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# Snapshot: Kodak v. Fuji

On May 18, 1995, the Eastman Kodak Company of Rochester, New York, filed a complaint with the US government under section 301 of the 1974 Trade Act, claiming that its archrival, the Fuji Photo Film Company of Japan, in collusion with the Japanese government, had denied it fair access to the Japanese market. In fact, Kodak estimated that it had lost at least $5.6 billion in potential revenues in Japan over the previous 20 years, in a market now worth an estimated $2.8 billion a year.[1]

The Clinton administration, reeling from the political setback of the 1994 midterm elections, was determined to show a hostile Congress that international trade agreements such as the North American Free Trade Agreement and the General Agreement on Tariffs and Trade (GATT) would in no way compromise the trading position of US companies.[2] With most conventional cross-border trade barriers, such as tariffs and quotas, significantly lowered or eliminated by international agreements, attention had shifted to domestic policy instruments as sources of trade friction between

*Snapshot: Kodak v. Fuji* is an edited and revised version of the case with the same name originally written by Samuel Passow for the Case Program at the John F. Kennedy School of Government. For copies or permission to reproduce the unabridged case please refer to www.ksgcase.harvard.edu or send a written request to Case Program, John F. Kennedy School of Government, Harvard University, 79 John F. Kennedy Street, Cambridge, MA 02138. Support for an update of this case was provided by the Kansai Keizai Doyukai.

1. Obtained from Alan Wolff and Thomas Howell at Dewey Ballantine, 1996.

2. The Republican Party had gained control of Congress for the first time in 40 years in the midterm elections of 1994. Organized labor (specifically, the AFL-CIO), which bitterly opposed the free trade treaties that it believed would lead to US job losses, not only withheld its traditional financial support of the Democratic Party but even campaigned against those Democratic members of Congress who had voted for the free trade bills. As a result of the Republican victory, New York's Senator Alfonse D'Amato became chairman of the Senate Banking Committee.

countries. The policies of the government of Japan as well as the private practices of Japanese firms had long been an irritation in trade talks with the United States. Not only did the Japanese government tightly regulate many aspects of the economy—a government permit was needed in some 10,760 circumstances[3]—but also myriad "private barriers," alleged to arise from certain practices or arrangements between local firms, stifled foreign access to the Japanese economy.

For its part, the Japanese government complained that the US government used bilateral negotiations combined with the threat of unilateral sanctions as a way of guaranteeing market share for US companies doing business in Japan, a practice more commonly called "managed trade." In response to the frictions over semiconductors, the Japanese had made it a cornerstone of their trade policy to use international forums like the World Trade Organization (WTO) to resolve trade disputes in ways that emphasized solutions that emerged from changing the rules.

Acting United States Trade Representative (USTR) Charlene Barshefsky hoped that the Kodak case could accomplish what she and her staff had laboriously sought in 23 sectoral agreements with Japan over the previous four years. After almost a year of investigation of and often intense deliberation about Kodak's claims, as well as several failed negotiations with the Japanese government, Barshefsky and her staff had to decide whether to resolve a broader version of Kodak's claim before the WTO or take unilateral action against the Japanese photographic industry. The management of Kodak had billed this suit to the USTR "as the trade case of the century," claiming that "this would be the case that would finally allow the US to nail Japan."[4]

At its core, the dispute centered on the question of whether the lack of enforcement by a government of its competition laws provided advantages to domestic firms in their home markets. A ruling by the WTO Dispute Settlement Body (DSB) could well set the precedent for broadening the definition of competition policy to include consideration of whether laws of a sovereign nation that are neutral on their face but administratively abused by that government contributed to problems of market access for foreign suppliers.

