

# Some Requests to the Clinton Administration

By Dr. Mitsuo Matsushita

## Introduction

After 12 years of Republican rule, the Democrats assumed office on January 20, 1993. All things considered, 12 years under the same party is rather long and the problems which accumulated during that time are mountainous. Thus the power shift is a positive step in the continued development of U.S. democracy. The policy gap between Democrats and Republicans is not as wide as that between Japan's ruling Jimin-to (Liberal Democratic Party) and the opposition parties. Nevertheless, there exists some differences and their impact on trade between Japan and the U.S. has been a matter of concern both inside and outside the Japanese government. As a specialist in trade laws and anti-trust laws, I have great respect for U.S. trade laws and anti-trust laws which have been a model for the rest of the world. From this perspective, I would like to make some frank suggestions to the new administration after critically examining current U.S. policies.

## Industrial policy

Under the Reagan and Bush administration, the concept of an industrial policy was an anathema. There were a few exceptions, such as SEMATEC (a semiconductor industry joint development program actively supported by the U.S. government) which sought to revitalize strategic industries. In Japanese terms, such action can be called nothing other than industrial policy. Nevertheless, the ideological position of the Republicans was consistently anti-industrial. In the face of declining U.S. industrial competition globally, the Republican administration tended to cite "unfair" trade practices by foreign governments and corporations, as well as "peculiarities in the Japanese market" as the fundamental cause of the problems rather than to take active governmental measures to improve the situation.

Early reports indicate the Clinton administration will more aggressively adopt measures derived from an industrial policy. This policy shift to acknowledging the true nature of the problems and responding with appropriate government

measures is most welcome. Along this line, Japan is well known as "the nation of industrial policies." Thus, I think it would be a good idea to establish U.S.-Japan joint research on industrial policy. Japanese industrial policy does not seek to protect industries from the free market, rather, to supplement market mechanisms. The position of the new Clinton administration seems not much different from this. It would be ideal if both the Japanese and the U.S. governments deepened their mutual understanding and learned from each other regarding government's role in industry.

## The Uruguay Round and trade laws

After a number of twists and turns, the Uruguay Round has yet to reach its final conclusion. The leader has been the U.S. and to a lesser extent the European Community (EC) and Japan. It is my hope that the Clinton administration will put the successful conclusion of the Uruguay Round at the top of its political agenda. There are many important issues such as agriculture, service trade and intellectual property rights included in the Uruguay Round negotiations. However, I would like to focus on two points from the perspective of trade laws.

The first point to consider is the restoration of the Super 301 provision of the U.S. Trade Act. However, the Dunkel proposal, presented to the Uruguay Round, includes a scheme to improve General Agreement on Tariffs and Trade (GATT) proceedings for solving trade conflicts. When this goes into effect, GATT proceedings will be significantly strengthened and capable of solving all trade conflicts among member states. Thus any application of Super 301—which imposes U.S. standards on other countries' "unfair" trade practices and forces a solution through the threat of retaliation—would invite unilateral retaliation from other GATT members. If this happens too often, the multilateral trade system will be thrown into a crisis situation. Thus, I suggest that the Clinton administration refrain

from restoring Super 301 as it will seriously jeopardize the GATT system.

The second point of consideration concerns anti-dumping laws. Apparently, some Americans feel Dunkel's proposed international anti-dumping agreement makes too many concessions to Japan and are demanding revision. For example, arbitrary price calculations in judging dumping cases are prohibited and a provisional sunset clause is introduced. It is clear that existing anti-dumping laws, as implemented in the U.S. and EC are heavily tainted with protectionism. The Dunkel proposal sets a minimum standard which would prevent anti-dumping laws from being used as a protectionist tool. Also, it should be noted that the Dunkel proposal includes some U.S. demands, such as an anti-circumvention measure.

Thus, my minimum request to the new administration is as follows: Help promote the establishment of an international anti-dumping agreement, recognize the protectionist nature built into existing anti-dumping laws, and try to prevent further restrictive developments through such laws.

