organizations as being "completely separate entities." If that omission is intentional, then the USG translation is clearly correct. The text specifically states that these two entities are "completely" "separate." The main point, however, seems to be the translation of *kiyakuka wo susumete kita*. By itself, this phrase is probably susceptible to either of the proffered translations. As a general matter, I believe the most comfortable translation of *susumete kita* is "has proceeded with". This is in large part because the previous text (eighth sentence of the relevant paragraph of the Provisional translation of the USG) refers to the process of the formulation of the code. Thus, I would suggest the following translation: "which has proceeded with the formulation of the codes". If the GOJ has other disagreements with the USG's translation, it must make those much clearer than it has in its current Submission before I can offer any opinion.	
	20. "has involved" or "involves": The relevant Japanese text reads *kakawatte kita*, a very in the perfect tense. Thus, the GOJ translation is more accurate in this case.	
	21. "executive" or "members": The word in question, *yakuin*, generally refers to someone in a position of authority or responsibility. Thus, the term "executive" or "official" is probably a more accurate translation.	
	22. "Vice Chairman" or "Deputy Director": Please refer to No. (10), issue 2.	
	23. "Chairman" or "Director": For the same reasons I am inclined to use the word "Vice Chairman," when referring to Mr. Hashimoto, I would use the word "Chairman" here, though the difference is not particularly great.	
	24. "blame" or "rely only upon": The Japanese verb, *semeru* can be properly translated as "blame." It is usually used in a negative context and generally does not mean to "rely upon," as suggested by the USG. The correct translation is "blame."	

Item No.	Michael Young	Zentaro Kitagawa
20	The word *teki-hatsu*, as used in the instant context, is not a term of art in legal parlance. In dictionaries, it is most commonly translated as “exposure” or “disclosure,” though sometimes it is also translated as “prosecution.” In casual conversations, it is commonly used in the context of “exposing” the truth, “revealing” some crime or otherwise “laying bare” the facts. At the same time, it is sometimes used, in a casual sense, to refer to a prosecution or, more broadly, especially when attached to the word *ihan* [”illegality”], to the entire process of addressing a crime or an illegal act, covering everything from exposure of the crime or act to arrest to prosecution and sometimes even punishment.	Neither "enforcement action" nor "discovery" seem entirely appropriate. I would translate "teki-hatsu" as "condemn or condemnation".
	Thus, given that this statement was apparently made in the context of a presentation by a JFTC official to a non-legal specialists audience, it is certainly possible that the audience would understand (and perhaps the official even meant) the entire range of enforcement activities of the JFTC were now being relegated to the Council.	
	At the same time, it is possible that the official had a somewhat narrower meaning in mind, a meaning more in accord with the practices of the JFTC and extra-legal enforcement activities and mechanisms sometimes used by the JFTC. In this context, the term begins to take on a somewhat more specific meaning. But, that meaning is not precisely in accord with the usage urged by either the USG or the GOJ.	
	The GOJ urges use of the word “discovery” as the correct translation. In a casual sense, that is not necessarily an inaccurate translation of the word, when the word has its meaning of exposure or disclosure. Revealing or exposing the facts is a form of “discovery” in the broad, non-legalistic sense. At the same time, the term “discovery” in English is generally used in a somewhat more legalistic sense. In this more legalistic sense, it generally means a relatively formal process whereby one party to a legal proceeding is able to secure from the other party information relevant to the lawsuit or action filed or defended by the first party. When contemplating “discovery,” one generally thinks of a somewhat orderly, legalistic process whereby a party is forced to disgorge a certain amount of information in the context of legal proceedings, but under various protective legal colourings. While the word *teki-hatsu* is certainly associated with exposure or disclosure, it generally does not mean disclosure in the technical legal sense described immediately above.	

