Proposal for the Reform of International Trade Laws

The proposal was adopted from eight discussion sessions, held between June 1991 and February 1992, among the following members of the U.S.-Japan Legal Affairs Committee of the Renaissance Society, a group to provide policy proposals from a non-governmental perspective.

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Legal unilateralism of the United States

"Unilateralism" is often practiced by the United States when interpreting and applying its trade legislation. By the term "legal unilateralism" we mean that the American side tends to impose its own domestic statutes and regulations on other countries under the premise that U.S. laws are absolute and universally valid.

At issue is extraterritorial application of U.S. law. The Export Administration Act and Antitrust Act of the United States have been applied to the activities of foreign firms in their home countries. One example of this practice involved the Siberian Pipeline Case. In that case, the U.S. government prohibited British and French companies from exporting from their own countries to the former Soviet Union pipeline equipment manufactured in their respective countries but using some U.S.-made component materials. The United States imposed sanctions against the foreign companies which violated the American ban.

U.S. antitrust laws have been frequently applied outside American borders. For example, in the Tanner Crab Case in 1983, the U.S. Justice Department regarded the exchange of information between Japanese companies in Japan over the price of imported tanner crabs as a violation of U.S. antitrust laws and prohibited Japanese corporations from engaging in such information exchanges.

The U.S. Department of Justice has recently revised its guidelines for international operations in order to regulate corporations that are said to engage in restrictive practices including business affiliation (*keiretsu*) activities in other countries, such as Japan.

Today, the world economy is becoming borderless, and corporate activities are expanding across national boundaries. In this situation, extraterritorial application of domestic law is inevitable to a certain extent.

Excessive application of extraterritoriality, however, would amount to the U.S. making unilateral determinations on matters which are under the jurisdiction of the Japanese government. In practice, U.S. courts can subpoena documents in Japan to be submitted to a U.S. court or prohibit activities of Japanese corporations within Japan, if they are found to violate U.S. laws.

Such a state of affairs amounts to interference in Japanese domestic affairs by the U.S. authorities and a violation of Japan's sovereignty. If every country in the world were to exercise extraterritorial application of its laws and take countermeasures against foreign companies, international tensions would sharply increase, and those businesses which are caught between disputing nations would be unreasonably harmed or restricted.

The sensible course of action is for a violation by a Japanese firm in Japan to be regulated under the Japanese Antitrust Law, and in cases where American interests are adversely affected by the activities of a Japanese firm in Japan, the U.S. government should seek international cooperation by requesting the

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A trade meeting in Fukushima Prefecture of Japan, the U.S., Canada and the EC sought to establish a model of antitrust legislation.

appropriate Japanese governmental authority to initiate action. The recently concluded U.S.-EC Antitrust Agreement affirms this sort of international cooperation. It is essential to establish closer cooperation between the antitrust authorities of the U.S. and Japan.

The second problem is the unilateral sanctions under Section 301 of the U.S. Trade Act. Super 301 was enacted under the Omnibus Trade and Competitiveness Act of 1988. In this context, the Structural Impediments Initiative was initiated and is still fresh in the memory. Under this legislation, in cases where a foreign government violates a trade agreement, or if the actions or practices of a foreign government are deemed "unreasonable" and "discriminatory," the U.S. government is authorized to take retaliatory measures against that country.

The problem here is that the determination as to what is "unreasonable" and "discriminatory" has been unilaterally decided. For example, in the U.S.-Japan Semiconductor Agreement, the U.S. government unilaterally imposed sanctions against Japan without appealing to the General Agreement on Tariffs and Trade. The reasons cited for this action were that the Japanese government failed to regulate the export of semiconductors to third parties properly and access to the Japanese domestic market for U.S.-made semiconductors was insufficient.

This case was an example of retaliation based on a unilateral judgment by the American side, without any investigation into the matter by an objective third party such as the dispute settlement panel of GATT. This action, it must be said, goes against the framework of international rules.

A similar case is the clause that led to sanctions against Toshiba Corporation. Based on the "Toshiba sanction clause" in the Omnibus Trade and Competitiveness Act of 1988, the United States can prohibit Japanese firms which exported materials under embargo from Japan to the former Soviet Union from conducting business in the American market and from bidding for federal contracts or selling to federal agencies.

Although COCOM (Coordinating Committee for Export Control to Communist Area) regulations are moving in the direction of relaxation, the need for export controls from the standpoint of international security will continue to exist. When an embargo on specific products, technologies or other materials to specific countries becomes necessary, it should be imposed under the domestic laws of the exporting country, based on its understanding of the international agreement. It is not proper for the U.S. government, based on its unilateral judgment, to impose sanctions against exports by a foreign firm from a foreign country, even in cases where that firm may have violated the law.

The third issue is that the U.S. government has impetuously attempted to compel the Japanese to adopt the American economic and legal system. In the Structural Impediments Initiative, for example, the U.S. government has tended to pressure Japan to introduce the American system, practices and regulations. Also, with its demand for stronger penalties under the Japanese antitrust law, the American side is trying to force Japan to introduce legislation which the U.S. thinks desirable, in disregard of what is appropriate for the Japanese legal system.