The case was also highly politically charged. It brought into question the deep issues of sovereignty, first defined in the 1648 Treaty of Westphalia (which brought an end to Europe's Thirty Years' War) and jealously guarded by governments ever since, by challenging whether an external organization, such as the WTO, was empowered to intervene and force a sovereign nation to abrogate or amend a domestic law intended to protect

3. Obtained from Alan Wolff and Thomas Howell at Dewey Ballantine.

4. Kodak manager, quoted in Helene Cooper and Wendy Bounds, "Kodak Chief and Capital Lawyer, Heavy Hitters on Trade Matters, May Strike Out in Fuji Case," *The Wall Street Journal*, May 24, 1996, A12.

the rights of its citizens or the cultural heritage of that nation. Many in the United States who were concerned about ceding power to international organizations would watch this case and USTR's handling of it carefully.

## Background on Kodak and Fuji

For decades, Eastman Kodak Company was the world's preeminent manufacturer of photographic imaging materials. In its global brand-name recognition, it was surpassed only by the likes of McDonald's, Coca-Cola, and Disney.[5] In 1995 the firm was the 247th largest company in the world, with sales exceeding $14.9 billion.[6] The company, which employed more than 96,600 people worldwide, had net earnings that year of $1.25 billion; it had 70 percent of the US market and 36 percent of the global market in color film.[7] Over the years, the company had spent tens of millions of dollars on a warm and fuzzy advertising campaign promoting that special "Kodak moment."

Kodak has had other moments, too. The company had been the subject of investigation and prosecution by the Justice Department since the turn of the century. From its founding in 1878 until 1915, George Eastman's company managed to get a lock on 98 percent of the total photographic market in the United States through various methods of price control and a combination of vertical and horizontal market restraints. In 1921, following an appeal to the US Supreme Court of a case brought by the Justice Department in 1915, Kodak entered into a consent decree that, among other things, required the company to divest itself of a number of factories, a photographic paper and supply company, and a dry-plate company. Kodak was ordered to refrain from engaging in resale price maintenance or employing "terms of sale." The company was also enjoined from monopolizing through mergers and acquisitions and from purchasing downstream distribution businesses without disclosure.[8]

In the 1940s and 1950s, Kodak engaged in a practice of tying its film sales to its photo-finishing services. Film was sold at a minimum unit price, set by Kodak, which included the cost of photo finishing. At that time, Kodak had a 95 percent market share of the color film market. By bundling the cost of film and processing, Kodak effectively monopolized the photo-processing industry as well. In 1954, the Justice Department was forced to add additional claims to its original 1915 suit in an attempt

5. "The World's Best Brands," *The Economist*, November 16, 1996, 108.

6. "Global 500 Poll," *Fortune Magazine*, August 15, 1996, F5.

7. Eastman Kodak, *Annual Report*, 1995.

8. *United States v. Eastman Kodak*, 226 F. 26, 63 (W.D. NY, 1915); appeal dismissed, 225 US 578 (1921).

to curtail Kodak's market behavior. This resulted in another consent decree prohibiting resale price maintenance and tying. The decree also required Kodak to divest itself of some of its photo-finishing labs. Both consent decrees were in force until 1994, when they were terminated by the US District Court in Rochester at the request of Kodak, which argued that various changes that had occurred in the photographic industry rendered the restraints obsolete.[9] The US government took the case to the court of appeals, which affirmed the lower court's decision.

Fuji Photo Film, founded in 1934, was by 1995 the 338th largest company in the world with sales of $10.2 billion. The company, the largest manufacturer of film products in Japan, employed 29,903 people worldwide and had net earnings of $685 million. It controlled about 70 percent of the Japanese market and 33 percent of the global market.[10] Though Fuji had been competing head-on with Kodak since its inception, it was not until the mid-1980s that the Japanese firm became a threat to Kodak's worldwide market domination. By then, according to Fuji's president and CEO Minoru Ohnishi, the stakes of global competition with the American firm were very clear: "We were in a race for survival with Kodak. We could almost see their numbers" (i.e., the numbers on the backs of the runners in a road race) (quoted in Sieg 1994, 18).