## Outside application of the Anti-Trust Law

The Anti-Trust Law lies beyond party politics. However, since the April 1992 announcement by the U.S. Anti-Trust Division that the law can be applied outside America, it has become a matter of concern in Japan. The U.S. Department of Justice will now apply the Anti-Trust Law to cases where actions taken by foreign firms outside the U.S., in effect, limit U.S. exports to that country even if they do not harm U.S. consumers. This would include price cartels, import cartels, boycotts and other restrictive business practices. While authorities deny it, the law is said to target Japan.

The new administration should remain cautious on this issue. Excessive application of the Anti-Trust Law outside the U.S. would violate international laws. Particularly critical is the section which cites "restrictive business customs" in foreign countries as this is not clearly

defined. Thus there is room for arbitrary rulings. If this is used against Japanese vertical corporate affiliations in production and sales, then the problem is serious because the Japanese system is not automatically unreasonable nor does it aim to discriminate against U.S. products and companies. Any imposition of the U.S. Anti-Trust Law on the vertical corporate affiliation system is one-sided, as would be the application of Super 301. Either action may be a violation of international law.

Furthermore, there exist precedents in the U.S. Supreme Court which find vertical corporate affiliations legal in principle. Thus, even if the U.S. does apply the Anti-Trust Law on Japan, vertical affiliations can only be found illegal by using a double standard. In fact, some U.S. experts point out a contradiction in U.S. Department of Justice policy: generous toward vertical affiliations in America while demanding that Japan prohibits them.

## Taxation system on transfer pricing

It has been reported that the Clinton administration might increase taxes on foreign firms operating in the U.S. on the grounds that they are evading U.S. taxes. This is known as the transfer pricing issue. Under this practice overseas parent

companies sell products to their U.S. subsidiaries at inflated prices, thus lowering subsidiary profits and avoiding U.S. taxes. To prevent this, U.S. tax authorities would calculate artificial prices regardless of actual trading practices and set taxes accordingly. Such action would be known as the transfer pricing taxation system.

If foreign firms are manipulating prices to evade taxes, then of course U.S. authorities have the right to force them to pay. Admitting that, it should be noted that if the system is abused, it discourages foreign investments in the U.S. thereby creating a bigger problem. It is possible that foreign firms—like those from Japan—make no profits from their direct investment in the U.S. for several years initially. Japanese firms operate differently from those in the U.S. by seeking to increase market share rather than increase profits. As a result, Japanese firms tend to set lower prices at the expense of immediate profits. It is not entirely because of price manipulation that Japanese subsidiaries in the U.S. are making little or no profits. Thus, to accuse a company of tax evasion simply because it does not make much profit is inappropriate.

## The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) will be implement-

ed in the near future, which in itself is a favorable development. Given the myriad delays in the establishment of global multi-lateral trade systems like GATT, any local free trade system is welcome. They augment regional economic development which eventually benefits outsiders by increasing export and other investment opportunities in the region. The important thing here is not to make local free trade agreements exclusionary.

Specifically regarding NAFTA, it should be noted that it tends to eliminate foreign products through local content requirements, and makes it financially off-limits for foreigners. Should this trend be strengthened, there would be multiple negative effects; international bilateral trade agreement system under GATT would be destroyed, outside countries would suffer as a result and finally, corporations in the U.S., Canada and Mexico would suffer from the lack of outside competition.

## Japan-U.S. Structural Impediments Initiative

My final point is regarding the Japan-U.S. Structural Impediments Initiative (SII) which is scheduled to end in 1993. There are reports the Clinton administration has no intention of renewing the talks, but a final decision has yet to be made. A forum for joint discussions, like the SII, is useful for Japan and the U.S. So far SII has concentrated on the "peculiarity of the Japanese market" rather than jointly working out a desirable market system for major trading countries.

I admit the Japanese market has a long way to go before it can be considered open. Having said that, I hope the SII delegates work together to establish a combined economic model for corporate behavior, government roles and so on, based on studies of different models from major traders including the U.S., Japan and the EC.

Despite the difficult requests I mentioned above, I would like to extend my most sincere wishes of success to the new Clinton administration.

*Dr. Mitsuo Matsushita is a professor at the University of Tokyo's Division of Law and Politics, Graduate School.*



Japanese cars have threatened the U.S. auto industry and the Big Three U.S. automakers reportedly are making moves to file dumping complaints against all imported vehicles. If this comes to pass, Japan will be the biggest target.