Item No.	Michael Young	Zentaro Kitagawa
20 (contd)	The USG suggests "enforcement action" as the appropriate translation. Again, that might be relatively close to what the JFTC official was suggesting. At the same time, that usage of the word also needs to be qualified. The JFTC has formal legal enforcement powers and can bring a formal legal action against an allegedly offending party. In these actions, the JFTC might seek various remedies, including orders to refrain from taking the offending action, to pay a fine, or to take other remedial actions. In extreme cases, the JFTC may even seek to impose criminal liability. As a general rule, these more formal legal proceedings are not called *teki-hatsu* and thus use of the word "enforcement action" to cover *teki-hatsu* may not be the most appropriate translation. Moreover, it is not at all clear that the JFTC can commit to a non-governmental entity (or, most probably, even to another government entity) the formal legal enforcement powers that have been relegated to it by statute. Thus, the official was probably not suggesting that this private organization -- however much the government did or did not participate in its creation -- should (or even could) be given the formal statutorily mandated enforcement powers of the JFTC.	
	Nevertheless, there is some validity to the USG attempt to translate *teki-hatsu* as "enforcement action" in part because of the broad, general usage of this word described above, but, in much more important part, because, on occasion, the JFTC uses the threat or the reality of exposure to encourage allegedly offending parties to alter their behaviour to comply with the various competition policy laws and regulations. This form of public exposure or public disclosure is used on some occasions by the JFTC and often with relatively good effect. This kind of public disclosure or exposure is often called *teki-hatsu*, at least in common conversation, and, while not a formal legal enforcement action, it is often a substitute for just such an action and done with precisely the same intent, namely, to force, through embarrassment and public pressure, an allegedly offending party to change its behaviour in a way that will bring it in compliance with Japanese competition laws, regulations and policies.	
	While there is certainly some ambiguity in the statement of the JFTC official quoted in the article, it appears that the activities he anticipates the relevant association to undertake are, at a minimum, the bringing of such activities to the attention of the JFTC and, more likely, public disclosure or exposure of the activities of non-complying companies. I believe this most accurately captures the meaning of what this JFTC official probably meant when he used the term *teki-hatsu*.	
21	The two principal issues in dispute between the GOJ and the USG on this particular point appears to be: (1) whether it is the warning that is "more severe," as the USG translation suggests, or whether it is the step of issuing the written warning that is " more strict," as the GOJ translation would have it; and, (2) whether the best word to describe the warning or the step of issuing the warning is "severe," as the USG has translated it, or "strict," as the GOJ has suggested in its translation.	I would translate this text as: "a more serious step of issuing written warning."
	Turning to the first issue, the most appropriate translation is "more severely [or more strictly] warn by means of a written warning." The form in the sentence is clearly the adverbial form and thus "more strictly" or "more severely" clearly modifies the action of issuing the warning.	

Item No.	Michael Young	Zentaro Kitagawa
21 (contd)	Regarding the second issue, in major dictionaries the word in question -- *kibishii* -- is variously translated as "severe," "strict," "stern," "rigorous," "hard," "harsh," "stringent," etc. In regard to a penalty, sometimes the word "Draconian" is also used. There is really no way to know whether the author, had he been perfectly fluent in English, would have used "severe" or "strict." It is probably sufficient to note that the word has a connotation of being much more harsh, stringent or rigorous. Whether "strict" or "severe" is the precisely proper analogue, no one has any way of knowing or saying with any certainty.	
22	Let me first address three points that I believe are somewhat less important in this context and perhaps not even seriously at issue in regard to this particular phrase. First, the USG uses the phrase "dumping," while the GOJ uses the phrase "unjustifiable low prices." While that particular Japanese word can appropriately be translated as "unjustifiable low prices," as the GOJ does, it is also fair to say that the description in the article of the activities covered by the word certainly seems to be what we generally consider "dumping" in U.S. parlance. In all events, whether one calls it "dumping" or "unjustifiable low prices," the point is essentially the same. This word describes that set of pricing activities that the JFTC considers illegitimate and thus appropriate targets of regulatory activity. Either word can be used as long as one understands it to mean the illegitimate pricing activities described earlier in the article.	The sentence at issue is much more vague in the original Japanese language than the U.S. translation would seem to indicate. On the other hand, the translation by the Government of Japan is not easily understandable. The misunderstanding here arises from the fact that the meaning of the original Japanese language sentence itself is vague. It is necessary to construe what the author intends should be done from the text and the context at hand. My comments are as follows.
	Second, the USG uses the word "loss-leader advertising," while the GOJ describes such advertising with the word "bait advertising." Again, there is not much to choose between these two translation. Nevertheless, perhaps the USG translation is to be slightly preferred for the following reason. In considering the English translation of this term, it is important to recall that the JFTC official did indicate that all such advertising was automatically inappropriate. Rather, such advertising may be appropriate when quantities of the loss-leader item are unlimited; or when amounts are limited and the advertisement clearly so specifies; or when customers can purchase only limited amounts of the item and the advertisement clearly indicates that limit. These are very rough examples and may require much more qualification in practice, but the main point is relatively simple: some advertising of this type may not be a problem from the perspective of preventing anti-competitive practices. To the extent the term "bait advertising" carries the connotation in English that such advertising is always unacceptable, then in this particular case it might be slightly misleading. The USG translation of "loss-leader advertising" is more useful because it does not inevitably carry a connotation of complete unacceptability of the advertising practice in question.	First, it does not appear, as the U.S. First Submission indicates, that the author could have intended to say that "rules" should be developed. According to the article there are three options: (1) rules; (2) operational standards to be used by the JFTC in executing rules; and (3) business practices with respect to fair competition. It is my understanding that the author refers to business practices rather than rules. This interpretation is supported by the fact that rules already exist with respect to such practices. The author appears to take the opinion that the JFTC should pile-up experience in actually confronting instances of unjustifiable low prices and loss leader advertising. The original text does not explain what this actually means in concrete terms but appears to intend that the JFTC should deal with concrete cases based upon experience in a step-by-step approach.
	Third, the USG starts the phrase with "Nevertheless," while the GOJ uses the term "Also." I would be inclined to start the sentence with "Also," rather than "Nevertheless," because the sentence does not convey a negative or disjunctive meaning, as the word "Nevertheless" may convey. Moreover, "nevertheless" is usually translated as *nimokakawarazu*, and has a connotation of "nevertheless" or "notwithstanding," while the Japanese words used in this sentence convey the sense of "Also" or "and."	Second, the U.S. Submission indicates "dumping and loss-leader advertising" and Japan's Submission translates this as "unjustifiable low prices and bait advertising." These items belong to the category of "unfair business practices" found in Chapter 1, Article 2, Section 9 and which are designated as such by the JFTC in its General Designations

