

## 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.<sup>1</sup> 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.<sup>2</sup>

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 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

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<sup>1</sup>Large Stores Law, Law No. 109 of 1973, US Ex. 74-4 and Japan C-1.

<sup>2</sup>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.

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."<sup>3</sup> 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", and, to promote increased import competition, it called for relaxation of regulations affecting large-scale stores.<sup>5</sup> 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".<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.

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

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<sup>3</sup>Agreement and Memorandum between Tokyo Zenren, Branch Office No. 9 and Yodobashi Camera K.K., 31 January 1990, US Ex. 90-3.

<sup>4</sup>Research Related to Imports and Prices, Economic Planning Agency, 1989, p. 5, US Ex. 89-1.

<sup>5</sup>Ibid. p. 10.

<sup>6</sup>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.

<sup>7</sup>Research Related to Imports and Prices, Economic Planning Agency, 1989, p. 11, US Ex. 89-1.

<sup>8</sup>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.

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<sup>9</sup>, 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.<sup>10</sup> 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.<sup>11</sup>

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.

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<sup>9</sup>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).

<sup>10</sup>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.

<sup>11</sup>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.

5.242 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;<sup>12</sup> the second examined the relationship between store size and volume of film sold.<sup>13</sup> The results of the first analysis confirmed the US contention that larger stores are more likely to carry foreign film than smaller stores.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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 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."<sup>18</sup> The

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<sup>12</sup>Second Panel Meeting, US Opening Statement, Exhibit 8.

<sup>13</sup>Second Panel Meeting, US Opening Statement, Exhibit 9.

<sup>14</sup>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).

<sup>15</sup>Research on Domestic and Import Products Sold at Low Prices," JFTC, June 1995 p. 1, US Ex. 95-10.

<sup>16</sup>Research Related to Imports and Prices, Economic Planning Agency, 1989, US Ex. 89-1.

<sup>17</sup>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.

<sup>18</sup>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.

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 photospecialty 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."<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup>

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 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.

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<sup>19</sup>Ibid.

<sup>20</sup>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).

<sup>21</sup>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.

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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.

5.254 Japan submits that MITI conducted its own analysis and found the following:

**Percentage of Retail Outlets by Store Size  
Carrying Foreign Brands**

<u>Volume Sold</u>	<u>Under 500 m<sup>2</sup></u>	<u>Over 500 m<sup>2</sup></u>
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<sup>22</sup>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.

<sup>23</sup>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).

<sup>24</sup>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 (Ogataen Keikaku Soran 1996).

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<sup>25</sup>. 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.<sup>26</sup>

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<sup>25</sup>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.

<sup>26</sup>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.<sup>27</sup>

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 a distribution system where oligopolistic manufacturers lead". The survey also identifies the "growth of retail

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<sup>27</sup>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.

routes (especially regular chains and supermarkets) other than the photo retail route" and the "effects of full participation of Eastman Kodak" as future problems.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup>

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, thus

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<sup>28</sup>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.

<sup>29</sup>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.

<sup>30</sup>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.

stabilizing prices<sup>31</sup>. 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."<sup>32</sup>

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<sup>33</sup>, 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.<sup>34</sup> 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.<sup>35</sup>

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.

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<sup>31</sup>See The Antimonopoly Laws and Policies of Japan, H. Iyori and A. Uesugi, Federal Legal Publications, Inc., 1994 p. 293, US Ex. 94-1.

<sup>32</sup>Ibid., p. 107.

<sup>33</sup>Distribution for the 1970s, Ninth Interim Report, Industrial Structure Council Distribution Committee, July 1971, p. 64, US Ex. 71-9.

<sup>34</sup>Ibid., p. 68 (emphasis added).

<sup>35</sup>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).

This argument ignores the actual operation of the law and implies a focus on products that simply does 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".<sup>36</sup>

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)<sup>37</sup>, 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.<sup>38</sup>

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.<sup>39</sup>

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 in the vicinity, carry particular products, much less the origin of the products they carry.<sup>40</sup> Similarly, the four adjustment

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<sup>36</sup>Large Stores Law, Article 1, Japan Ex. C-1.

<sup>37</sup>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.

<sup>38</sup>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.

<sup>39</sup>See para. 5.243.

<sup>40</sup>The factors considered are the following:

(i)qualitative factors:

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.<sup>41</sup> After the local explanations, the appropriate authority must post a notice as to whether the store will be subject to "adjustment".<sup>42</sup> The retailer may not commence business until seven months after the date of this notice.<sup>43</sup>

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

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- (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.

<sup>41</sup>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).

<sup>42</sup>Large Stores Law, Article 3(2), US Ex. 74-4.

<sup>43</sup>Large Stores Law, Article 4.

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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> The Council must submit the results of its deliberations to the appropriate authority.<sup>47</sup>

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.<sup>48</sup> If the store does not follow the recommendation, MITI may order it to do so.<sup>49</sup>

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.<sup>50</sup> 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).<sup>51</sup>

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 8:00 p.m. The law only subjects them to the notification and adjustment procedures if they operate beyond these

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<sup>44</sup>Large Stores Law, Article 5.