Kodak and Fuji battled each other relentlessly around the globe. In both their successes and failures, they seemed to be mirror images. In the United States, Kodak had approximately a 70 percent market share in color film to Fuji's 10 percent, while in Japan the reverse was true: Fuji had a 70 to 10 percent advantage over Kodak. The similarities persisted even when viewed globally, as these two titans could each lay claim to a third of worldwide market share.

Kodak began selling its products in Japan in 1889; by the 1930s, it had established a thriving operation and developed long-term relationships with the major Japanese wholesalers (Kashimura, Ohmiya, Asanuma, and Misuzu), or *tokuyakuten*, and was successfully using their extensive distribution system throughout Japan. After World War II, the Japanese government erected a wall of tariffs and quotas on all products, including photographic supplies, severely restricting the US firm's ability either to maintain its market share or to penetrate the market further. In the early 1950s, Kodak was limited to using only two distributors. In the official

9. *United States v. Eastman Kodak Company,* 853 F. Supp. 1454 (W.D. NY, 1994). In his opinion, Judge Telesca agreed with Kodak's argument that the relevant market for film was global. Given Kodak's worldwide share of 36 percent and the technological innovativeness of all the major competitors, he found that Kodak did not have monopoly market power. Even if the relevant market were limited to the United States, where Kodak's share was much higher (70 percent), Telesca found that Kodak did not possess monopoly power, because consumers were price-sensitive and because other suppliers could increase their capacity if Kodak restricted output or raised its prices.

10. "Global 500 Poll," *Fortune Magazine*, August 15, 1996, F7.

parlance of the Japanese bureaucracy at the time, the action was taken to "end confusion" in the importing business (Sieg 1994,102).

By 1960, Kodak was selling its products in Japan through a single intermediary trading house, Nagase & Co. The other *tokuyakuten* became the main distributors for Fuji Photo Film. Kodak's former president for Japan (1984–91), Dr. Albert Sieg, noted: "In effect, we taught the distribution company that was to become our main competitor how to move film throughout the country's retail stores" (Sieg 1994, 102).

Kodak's decision to run its business through a single trading house upset a number of Japanese. The management of Asanuma, the third-largest *tokuyakuten* in Japan, had a prior relationship with Kodak dating back to 1890 and did not like going through its rival, Nagase, for its supply of US film (Asanuma 1971).[11] Until World War II, the US firm accounted for nearly half of Asanuma's business.

In 1973, the top management of Asanuma claims to have visited Rochester to reestablish direct dealings but was allegedly rebuffed.[12] Kodak declares that it has no records of those meetings, and for that reason doubts that they took place. Two years later, Asanuma stopped buying the US firm's film product, a move that the Kodak management seemingly did nothing to reverse. But whether the meetings occurred or not, Sieg recalled in his memoirs, "Those distributors (the ones abandoned by Kodak) never forgave us, even after the government eased restrictions and we attempted to expand our network; many told us in no uncertain terms that they would never work with us because of the way we treated them in the past. Indeed, they stuck with Fuji and became part of one of Japan's most successful alliances" (Sieg 1994, 102).

In addition to running its business through a single Japanese trading house, Kodak also sold technology to Japanese companies. "Like most American companies [in the 1950s and 1960s], we were content to sell technology to the Japanese and make money. And we did," said Dr. Sieg. "We sold technology to Fuji Photo Film and Konica and anybody that came to our door. That was the way we decided we could make money in Asia. It was also a judgment—obviously not right—that we didn't need to worry about the Japanese as a competitor."[13]

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11. In 1920, when George Eastman came to Japan for the first time, Tokichi Asanuma, the founder of the firm, hosted him with a lavish geisha party in Kyoto. Eastman commented at the time, "In thinking back on the growth of this industry, the credit that I allot myself is for always getting good men to join us." ("Asanuma—A Commemorative History of the First Hundred Years," Japan, 1971)

12. Asanuma professes to have made several trips to Rochester that year to meet with the Kodak management as part of its process of strategically reevaluating the film distribution market in Japan following the liberalization of the market (Interviews with company directors, November 14-15, 1996).