While we fully recognize the necessity of harmonizing the Japanese system, practices and regulations with those of other countries, as we shall discuss in the third section of this proposal, this should be done according to internationally agreed models, through multilateral negotiations on legal harmonization. It is inappropriate to take such steps solely through bilateral negotiations between the United States and Japan.

The Japanese government, in its eagerness to resolve these urgent bilateral problems, compromises too readily and thus gives both the U.S. government and the American people the misleading expectation that it can solve the trade imbalance between the two countries. Such impressions, in the long run, are not beneficial for maintaining and developing a healthy U.S.-Japan relationship.

We have discussed "unilateralism" as a problem related to the current application of the U.S. Trade Act. In addition, there is the problem of a "protectionist" approach in the U.S. Trade Act. This tendency has become increasingly pronounced with the decline of the international competitiveness of American industry during the recent past, and protectionism is sometimes interwoven with unilateralism. Specifically, we are addressing arbitrary application of the law to foreign firms, their subsidiaries or U.S.-incorporated firms of foreign origin. There is, moreover, evidence which suggests an intention to use legislation and regulations as a means to protect American industries by expanding the definition of national security to include economic security.

Recommendations for assessing and improving Japanese trade legislation

Within the corpus of Japan's domestic regulations on international trade and commerce, there are many points that need improvement. In a general sense, the Japanese system lacks "legalism." If America's problem lies in an excess of legalism, Japan's problems are, conversely, a paucity of legalism.

In this borderless era, it is inappropriate for international commerce and trade to be regulated by ambiguous and opaque means such as administrative guidance, since these policies might affect foreign corporations. When regulations are required, they should be defined and carried out through the law. On this point, there is much Japan could learn from U.S. trade laws. Japan's trade laws should be based on GATT and on the principles of "transparency," "openness" and "due process," which are highly developed in U.S. laws.

Japan's trade-related laws include such export and import trade regulations as the Foreign Exchange and Foreign Trade Control Law, the Customs and Tariff Law and the Antimonopoly Law.

The first issue which confronts us is that due process and transparency are lacking in current Japanese trade legislation and regulations. For example, there exists no provision for a private company or an individual to appeal to the govern-

ment (except in cases of antidumping tariffs and countervailing tariffs under the Customs and Tariff Law); much is left to the government's discretionary authority. If a private company tries to press to initiate such an appeal, it is forced to resort to opaque "political approaches."

Under U.S. trade law, there is a provision for individuals to institute an action, and subsequent legal action taken by the government is based on such complaints. American law is thus better able to deal with this particular point. In Japan, the right of private individuals to pursue legal action should be clarified in the law.

In addition, when regulations are made or implemented in Japan, there are no procedures such as public hearings, in which the opinions of those concerned could be expressed. This deficiency adds to the lack of transparency. On this point, too, U.S. laws are generally better equipped with a system that allows participation of not only interested groups but also of the general public as much as possible in the process of legal examination through public hearings and other measures. In the process of enactment and implementation of regulations, Japan should also establish a climate of openness, so that the views of both interested parties and consumers can be reflected.

The second problem in Japanese trade law is that there is no special procedure for filing a formal legal action by the party affected by the regulation (foreign exporters, Japanese importers, etc.) against the regulatory authority in a court that has expertise on trade issues. In the U.S. there is a court that adjudicates international commerce cases; Japan should establish a similar system.

The third concern is that Japanese trade regulations are enforced separately by different government agencies and are not unified, a situation that lends itself to confusion. For example, emergency import restrictions (safeguards) are under the Import Trade Control Ordinance (import quota system) of the Foreign Exchange and Foreign Trade Control Law, the import agreement of the Export-Import Transactions Law is under the jurisdiction of the Ministry of International Trade and Industry, and emergency tariffs are under the authority of the Ministry of Finance. These regulations should be structured into a coherent trade law system; a mechanism for unified enforcement is needed.

In an investigation to determine whether to impose an antidumping duty, the Ministry of Finance, MITI and the minister in charge of the products in question conduct probes. Under this system, the potential for jurisdictional disputes makes swift and fair execution of the law difficult indeed. Moreover, in making a decision to impose an antidumping tariff, the regulatory agencies are required to determine both the fact of dumping against Japan by foreign firms and the actual damage inflicted on Japanese firms by the dumping. The injury determination should be made instead by an organization independent of those agencies whose mission is to promote domestic industries.

The fourth concern is related to the introduction of "legalism." Japanese corporations should use litigation as a corporate strategy. For example, when a product that would infringe on a patent is imported into the United States, this commodity can be excluded on the basis of Article 337 of the U.S. Customs Law. This law can be utilized by foreign corporations in the United States with licensing agreements, just as in patent cases in the United States. Recently, there have been cases in which Japanese corporations utilized Article 337 in the United States.

Japanese corporations also have the perception that antitrust laws are solely employed to regulate and restrict business activity against their interests and are thus a cause for discomfort. Yet American corporations have frequently demonstrated that antitrust action can be utilized "on the offensive." In Japan, many business executives regard enforcement of antitrust regulations as the "monopoly" of the Fair Trade Commission. But antitrust laws both in Japan and the United States can easily be used to advantage, by launching civil suits as an expeditious means for corporations to set precedents, gradually define the parameters of the law, and thus help in the formulation of clear rules.