<sup>45</sup>Large Stores Law, Article 7(1).

<sup>46</sup>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).

<sup>47</sup>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.

<sup>48</sup>Large Stores Law, Article 7(1).

<sup>49</sup>Large Stores Law, Article 8(1).

<sup>50</sup>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.

<sup>51</sup>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.

thresholds. Further, in practice, 12 percent of notified stores close after 10:00 p.m.<sup>52</sup> 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.<sup>53</sup>

### ***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<sup>54</sup>, and whatever the legal relevance of any such restrictions<sup>55</sup>, 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<sup>56</sup> to, *inter alia*, "secure business opportunities for small and medium merchants by adjusting the business activities of department stores".<sup>57</sup> 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<sup>58</sup>, 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".<sup>59</sup>

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 creating so-called

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<sup>52</sup>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.

<sup>53</sup>See Article 9-2 of the Large Stores Law, LSRSL Executive Regulations Article 10.4, Japan Ex. C-10.

<sup>54</sup>As discussed below, the Large Stores Law as currently administered does not restrict the opening of large stores. See Section VII.B.4. below.

<sup>55</sup>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.

<sup>56</sup>The Department Stores Law, Law No. 116, 23 May 1956, US Ex. 56-2 and Japan C-3.

<sup>57</sup>Article 1, Department Stores Law.

<sup>58</sup>Article 3, Department Stores Law. The threshold was 3,000 square meters in cities designated by ministerial ordinance.

<sup>59</sup>Article 5, Department Stores Law.

"pseudo-department stores".<sup>60</sup> MITI closed this loophole on June 7, 1968 by issuing a directive, which mandated that such entities obtain department store permits.<sup>61</sup> 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".<sup>62</sup> MITI issued a third Directive in October 1972<sup>63</sup>, which instructed large stores to respect local business "customs" and to not "disturb the order in the retail [market]" by using aggressive sales promotions.<sup>64</sup>

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.<sup>65</sup>

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".<sup>66</sup> 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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<sup>60</sup>Stores established "pseudo-department stores" by creating legal identities for separate sales floors that were below the Department Stores Law's floor space threshold.

<sup>61</sup>Directive No. 941, Guidance Considering Pseudo Department Stores, 7 June 1968, US Ex. 68-6.

<sup>62</sup>Directive 1759, Concerning the Construction and/or Expansion of Specified Stores, 28 September 1970, US Ex. 70-6.

<sup>63</sup>Directive No. 971, Concerning the Construction and/or Expansion of Specified Stores, October 1972, US Ex. 70-6.

<sup>64</sup>MITI History, Volume 13. US Ex. 78-2 and 78-5.

<sup>65</sup>Tenth Interim Report, p. 4, US Ex. 72-3.

<sup>66</sup>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<sup>67</sup> 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".<sup>68</sup>

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 more

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<sup>67</sup>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.

<sup>68</sup>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.

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.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup>

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.<sup>72</sup>

5.312 MITI Directive No. 365<sup>73</sup> created "prior adjustment" and "formal adjustment" processes. The prior adjustment process took place after the Article 3 Notification (store construction) and before the

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<sup>69</sup>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.

<sup>70</sup>Law No. 105 of 1978, US Ex. 78-1.

<sup>71</sup>The Status of Large Scale Retail Store Notification, Explanation of the Large Scale Retail Stores Law, p. 16-17, US Ex. 94-9.

<sup>72</sup>Enforcement Regulations, Article 8(2), MITI Ministerial Order No. 38, 11 May 1979, MITI History, Volume 13, p. 528, US Ex. 79-2.

<sup>73</sup>Directive No. 365, The Operation of the Commerce Adjustment Board, MITI History Volume 13, p. 528, US Ex. 79-2.

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.<sup>74</sup>

**(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<sup>75</sup>, 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.<sup>76</sup> 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.<sup>77</sup>

5.315 In Directive No. 36, MITI also mandated that the adjustment process "be carried out in a restrictive manner"<sup>78</sup>, 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.<sup>79</sup> From 1981 to 1982, almost every store that attempted to open was reportedly forced to exercise self restraint.<sup>80</sup>

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

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<sup>74</sup>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.

<sup>75</sup>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).

<sup>76</sup>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.

<sup>77</sup>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.

<sup>78</sup>Immediate Measures Regarding Notification to Establish Large Scale Retail Stores, Directive No. 36, 30 January 1982, US Ex. 82-2.

<sup>79</sup>Ibid.

<sup>80</sup>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.

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.<sup>81</sup> 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.<sup>82</sup>

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".<sup>83</sup> In 1992, MITI replaced the "prior explanation" process with a procedure for "local explanation".<sup>84</sup> 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.<sup>85</sup>

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 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.

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<sup>81</sup>Investigation Condition of Recent Major Notification (International Contract, Merger, etc.), Kosei Torihiki, No. 398, December 1983, US Ex. 83-23.