13. Sieg, quoted in Scott Lathan, "Manager's Journal: Kodak's Self-Inflicted Wound," *The Wall Street Journal*, August 14, 1995, A10.

Between 1971 and 1976, the Japanese government progressively dismantled its tariffs on photographic goods, which earlier were as high as 40 percent. In 1979, it also ended the prohibition on direct foreign investment in the sector, including in distributors and photo-processing facilities. With legal barriers to direct investment gone, Kodak established a local subsidiary to provide technical and marketing support to its exclusive distributor. The American managers were confident that Nagase's network of 33 distributors and dealers was sufficient to compensate for the loss of Asanuma.[14]

In fact, by 1983, Kodak's sales soared and its market share of consumer color film reached an all-time high of 15.8 percent. This success was primarily attributed to Kodak's decision not to raise prices in response to the increased market cost in 1980 of silver, a major component in the manufacture of film, and the resulting wide price differential between its product and Fuji's. Other contributing factors were Kodak's introduction of the highly popular 110 cartridge film two years earlier than its Japanese competitors and the decline of import quotas, which enabled the company to bring more film into Japan.

But it was not until 1984 that Kodak made its major push into the Japanese market by creating a joint venture, Kodak Japan Ltd., which absorbed Nagase's division of Kodak products. Starting with only 11 people, Kodak set up a technical center in Tokyo and hired Japanese salespeople, managers, and advertising and marketing experts.[15] In 1986, Kodak listed its shares on the Tokyo Stock Exchange to allow for greater local participation in the company. To bolster marketing efforts in Japan, Kodak undercut its competition by selling its film at an average rate of 100 yen (90 US cents) less per roll, even though its product was imported. In addition, it sold its film in Japan under a private label for the Japanese Consumer Cooperative Movement, a group of 2,500 retail outlets, at an estimated 38 percent discount off the price of its own brand in Japan.[16]

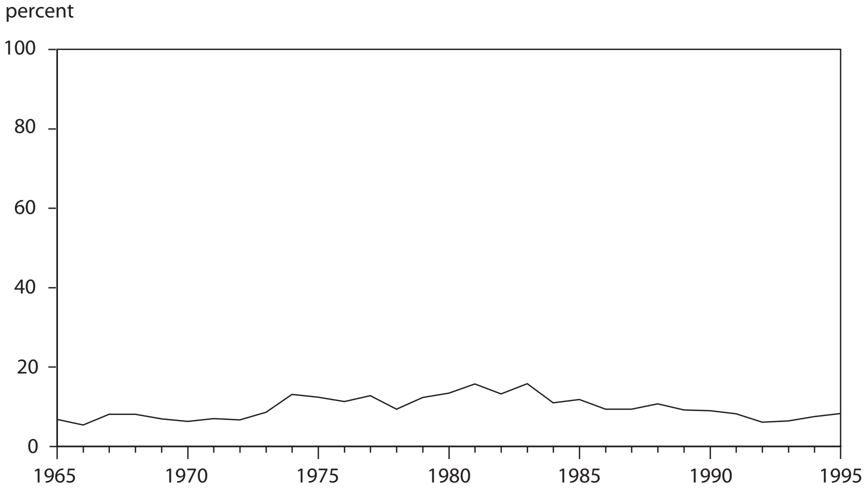
Fuji and Kodak ruthlessly attacked and counterattacked each other. Both firms introduced new products in quick succession, advertising them with outrageously large colored neon signs in major metropolitan areas in order to capture that all-important market share. In addition to fighting

14. Kodak had built direct distribution systems in the United States, Canada, the United Kingdom, France, Spain, Sweden, Switzerland, Taiwan, Singapore, Indonesia, Thailand, Chile, Peru, South Africa, Australia, and New Zealand.