The fifth point is that a Japanese version of Article 301 of the U.S. Trade Act is necessary for implementing the GATT system. Under GATT, all international conflicts should be brought before GATT and resolved through arbitration. The Uruguay Round has attempted to improve this process of conflict resolution. In cases where the country against which

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GATT ministers in session during an informal meeting on April 19 in Puerto Vallarta, Mexico.

an action is filed does not take corrective measures according to the recommendation of GATT, the aggrieved country is allowed to take retaliatory measures under certain conditions.

Japan should utilize GATT as a means of settling trade conflicts with other nations. Japan needs a new domestic law to enable it to implement retaliatory measures permitted by GATT. For the United States and the European Community, Article 301 of the Trade Act and the "New Commercial Policy Instruments" respectively perform this function. The Japanese need a law equivalent to these. In contrast to the arbitrariness of Article 301, Japan's retaliatory law should be designed as a means to implement GATT. (As discussed earlier in the example of the Semiconductor Agreement, Article 301 provides for unilateral retaliation without permission from GATT.)

The sixth problem is that certain aspects of Japanese trade legislation do not conform to GATT, notably the import ban against rice under the Staple Food Control Act. The safeguard provided in Article 19 of GATT allows contracting parties to implement emergency import restrictions if the domestic industry suffers "serious injury" from imported goods. The Import Trade Control Ordinance of the Foreign Exchange and Foreign Trade Control Law, which is the legislation that determines such implementation, does not contain a provision in regard to "serious injury," nor a procedure for rendering judgment. This matter should be urgently corrected. In terms of protection of agriculture, there should be introduced a law that might be called a "Law to Provide Special Measures on the Import of Agricultural Products," along with an agreement in the Uruguay Round to accommodate such legislation.

Harmonization of economic regulations and economic systems

One of the most important problems Japan faces in the future is to harmonize its domestic economic legislation and regulations and commercial practices with the rest of the world. There are many sides to this question, including competition policy (antitrust law), environmental regulations, a standards and certification system, working conditions and intellectual property rights.

The concept of "harmony" is not built in as part of the present economic system, rather it is extended as an aspect of commercial practices and corporate activities. The worldwide movement for harmonization is just getting under way, but it will be increasingly important and it should pick up speed from now on. The Structural Impediments Initiative has shown a conspicuous tendency toward experimentation with harmonization between the two nations.

As a first step, we propose the international harmonization of antitrust laws. In order to equalize conditions for competition among corporations of each country, it is necessary to harmonize the regulation of antitrust laws that set the rules for business competition. Harmonization is necessary not only to disallow certain activities (e.g. prohibition of cartels), but also to strengthen sanctions (e.g. the amount of penalties and surcharges). The most important examples of antitrust laws are the U.S. model and the European Community model (and that of Germany).

The Japanese antitrust laws enacted since World War II form a regulatory system that includes criminal charges based on the American model, but it was not strongly enforced. After it became necessary to strengthen enforcement, due to the oil crisis (and other factors), a surcharge system based on the EC (German) model, whose legal system is similar to Japan's, was hastily introduced.

Due to the lack of consistency and coherence in legislative policy, the Japanese antitrust law has several inherent problems. For example, if the government were to increase the amount of surcharge it would conflict with the prohibition against double jeopardy stipulated in the Constitution, an obvious defect in the system of enforcement. In due course, this law should be fundamentally reexamined.

In the Structural Impediments Initiative, the United States has insisted that Japan adopt the American model. But if the above-mentioned points are considered, it is highly questionable whether it would be appropriate to attempt harmonization solely based on this sort of bilateralism. The American model functions in the context of the U.S. legal tradition. Grafting it onto Japan hastily might bring poor results, which has already been proven by prior examples. Also, there is the possibility that excessive dependence on the American model could cause a rift with those countries which adopt the EC (German) model.

An important point is to establish a model which is acceptable to the U.S., the EC, Japan, other Asian nations and other countries, through comprehensive discussions of the U.S. model and EC (German) model at multilateral negotiations (possibly in GATT's new multilateral negotiations after the Uruguay Round). It is necessary for each country to standardize its antitrust law based on the common model. This is a difficult task but an important process, and we hope Japan will launch a comprehensive study at the official and private level toward this objective.

Maintenance of the GATT system

A look at the present-day international economic system shows that "bilateralism," represented by voluntary restrictions on exports, and "regionalism," exemplified by the unification efforts of the European Community and the North America Free Trade Agreement, are becoming the prevalent modes. Japan, as a trading nation, cannot remain a passive spectator in this situation, since the diffusion of these trends would lead to a world economy divided into economic blocs.

Japan must make the maintenance of a multilateral trading system our ultimate objective. It is GATT that embodies this ideal. It would be a serious setback if the Uruguay Round were to collapse due to problems in a single area. Therefore, in this regard, Japan must do everything it can to bring the Uruguay Round to a successful conclusion.