<sup>82</sup>Distribution Problems and Antimonopoly Law, Yamamoto Takeshi, pp. 263-264, US Ex. 96-6.

<sup>83</sup>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.

<sup>84</sup>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.

<sup>85</sup>Ministerial Order No. 33, 1 April 1994, US Ex. 94-6.

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.<sup>86</sup> The average length of time to complete the process is actually only 6 months.<sup>87</sup> Also in 1994, MITI issued a general exemption from the normal Large Stores Law process for stores under 1,000 square meters in size.<sup>88</sup> 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 store 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.<sup>89</sup> In addition, under the Large Stores Law, as indicated above, approximately 96 percent of notified plans are implemented<sup>90</sup>, while under the Department Store Law, only 84 percent of applications were permitted and implemented.<sup>91</sup> Thus, the Large Stores Law is more liberal than the Department Store Law was at the time of the Kennedy Round tariff concessions.

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

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<sup>86</sup>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.

<sup>87</sup>Figures compiled on a notification basis by MITI, Distribution Industry Division, Industrial Policy Bureau, for the fiscal year of 1995.

<sup>88</sup>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.

<sup>89</sup>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).

<sup>90</sup>Figures compiled on a notification basis by MITI, Industrial Policy Bureau, Distribution Industry Division.

<sup>91</sup>Hyakkatenhorei no Kaisetsu (Guidebook of Department Store Law), Commercial Division, MITI, 1956, p. 65, Japan C-9.

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.<sup>92</sup>

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.<sup>93</sup>

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.<sup>94</sup> The US submits individual examples to show the extent and burden of floor space reductions imposed on large scale retailers.<sup>95</sup> From such aggregated statistics and examples, there can be no question, according to the

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<sup>92</sup>Table of official statistics provided to the Government of the United States by the Government of Japan by a letter dated 10 December 1996.

<sup>93</sup>MCA Survey, p. 3, US Ex. 95-15.

<sup>94</sup>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.

<sup>95</sup>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.

-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.

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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup>

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:<sup>99</sup>

-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.<sup>100</sup>

-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.

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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.

<sup>96</sup>Figures compiled on a notification basis by MITI, Industrial Policy Bureau, Distribution Industry Division.

<sup>97</sup>Probabilities Standards, Section 1, para. 4, Japan Ex. C-7.

<sup>98</sup>Japan notes that only a subset of this small number (34 cases or 1.5 percent) received any adjustment after the process.

<sup>99</sup>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.

<sup>100</sup>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 *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*.<sup>101</sup> The average reduction percentage of all notifications will likely be much lower:<sup>102</sup>

Figure N

Average Rate of Retail Space Reduction  
for Large Scale Stores

	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>
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.<sup>103</sup> 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 than prohibiting them, merely requires that they "respect the intent" of the Large Stores Law.<sup>104</sup> In the view of

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<sup>101</sup>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.

<sup>102</sup>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.

<sup>103</sup>Data determined by MITI, Distribution Industry Division, Industrial Policy Bureau, based on Article 3 notifications.

<sup>104</sup>Large Stores Law, Article 15-5, US Ex. 74-4.

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.<sup>105</sup> 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".<sup>106</sup>

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".<sup>107</sup> The 1995 Survey by the Management and Coordination Agency made similar findings.<sup>108</sup>

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".<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> Japan also argues that the surveys cited by the US are not representative of current conditions.

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<sup>105</sup>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.

<sup>106</sup>Ibid.

<sup>107</sup>Ibid.

<sup>108</sup>MCA Survey, p. 61, US Ex. 95-15. Japan disagrees with the US interpretation of the MCA survey. See translation issue 12.

<sup>109</sup>Ibid., p. 17.

<sup>110</sup>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.

<sup>111</sup>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.<sup>112</sup> Thus, the US characterization of local regulations is not consistent with current reality.<sup>113</sup> 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.<sup>114</sup>

**(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"<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup>

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<sup>112</sup>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.

<sup>113</sup>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.

<sup>114</sup>Arrangement Letter and Agreements between a New Retail Store and the Local Shopping Center Association, 1996, US Ex. 93.

<sup>115</sup>JFTC Report, pp. 15-16. MCA Survey, pp. 24-25, US Ex. 95-15.

<sup>116</sup>MCA Survey, p. 31; Directive No. 93, 1 April 1994, US Ex. 94-7.

<sup>117</sup>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.<sup>118</sup> 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.<sup>119</sup> According to the 1995 MCA survey, the governmental entities generally designate the localities and associations to whom such explanations are to be given.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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".<sup>123</sup> 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"<sup>124</sup> 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.<sup>125</sup> The relevant MITI circular expressly indicates that the purpose of the public briefing is "not to seek consent, etc., from them".<sup>126</sup> Japan also notes that the United States exaggerates the amount of money that large stores must spend during the public briefing process.<sup>127</sup>

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<sup>118</sup>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.

<sup>119</sup>Directive No. 93, 1 April 1994, US Ex. 94-7.