15. Kodak also opened a state-of-the-art research and development facility in Yokohama to develop goods tailor-made for the Japanese market; its products, such as the Weekend 35 single-use camera, which could be used under water, and the Panorama single-use camera for wide-angle prints, had no competitive counterpart.

16. Wendy Bounds, "Kodak Pursues A Greater Market Share in Japan with New Private-Label Film," *The Asian Wall Street Journal*, March 7, 1995, B9.

**Figure 3.1 Kodak's market share in Japan in consumer color film roll, 1965–95**




*Source:* Dewey Ballantine (1995).

over photographic film and paper, they also went head-to-head in the photocopier and clinical blood analyzer markets.

While Fuji had always held an overwhelming advantage over Kodak in Japan, it seemed to solidify its hold of about 70 percent of market share when it became the first company there to introduce the single-use camera (in 1987) and ISO 400 fast film (in 1989).[17] Kodak lagged a year behind Fuji in producing a single-use camera for the Japanese market, and two years behind with the highly popular faster film. The marketing war in Japan became so intense that Kodak had its blimp with "Go Kodak" printed on it buzz the Fuji Tower in Tokyo just to rile the company's management.

By 1995, Kodak had more than 4,300 employees in Japan and had built its own network of affiliated photo-processing laboratories by acquiring an equity position in several Japanese firms. It accounted for 8.3 percent of the local market in color film. But less than half of Kodak's more than $1 billion total annual revenues in Japan was from consumer film products. The company also stopped trading its shares on the Tokyo Stock Exchange (see figure 3.1).

Kodak claimed that by the time the Japanese government had lifted all trading restrictions in the photographic sector in 1979, Fuji Photo Film

17. After the film in the plastic single-use camera is developed, the photo finisher returns the camera to the company for reuse. This innovation was considered the brainchild of Minoru Ohnishi, the president of Fuji.

had already created the closed distribution system that has acted to the present day to protect its business in Japan and its 70 percent market share (see appendix figure 3A.1).

## Antitrust and Trade Frameworks

### The United States

The United States has one of the world's oldest and the most comprehensive system of antitrust regulations, embodied in such laws as the Sherman Act (1890), the Clayton Act (1914), the Robinson-Patman Act (1936), and the Celler-Kefauver Act of 1950 (the latter two being amendments to the Clayton Act). Under the US system, antitrust laws are articulated and enforced by the courts; the final arbiter of this case-by-case adjudication is the Supreme Court. While US antitrust doctrine is premised on ensuring that the quality of competition generally is not injured, noncompetitive behavior is more often than not interpreted as causing harm to specific individuals or business firms.

In the American legal system, individuals or corporations can bring private antitrust lawsuits before the courts. From 1980 to 1989, 10,018 private antitrust cases were filed in the United States, compared to 1,001 government-initiated cases (First 1995, 163). The goal of these private litigants was not to maximize the economic welfare of the country nor to establish public policy by providing guidance to other business firms, but to gain financial compensation. Private litigants sought the "treble-damage remedy": triple the actual damage incurred was awarded if the plaintiff could prove the fact of injury and the amount.

The president's primary vehicle for negotiating and implementing international trade policy is the Office of the USTR, a cabinet-level agency within the Executive Office of the President. While the US trade representative is not a cabinet member per se, the official holds the title of ambassador and is directly responsible to both the president and Congress, which must confirm his or her appointment.

Internationally, the USTR has at its disposal a number of enforcement tools approved by Congress to help break down foreign trade barriers. The most important of these methods of dealing with trade cases are section 301 of the Trade Act of 1974 and the dispute settlement procedures of the WTO.

Section 301 is the principal statute for addressing unfair foreign practices affecting US exports of goods and services. It can be used to enforce US rights under international trade agreements and also to respond to unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict US commerce. Under section 301 the USTR can take action, subject to direction from the president, against such practices as withdrawing trade agreement concessions and imposing duties, fees, or restrictions on imports.