Item No.	Michael Young	Zentaro Kitagawa
22 (contd)	The much more critical question raised by the GOJ, of course, involves whether the phrase in question specifically mentions "rules" or not. As a matter of precise language, the GOJ translation of the sentence in question is undoubtedly more accurate and the GOJ is quite correct that the phrase in question nowhere uses the word "rules."	As a matter of substantive law, concepts known in the U.S. as "dumping and loss-leader advertising" do not necessarily overlap with the concepts of "unjustifiable low prices and bait advertising" as prescribed under Japanese law.
	At the same time, the GOJ says that it is "not clear even from the context" what should be piled up. On that point, I think the context of the paragraph and the articles provides more guidance than the GOJ suggests. The sixth and seventh full paragraphs of the article (USG translation) make clear that one must think about the nature, purpose and effect of sales below cost to determine whether they are unjustifiable, whether they undermine the competitive order by generating excessive competition and whether they should be "subject to regulation." In fact, in the seventh paragraph, the author explicitly states: "The question is what will be determined as being dumping." In the eighth paragraph, the author also states:	
	"The question is how the standards for using [the Premiums Law] will turn out." In the sentence immediately preceding that one, moreover, the author notes that: "...the establishment of standards to use [the Premiums Law] must be installed as quickly as possible." All of these indicate that the principal inquiry is the precise content of these various terms, or, in other words, the precise content of the rules or standards that will govern this behaviour.	
	The last sentence of the eight paragraph (the paragraph immediately preceding paragraph the question) also makes clear the necessity of developing the standards for use of the Premiums Law to address "loss-leader advertising." The first sentence of paragraph nine then says that sales practices and competition must be based on rules. The next sentence then mentions one set of standards or regulations for "normalizing transactions," namely, those of the photo industry itself.	
	We then come to the sentence in question in which the JFTC official says that it is of vital importance or imperative to build up one by one something regarding "unjustifiable low prices" and "loss-leader advertising." It takes very little imagination in this context to understand that he is referring to the development of standards or examples of what kinds of prices are "unjustifiably low" and what kinds of "loss-leader advertising" is inappropriate. The sentence is admittedly not a model of clarity, but it is very easy to infer that some sorts of examples or standards regarding the practices under discussion need to be developed one by one.	

II. Translation Problems pointed out in:
"Written Responses to the Initial Questions by the Panel to Japan (17 April 1997)" and "Written Responses to Additional Questions By the Panel to Japan (18 April 1997)"

Item No.	Michael Young	Zentaro Kitagawa
23	P. 6, Fn 1: re: *Jishu-kisei* The issue is whether to translate *jishu-kisei* as "self-regulating measures" as the USG asserts, or whether "self-regulation" is more appropriate as the GOJ states. Speaking generally, *jishu-kisei* can be translated either way. "Self-regulation" may be more appropriate when the surrounding context is referring to self-regulation as a "concept," whereas, the translation, "self-regulating measures" may be the better choice when the context seems to talk about "specific measures" of self-regulation.	[ITEM 1] The better answer is Japan's translation.
24(1)	The principal issues between the USG and the GOJ are the following: (1) The object of what has been recognized: whether it is *recognized* that the Codes have been observed and established as normal business practices, as the GOJ asserts, or whether it is *recognized* as having been established in accordance with normal business practices, as the USG urges; and, (2) Whether the phrase, *baai ni wa* is more accurately translated as "but as long as" as the USG claims, or as "but when" as the GOJ suggests; and, (3) Whether the phrase, *toshite* is more accurately translated as "in accordance with" as the USG claims or as "as" as the GOJ suggests. In all three cases, while alternate translations are also possible, if forced to choose between the USG and GOJ translation, the GOJ translation is generally technically more accurate.	