<sup>120</sup>MCA Survey, p. 31, US Ex. 95-15.

<sup>121</sup>Ibid., p. 35.

<sup>122</sup>Ibid., p. 41.

<sup>123</sup>Section 1, Directive No. 93, 1 April 1994, US Ex. 94-7.

<sup>124</sup>In US submissions, the "public briefing" is referred to as a "local explanation". See translation issue 14.

<sup>125</sup>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.

<sup>126</sup>Ibid.

<sup>127</sup>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

## (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.<sup>128</sup>

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".<sup>129</sup> 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".<sup>130</sup> 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.<sup>131</sup> 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".<sup>132</sup>

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.<sup>133</sup> The procedures require consideration of all opinions, thereby ensuring a fair and impartial process.

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

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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.

<sup>128</sup>MCA Survey, p. 50, US Ex. 95-15.

<sup>129</sup>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.

<sup>130</sup>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.

<sup>131</sup>Ibid., pp. 20-21.

<sup>132</sup>Ibid., p. 16 (emphasis added by the United States).

<sup>133</sup>See Deliberation Procedures, Sections II and III, Japan Ex. C-4.

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'".<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup>

### ***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.<sup>137</sup>

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 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.

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<sup>134</sup>Ibid.

<sup>135</sup>MCA Survey, p. 42, US Ex. 95-15.

<sup>136</sup>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.

<sup>137</sup>MCA Survey, Table 6.

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.<sup>138</sup> 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".<sup>139</sup>

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:

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<sup>138</sup>Estimates by staff of Retailer X. Frederick Nagai Affidavit of 14 February 1997, p. 3, US Ex. 97-8.

<sup>139</sup>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.

<u>Year</u>	Percent of Retail Establishments in Sales in Japan by Japan That Are	
	<u>Large Stores</u> <sup>140</sup>	<u>Large Stores</u> <sup>141</sup>
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:<sup>142</sup>

**Number of New Notifications  
for Large Stores**

<u>Year</u>	<u>New Notifications</u>
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.<sup>143</sup>

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<sup>140</sup>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.

<sup>141</sup>Ibid.

<sup>142</sup>Figures compiled on a notification basis by MITI, Distribution Industry Division, Industrial Policy Bureau, including the four most recently completed fiscal years.

<sup>143</sup>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:<sup>144</sup>

<b>Share of the Total Retail Sales<sup>145</sup></b>	
<u>Year</u>	<u>Sales Share of Large Stores</u>
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.

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<sup>144</sup>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.

<sup>145</sup>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")<sup>146</sup>; (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").<sup>147</sup> 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".<sup>148</sup>

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<sup>146</sup>Law No. 134 of 15 May 1962, Kanpo, 15 May 1962, amended by Law No. 44 of 30 May 1972, US Ex. 72-1.

<sup>147</sup>Law No. 54 of 1947, US Ex. 47-1.

<sup>148</sup>See translation issue 1.

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. 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.<sup>149</sup>

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.<sup>150</sup> "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."<sup>151</sup> In 1948, the Japanese Diet supplemented the Antimonopoly Law by enacting the Trade

<sup>149</sup>See Article 28 of the Antimonopoly Law.

<sup>150</sup>Thomas A. Bisson, *Zaibatsu Dissolution in Japan*, (1954), p. 191, US Ex. 54-1.

<sup>151</sup>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.

Association Law.<sup>152</sup> 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.<sup>153</sup>

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".<sup>154</sup> "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".<sup>155</sup> 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.<sup>156</sup>

5.382 The United States submits that the Antimonopoly Law in its initial form permitted only limited exemptions.<sup>157</sup> 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<sup>158</sup> and the "Export Trading Law".<sup>159</sup> 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.<sup>160</sup> The Diet subsequently passed many other Antimonopoly Law exemption laws.<sup>161</sup> "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".<sup>162</sup> 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.<sup>163</sup> 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."<sup>164</sup> The sections of the AML banning "unfair trade practices," as revised in 1953, remain largely the same today.<sup>165</sup>

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<sup>152</sup>Iyori Hiroshi and Uesugi Akinori, *The Antimonopoly Laws of Japan*, (1983), p. 13, US Ex. 83-1.

<sup>153</sup>*Ibid.*

<sup>154</sup>Matsushita Mitsuo, *International Trade and Competition Law in Japan*, 1993, pp. 79-80, US Ex. 93-1.

<sup>155</sup>Iyori Hiroshi and Uesugi Akinori, *The Antimonopoly Laws of Japan*, 1983, p. 16, US Ex. 83-1.

<sup>156</sup>*Ibid.*, US Ex. 83-1.

<sup>157</sup>See Antimonopoly Law, Articles 20-24.

<sup>158</sup>Law No. 294 of 1952. This law was repealed by Law No. 185 of 25 November 1957.

<sup>159</sup>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.

<sup>160</sup>Iyori Hiroshi and Uesugi Akinori, *The Antimonopoly Laws of Japan*, 1983, p. 19, US Ex. 83-1.