Throughout the 1980s and early 1990s, successive US administrations actively used the unilateral threat of retaliatory measures under section 301 to improve market access for US exporters in both emerging markets and developed economies. In most cases, the one-year investigation conducted by the USTR, combined with a 30-day notice period for imposing tariffs or quotas required under the legislation, helped to catalyze an agreement, as well as provide a face-saving period during which both sides in a dispute could back away from a trade war.

## Japan

Modern Japan's main legal framework for anticompetitive conduct was originally put in place by US General Douglas MacArthur, who as Supreme Commander for the Allied Powers (SCAP) of Japan headed the victorious Allied occupation from 1945 to 1951. As part of his effort to "democratize" Japan, MacArthur quickly introduced antitrust principles by dismantling the *zaibatsu*, the large family-owned conglomerates that dominated the Japanese economy before and during World War II through their cross-ownership of banks, manufacturing, and distribution. The four major firms—Mitsubishi, Mitsui, Sumitomo, and Yasuda—were, in effect, the military-industrial complex of imperial Japan.

Under SCAP's autocratic direction, in 1947 the Japanese Diet (Parliament) approved the Anti-Monopoly Law (AML) that established the Japan Fair Trade Commission (JFTC) to ensure the existence of competitive conditions by destroying cartels and preventing the reemergence of large, single-firm monopolies. The JFTC was empowered to eliminate "substantial disparities" in economic power—by divestiture, if necessary—and to prevent various devices for monopolization such as interlocking directorates, intercorporate stockholding, and holding companies.[18] The Diet also passed the Trade Association Act of 1948, which prohibited groups of firms from restrictive operating practices.

After the peace treaty of September 1951 returned full sovereignty to Japan, the Diet wasted little time in modifying the US-imposed antitrust laws. An amendment to the AML in 1953 permitted groups of domestic manufacturing firms in "depressed industries" to form cartels in order to rationalize production, improve technology, assess quality, and increase

18. In 1949 and 1950, before the end of the occupation, the AML's prohibition of interlocking directorates, stockholding, and mergers was modified, as SCAP was concerned that the economy was not developing fast enough. At a time when communists had gained control of China and North Korea, the United States worried that a weakened Japan could undercut the region's defense.

business efficiency (Ito 1992, 204).[19] In addition, the practice of maintaining resale price through linked relationships called *keiretsu* was reinstituted, and the Trade Association Act was repealed. The constituent firms of the old *zaibatsu* were drawn together again; but now, instead of being centrally controlled by a holding company, relations between the various entities were looser and often indeterminate (Allen 1981, 41).[20]

The AML, which was amended again in 1977 and 1991, empowers the JFTC to monitor all oligopolistic industries and investigate violations reported by any person.[21] If it finds any price-fixing or other market-rigging measures, it can order the payment of fines or "administrative surcharges" against a cartel. If the matter involved is criminal, the JFTC can refer the case to the prosecuting authority who would try the case in court. Convictions rarely result in penal sentences. In the 10-year period from 1985 to 1994, the JFTC conducted only 109 cases, handing out penalties totaling $223.3 million (Willkie, Farr & Gallagher 1995). While Articles 25 and 26 of the AML allow courts to rule on private action in antitrust cases, the JFTC must first determine that there was unlawful conduct. If the matter is then taken to court, the plaintiff need only prove linkage between the damage and the illegal conduct. According to Harry First of New York University Law School, an expert on Japanese law, "This takes on great significance because the JFTC has always preferred to act informally, disposing of the large bulk of its cases through warnings or guidance" (First 1995, 147). Under the AML, plaintiffs can recover only single damages, and there is no provision for the additional recovery of attorney fees. In 1989, the Japanese Supreme Court held that plaintiffs could use Article 709 of the Civil Code, the general tort provision, to recover damages caused by antitrust violations, but the plaintiff had to first prove unlawful conduct before establishing a linkage to the damages; not until 1993 was any private plaintiff successful in recovering damages under the AML.[22]

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19. Industries designated "depressed" by the Ministry of International Trade and Industry (MITI) were then approved by the JFTC under Article 24-3 of the AML; "after such a cartel was formed, production and investment schedules were coordinated by MITI." Thus, at times during the 1970s and 1980s the coal mining, aluminum, and shipbuilding industries were legal cartels.