Item No.	Michael Young	Zentaro Kitagawa
24(1) (contd)	(1) As to the first issue, the USG has asserted that, *kiyaku no naiyo ga junshu sare* (the first phrase in the original Japanese text) stands independently, and that the word "recognized" only modifies what has been "established". The GOJ, on the other hand, argues that both "observed" and "established" are modified by the word, "recognized," and thus the phrase in question should read: "it is recognized that the Codes have been observed and established as normal business practices." In other words, the GOJ views "recognized" as having a distributive function so that it carries over to both phrases (e.g., "observed" and "established") seen in the original Japanese text. In this regard, I believe the GOJ is correct. The context of this sentence is a discussion of direct regulation by the JFTC of those who do not participate in the Codes, so-called "Outsiders." In particular, the disputed phrase explains when the JFTC will use the Code as a guide or reference point regarding application of the law. Thus, naturally read, the "but" clause refers to conditions that must prevail for the JFTC to use the Code as a reference point when applying the law. Therefore, it is when the JFTC recognizes that both the Codes have been both observed and established as normal business practices that "the JFTC uses the Fair Competition Codes as reference when it applies the law."	(1) The correct translation should be "but as long as the Codes are observed and recognized as having been established as normal business practices".
	(2) Regarding the second point, I believe that the correct translation is "but when," as the GOJ asserts, or, in the alternative, "but in case(s) where ~." The USG translation, "but as long as" is not incorrect if the context of the sentence seems to emphasize those parts of the sentence that follow the disputed phrase. However, even in this context, usually, "but as long as" would be the direct translation for *ni kagiri*; and, in the circumstance of the instant case, "but when" or "but in the case(s) where ~" seems to be the better choice.	
	(3) Lastly, *toshite* usually is translated as "as," "for," "by way of," or "in the capacity of." The USG translation, "in accordance with" is more commonly translated from the phrase, *~ni icchi shite* or *no touri ni*. In this case, it seems appropriate to use the GOJ translation of "as."	
24(2)	In this case, the key issue seems to be how to translate *~koto ni yotte*. The original Japanese text seems to use *~koto ni yotte* to mean "if" or "by." The USG translates this as "by virtue of the fact that" or more like "because". This seemingly suggests that the Code has already been established as normal practice in the photographic industry and that the Code has been strictly obeyed (or observed). However, from the surrounding text, it appears that the Code has not yet been obeyed (or observed) or established, and that it is defining a new or somewhat different standard of conduct for the industry.	(2) This is a question of to whom this Code should apply. I would translate this sentence as follows: "If this Code is observed and is established as the normal business practices of the photo industry, then the JFTC will refer to this Code in applying the Premiums Law to outsiders.

Item No.	Michael Young	Zentaro Kitagawa
24(2) (contd)	At the same time, even the GOJ translation does not make entirely clear that it is through the process of strict observance and establishment that the Code develops the characteristics that result in the JFTC's using the Code as a reference point when applying the Premiums Law to outsiders. As long as one understands this point, however, then the GOJ translation is adequate and probably slightly closer to the mark than the USG translation. That is, the GOJ uses the word "by," and as long as one understands that use of that word in this context implies that "observing" and "establishing" are two conditions which need to be met before the JFTC applies the Premiums Law to outsiders, then use of the word "by" is acceptable.	
	Another small issue is whether *kore ga junshu sare* should be translated as "to be strictly obeyed," as the USG has asserted, or as "being strictly observed" as the GOJ has claimed. First, the dictionary translation of "junshu" is "obeyed", "observed", or "followed." It does not make much difference which word one uses here, but I may support "observed" here for consistency reasons. (We had translated "junshu" as "observed" in Part 1 of this question.)	
	Second, on the more critical issue, I believe that *kore ga junshu sare* should be seen as an independent phrase here, as the GOJ has interpreted it. The USG asserts that the "Code has been established...to be strictly obeyed." This shows a causal relationship between "established" and "obeyed". However, I believe that the more appropriate relationship of the two verbs are that of conjunction, and the GOJ translation, "by being strictly observed and established as the normal practices of the photographic industry" adequately expresses these two conditions. This is consistent with the discussion of the dispute phrase in Part 1 of this particular Item, discussed above.	
	For the latter half of the sentence, I believe that the USG translation is more accurate because the USG identifies "who" is using the Code as reference, whereas, in the GOJ translation, the subject becomes clouded. I believe the precise language of the sentence and the context in which it sits allows a fairly clearly identification of the subject. The USG translation more accurately reflects this aspect of the sentence.	
	Thus, the best translation here would be: "The Code, by being strictly observed and established as the normal practices of the photographic industry, will be used as reference by the JFTC when it applies the Premiums Law to outsiders."	