<sup>161</sup>*Ibid.*, US Ex. 83-1.

<sup>162</sup>Iyori Hiroshi and Uesugi Akinori, *The Antimonopoly Laws and Policies of Japan*, 1994, p. 32, US Ex. 94-1.

<sup>163</sup>*Ibid.*, pp. 30-34.

<sup>164</sup>Matsushita Mitsuo, *Antimonopoly Law & International Transactions* (25 May 1970) p. 83, US Ex. 70-2.

<sup>165</sup>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.

5.383 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.

5.384 The JFTC issued a list of designated "unfair trade practices" shortly after the Antimonopoly Law was amended in 1953.<sup>166</sup> 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".<sup>167</sup>

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.<sup>168</sup> 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".<sup>169</sup> 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".<sup>170</sup>

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<sup>171</sup>, the JFTC has been monitoring the film manufacturing industry.

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<sup>166</sup>JFTC Notification 11 of 1953.

<sup>167</sup>*Ibid.*, designation 6.

<sup>168</sup>Notification on Unfair Trade Practices, JFTC Notification 15 of 15 June 1982, US Ex. 82-6, which replaced Notification 11 of 1953.

<sup>169</sup>JFTC Notification 15, designation 9.

<sup>170</sup>*Ibid.*, designation 8.

<sup>171</sup>See Articles 8-4 and 18-2 of the Antimonopoly Law.

**(b) The Premiums Law**

5.389 The **United States** submits that the Japanese Diet enacted the Premiums Law on 15 May 1962.<sup>172</sup> 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 redundant nature of the Premiums Law and the premium and representation designations under the Antimonopoly 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.<sup>173</sup>

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<sup>172</sup>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.

<sup>173</sup>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:

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.<sup>174</sup>

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<sup>175</sup>, 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.<sup>176</sup> Japan argues that the statements cited by the United States are selective and miss the overall context.

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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).

<sup>174</sup>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.

<sup>175</sup>Panel Report, adopted on 1 November 1996, WT/DS8, 10 and 11/R, para. 87.

<sup>176</sup>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

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 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".<sup>177</sup> At the same time, the JFTC has indicated that it distinguishes between premiums and price discounts or rebates on a case-by-case basis,

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and appropriate means to effectively control excessive premium sales and misleading representations, as a special rule to the Antimonopoly Law".

<sup>177</sup>FTC/Japan Views: Information and Opinion from the Japan Fair Trade Commission, No. 2, April 1988, p. 15, US Ex. 88-3.



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".<sup>178</sup> Nonetheless, the United States argues, the JFTC acknowledges that some forms of discounts or rebates may be premiums.<sup>179</sup> 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.

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"<sup>180</sup> 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."<sup>181</sup>

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

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<sup>178</sup>Ibid., p. 16.

<sup>179</sup>Ibid.

<sup>180</sup>JFTC Notification No. 3 of 1962 enacted pursuant to Article 2 of the Premiums Law, Japan Ex. D-28.

<sup>181</sup>JFTC/Secretary General Circular No. 7 of 1977, Japan Ex. D-29.

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 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.<sup>182</sup> Little price differential exists among Fuji, Konica and Kodak at either the retail level<sup>183</sup> or with respect to wholesaler prices to retail outlets.<sup>184</sup> 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"

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<sup>182</sup>Photo Market, 1996, p. 31, US Ex. 101.

<sup>183</sup>Management Analysis of Photo Stores, Camera Times, 1979-1996, US Ex. 40.

<sup>184</sup>Construction Research Institute, Information on Prices, Monthly Edition, December 1972- September 1996, US Ex. 22.

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 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.<sup>185</sup> 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.<sup>186</sup> 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

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<sup>185</sup>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).

<sup>186</sup>JFTC v. Sanki Co., Ltd, et al, of 1982, Tokyo Court of Appeals, Japan Ex. D-76.

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.<sup>187</sup> 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.

(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.<sup>188</sup>

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".<sup>189</sup> The notification limited premiums offered in connection with "closed"

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<sup>187</sup>Itoda Shogo, JFTC Secretary General, Antimonopoly Law, (15 December 1995), pp. 392-393, 396, 420-424, US Ex. 95-20.

<sup>188</sup>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).

<sup>189</sup>JFTC Notification 5 of 1962, Kanpo, 30 July 1962, pp. 626-627, US Ex. 62-1.

lotteries<sup>190</sup> 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.<sup>191</sup>

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.<sup>192</sup> The JFTC responded in April 1966 by implementing changes in its organizational structure, including the creation of the Premiums and Representation Division.<sup>193</sup> 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.<sup>194</sup>

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.<sup>195</sup> "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".<sup>196</sup> 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".<sup>197</sup> 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".<sup>198</sup>

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

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<sup>190</sup>A "closed" lottery requires purchase of a good or service. An "open" lottery requires no such purchase.

<sup>191</sup>JFTC Notification 20 of 1965, Kanpo, 15 July 1965, p. 5, US Ex. 65-1.

<sup>192</sup>Industrial Structure Council Distribution Committee, Regarding the Basic Direction of the Distribution Policy, Tsusansho Koho, 24 April 1965, p. 8, US Ex. 65-2.

<sup>193</sup>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.

<sup>194</sup>1966 JFTC Annual Report, US Ex. 66-1; 1988 JFTC Annual Report.

<sup>195</sup>Otsuka Noritami, JFTC Trade Practices Division, Recent Activities Concerning the Premiums Law, Kosei Torihiki, November 1965, p. 3, US Ex. 65-5.

<sup>196</sup>Ibid.

<sup>197</sup>Ibid.

<sup>198</sup>Ibid.

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.<sup>199</sup>

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.

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 States** 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.<sup>200</sup>

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.<sup>201</sup>

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."<sup>202</sup> 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

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<sup>199</sup>In Japan's view, *kamera-rui* means "camera category" rather than "cameras and related products". See translation issue 17.

<sup>200</sup>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).

<sup>201</sup>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).

<sup>202</sup>Matsushita Mitsuo, Antimonopoly Law and International Transactions (With Focus on Extra-territorial Application), 25 May 1970, pp. 83-89, US Ex. 70-2.

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."<sup>203</sup>

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".<sup>204</sup> 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."<sup>205</sup> Japan thus set out on a course to impede the ability of imports to challenge Fuji's name-brand advantage.

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<sup>203</sup>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.

<sup>204</sup>M.Y. Yoshino, The Japanese Marketing System: Adaptations and Innovations, MITI Press, 1971, p. 103, US Ex. 71-1.

<sup>205</sup>Japanese See Kodak Case As Hardly Black and White, New York Times, 5 July 1995, US Ex. 95-14.

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.<sup>206</sup> 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.

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".<sup>207</sup> 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.<sup>208</sup> 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

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<sup>206</sup>See J.S. Bain, *Barriers to New Competition*, 1956, p. 216, US Ex. 56-1.

<sup>207</sup>Carpenter and Nakamoto, *Consumer Preference Formation and Pioneering Advantage*, *Journal of Marketing Research*, Volume 26, August 1989, p. 297, US Ex. 89-4.

<sup>208</sup>OECD *Premium Offers and Similar Marketing Practices* (1977), Japan Ex. D-36.



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 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".<sup>209</sup> 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)<sup>210</sup>**

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.<sup>211</sup> The JFTC explicitly included "photosensitive materials" as one of the industries covered by the notification.<sup>212</sup>

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".<sup>213</sup>

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

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<sup>209</sup>Japan Ex. D-62.

<sup>210</sup>See Section II.B.3.(b).(ii) above.

<sup>211</sup>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.

<sup>212</sup>See table attached to JFTC Notification 17.

<sup>213</sup>Severe Restrictions Placed on Businesses for Premium Offers, op.cit.

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*".<sup>214</sup> 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 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".<sup>215</sup> 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 ...".<sup>216</sup>

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.

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<sup>214</sup>JFTC Annual Report, 1966, US Ex. 66-1, emphasis added by the United States.

<sup>215</sup>Severe Restrictions Placed on Businesses for Premium Offers, op.cit.

<sup>216</sup>JFTC Annual Report, 1966, Japan Ex. D-43.

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 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)<sup>217</sup>**

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".<sup>218</sup> These codes were to be established, the Committee suggested, "with assistance from the industry that might be affected".<sup>219</sup>

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".<sup>220</sup> 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...".<sup>221</sup>

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.<sup>222</sup> For the United States, the government directed that the codes were to be established by industry representatives and trade

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<sup>217</sup>See Section II.B.1 above.

<sup>218</sup>Report of the Foreign Investment Council Expert Committee, Finance, June 1967, p. 3, US Ex. 67-5. See Section II.B.1.

<sup>219</sup>Ibid.

<sup>220</sup>Postwar Developments and Challenges of Corporate Law Part II: Capital Liberalization Countermeasures, Hogaku Seminar, April 1968, p. 3, US Ex. 68-4.

<sup>221</sup>Ibid.

<sup>222</sup>See Section II.B.1.

associations, as provided under Article 10 of the Premiums Law, and the government would exercise "active guidance".<sup>223</sup>

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".<sup>224</sup>

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".<sup>225</sup> 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".<sup>226</sup> 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

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<sup>223</sup>"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 from Liberalization of Direct Investment, Finance, July 1967, p. 6, US Ex. 67-5).

<sup>224</sup>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.

<sup>225</sup>Finance, June 1967, Japan Ex. D-58, US Ex. 67-5.

<sup>226</sup>Finance, July 1967, Japan Ex. D-59, US Ex. 67-9.

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. The United States 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.<sup>227</sup>

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.<sup>228</sup> 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".<sup>229</sup> 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.<sup>230</sup> 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

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<sup>227</sup>Ueno Toshiro, JFTC's Premiums and Representation Division, Pepsi Cola Premiums Law Case, Kosei Torihiki, December 1971, US Ex. 71-12.

<sup>228</sup>Premiums Law, Articles 9-2 and 9-3, US Ex. 62-6.

<sup>229</sup>Ibid., Article 9-2.

<sup>230</sup>Thirty-Years of Competition Policy, pp. 286-287, Japan Ex. D-56.

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.

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)<sup>231</sup>**

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.<sup>232</sup>

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."<sup>233</sup>

**(d) JFTC Notification 34 of 1973 (country of origin of goods)<sup>234</sup>**

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.<sup>235</sup> For the United States, the less favourable treatment accorded to imports by any limitation on the use of Japanese is manifest and is

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<sup>231</sup>See Section II.B.3.(a).(ii).

<sup>232</sup>See Japan Ex. D-27, containing a "List of Kodak's Previous Prizes".

<sup>233</sup>Affidavit of Sumi Hiromichi, p. 27, US Ex. 96-10.

<sup>234</sup>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.

<sup>235</sup>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.

exacerbated by guidelines interpreting the notification.<sup>236</sup> These guidelines establish exceptions from the notification in favour of domestic products, exceptions for which there are no analogies applicable to foreign-made items.

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".<sup>237</sup>

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".<sup>238</sup>

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.<sup>239</sup> 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

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<sup>236</sup>Application Standards for "Misleading Representations Regarding Country of Origin of Goods", Secretary General's Directive No. 12, 16 October 1973, US Ex. 73-5.

<sup>237</sup>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[ ]ippings from English-language magazines used as patterns on carrier bags").

<sup>238</sup>JFTC/Secretary General Circular No. 12 of 1973, Japan Ex. D-54.

<sup>239</sup>See Section II.B.3.(b).(iii).

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.

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".<sup>240</sup> 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)<sup>241</sup>**

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."<sup>242</sup> 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").<sup>243</sup> 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<sup>244</sup>, 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.

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<sup>240</sup>Foreign Origin, Trade Reg. Rep., 7551, Japan Ex. D-55.

<sup>241</sup>See Section II.B.3.(b).(iv).

<sup>242</sup>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.

<sup>243</sup>JFTC Secretary General Circular No. 4 of 1977, Japan Ex. D-35.

<sup>244</sup>Japan Ex. D-27.



**(f) JFTC Notification 5 of 1977 (premiums to consumers)<sup>245</sup>**

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 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").<sup>246</sup>

***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.<sup>247</sup>

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.<sup>248</sup>

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<sup>245</sup>See Section II.B.3.(b).(v).

<sup>246</sup>JFTC Secretary General Circular No. 6 of 1977, Japan Ex. D-34.

<sup>247</sup>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).

<sup>248</sup>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.

**(a) JFTC guidance on the use of dispatched employees<sup>249</sup>**

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 trade practice designations related to distribution".<sup>250</sup> Upon its establishment, the DSO studied 16 business sectors, issuing its findings on cameras and photographic materials in December 1981.<sup>251</sup> 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".<sup>252</sup> 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.<sup>253</sup>

**(b) 1982 Self-Regulating Measures (dispatch of employees)<sup>1</sup> and the Promotion Council<sup>255</sup>**

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."<sup>256</sup> These measures govern the use of dispatched employees and contributions by manufacturers and wholesalers to promotions by photospecialty retailers.<sup>257</sup> 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.<sup>258</sup> 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".<sup>259</sup> 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

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<sup>249</sup>See Section II.B.3.(c).(i).

<sup>250</sup>Cabinet Order No. 43 of 1979 as reported in JFTC Annual Report 1980, p. 283, US Ex. 79-1.

<sup>251</sup>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).

<sup>252</sup>Ibid., p. 8. See Section II.B.3.(c).(i).

<sup>253</sup>According to Japan, the establishment of the DSO led only to sector-specific advisory reports, not any government action.

<sup>254</sup>See Section II.B.4.(a).(i).

<sup>255</sup>See Section II.B.4.(a).

<sup>256</sup>See translation issue 23.

<sup>257</sup>See Section II.B.4.(a).(i).

<sup>258</sup>See Section II.B.4.(a).

<sup>259</sup>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.

we implement self-regulating measures.<sup>260</sup> 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 Trade Commission, issue guidance to them as appropriate and necessary".<sup>261</sup> 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<sup>262</sup> 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.<sup>263</sup> 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."<sup>264</sup>

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,<sup>265</sup> it also saw the campaign as a significant threat – "an extraordinary new expansion strategy targeting Japan's market."<sup>266</sup> 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.<sup>267</sup>

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.<sup>268</sup> Kodak complied with the guidance.

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<sup>260</sup>"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.

<sup>261</sup>Self-Regulating Measures Regarding Making Business Dealings with Trading Partners Fair, reprinted in Camera Times, 22 June 1982, p. 3, US Ex. 82-8.

<sup>262</sup>John Babbitt Affidavit, US Ex. 97-7.

<sup>263</sup>Ishikawa Sumio Affidavit, US Ex. 97-10.

<sup>264</sup>Ibid.

<sup>265</sup>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.

<sup>266</sup>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.

<sup>267</sup>US Ex. 83-11, 83-14, 83-15, 83-22.

<sup>268</sup>Ishikawa Sumio Affidavit, US Ex. 97-4.

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.<sup>269</sup> Furthermore, retail associations asked Nagase "not to list prices in newspapers, and among other places." Kodak was forced to minimize its promotion of the trial pack.<sup>270</sup>

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".<sup>271</sup>

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.<sup>272</sup> 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.<sup>273</sup> For Japan, it should be obvious that the

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<sup>269</sup>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.

<sup>270</sup>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.

<sup>271</sup>Promotion Council Issue No. 8-1, 22 July 1996.

<sup>272</sup>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.

<sup>273</sup>Ibid.

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.

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.]"<sup>274</sup>

**(c)JFTC guidance on dumping and loss-leader advertising**<sup>275</sup>

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."<sup>276</sup> 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."<sup>277</sup> 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."<sup>278</sup>

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.

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<sup>274</sup>Panel Report on *Japan - Liquor Taxes and Labelling Practices*, adopted 10 November 1987, BISD 34S/83, 86-87, para. 2.7.

<sup>275</sup>See Section II.B.3.(c).(ii).

<sup>276</sup>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.

<sup>277</sup>Regarding the Antimonopoly Law and "Fair Trade", Shashoren Lecture Series (Part II), Shashin Kogyo Junpo, 10 June 1983, p. 10, US Ex. 83-11.

<sup>278</sup>Zenren Tsuho, October 1983, pp. 8-9, US Ex. 83-21.

**(d) 1984 Self-Regulating Standards (developing fees)<sup>279</sup>**

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 [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<sup>280</sup>**

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 ... <sup>281</sup>

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.

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<sup>279</sup>See Section II.B.4.(a).(ii).

<sup>280</sup>See Section II.B.4.(b).

<sup>281</sup>Ishikawa Sumio Affidavit 1, p. 1, US Ex. 97-4.

5.514 For the United States, though it does not explicitly include film within its scope<sup>282</sup>, 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 correspond exactly to Cameras and Related Products".<sup>283</sup> 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.<sup>284</sup>

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.<sup>285</sup> 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."<sup>286</sup> 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.<sup>287</sup>

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".<sup>288</sup> 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

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<sup>282</sup>Article 2 of the Retailers Code states that the code applies to "Cameras and Related Products". Japan disagrees with the US translation of "Kamera-ruii". See translation issue 17.

<sup>283</sup>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).

<sup>284</sup>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.

<sup>285</sup>"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.

<sup>286</sup>*Ibid.*, p. 7.

<sup>287</sup>Fair Trade Competition Code Regarding Representations in Camera and Related Products Retail Industry, 1987, US Ex. 87-1.

<sup>288</sup>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.

confronted with a large-scale promotion similar to the VR campaign conducted by a domestic manufacturer, Konica, the Retailers Council took no action.<sup>289</sup>

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 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.<sup>290</sup> 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."<sup>291</sup>

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".<sup>292</sup> 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.<sup>293</sup> 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

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<sup>289</sup>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.

<sup>290</sup>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.

<sup>291</sup>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).

<sup>292</sup>Article 1 of the Retailers Code.

<sup>293</sup>See also translation issue 17.



"camera category". Japan submits that the JFTC has never allowed and has no intention to allow application of the code to film or paper.<sup>294</sup>

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 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

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<sup>294</sup>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.

correspond exactly to Cameras and Related Products".<sup>295</sup> 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."<sup>296</sup> 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."<sup>297</sup> 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."<sup>298</sup>

## 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".<sup>299</sup>

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.<sup>300</sup> 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.<sup>301</sup> Later, Kodak attempted to devise joint promotions with McDonald's but was frustrated by the ten-percent limitation on

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<sup>295</sup>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.

<sup>296</sup>*Ibid.*, p. 18.

<sup>297</sup>*Ibid.*

<sup>298</sup>Shukan Shashin Sokuho, 7 August 1987, p. 3, US Ex. 87-9.

<sup>299</sup>Affidavit of Sumi Hiromichi, p. 27, US Ex. 96-10, p. 5 and 6.

<sup>300</sup>Affidavit of Isshi Norito, 1 February 1997, US Ex. 97-5.

<sup>301</sup>Affidavit of Yasuyuki Suzuki, p. 1, US Ex. 97-6.

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.<sup>302</sup>

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.<sup>303</sup>

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.<sup>304</sup> 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.<sup>305</sup>

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".

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<sup>302</sup>Affidavit of William Jack, former Kodak vice-president for marketing in Japan, p. 8, US Ex. 97-2.

<sup>303</sup>Affidavit of Suzuki Mikio, p. 3, US Ex. 97-3.

<sup>304</sup>Kanpo, 16 February 1996, Japan Ex. D-30.

<sup>305</sup>Kanpo, 10 December 1996, Japan Ex. D-31.