20. After 1953, the ability of the JFTC to curb monopoly and restrictive practices was further weakened by special enactments sponsored by MITI, which made it possible for the law to be bypassed in particular industries. Moreover, firms brought under scrutiny by the commission sometimes pleaded successfully that they had acted under "administrative guidance."

21. The 1977 amendments limited a bank's shareholding of a company to 5 percent of the company's equity and introduced an "administrative surcharge" against cartels affecting prices. The 1991 reforms, which followed the 1989–90 Structural Impediments Initiative talks between the United States and Japan, raised the amount of surcharge to be imposed by the JFTC.

22. Professor Mitsuo Matsushita of Seikei University, "Private Enforcement of Competition Law" (speech, 1996). In the breakthrough case, upheld by the Osaka High Court, a Japanese

Rather than viewing antitrust regulations as a legal mechanism for protecting the quality of competition, the Japanese saw them as a bureaucratic approach to managing the economy through "administrative guidance." The former chairman of the JFTC, Masami Kogayu, conceded that "even though 48 years have passed since the AML was established in Japan, it had not really taken root in Japanese society."[23]

This attitude is explained in part by the strong tendency in Japanese society to value cooperation over competition, perhaps best illustrated in the wording in the first article of the 1947 AML. After setting out the law's intent to promote "free and fair competition," it concluded by stating the law's overall purpose: "to protect the democratic and wholesome development of the national economy as well as assure the interests of consumers in general" (quoted in First 1995, 144). This phrasing would later provide US negotiators with an insight into how Japan's government then viewed the proper place for antitrust legislation. Of paramount concern was protecting not the consumer, the individual, but rather the national economic interest. The Japanese cultural aversion to litigation also stunted any significant doctrinal development of the AML, as legal precedents were scarce. Without the practical guidance offered by court cases, enforcing the highly detailed piece of legislation was not feasible.

US influence on Japan's antitrust enforcement surfaced again in the late 1980s during the Structural Impediments Initiative (SII), a bilateral negotiation aimed at setting a new framework for getting negotiations between the two countries back on track after the Market-Oriented Sector-Specific (MOSS) talks had broken down over importation in particular areas that the Japanese considered to be strategic industries underpinning their economy, such as rice and lumber. As First notes, "The fact that the United States focused on antitrust as a critical trade issue made antitrust into an important economic policy for Japan's government. It was irrelevant whether Japan's government believed, as a general matter, that antitrust laws were good economic policy. Doing something about antitrust laws became vital national policy simply because it was necessary for managing the trade relationship with the United States" (First 1995, 174).

As a result of the SII discussions, the JFTC published *The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices* in 1991. This 93-page document, written in English, spelled out in detail where, in

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small elevator service company using Article 709 proved that Toshiba, which manufactured elevators, illegally used anticompetitive tie-in clauses to favor its own service subsidiary and that its refusal to sell spare parts prevented the independent maintenance contractor from working in buildings with Toshiba elevators. Among other arguments, both sides cited legal precedents from Kodak antitrust cases in the United States.

23. Michiyo Nakamoto, "The Watchdog that Refuses to Bite—Japan's Anti-Cartel Agency," *The Financial Times*, February 23, 1996, 4.

its view, the line between legality and illegality falls in such practices as boycotts, exclusive dealing arrangements, full-line forcing, reciprocal dealing, sales territory restrictions, rebates, resale price maintenance, acquisition of ownership interests in vertical trading partners, and the abuse of a dominant bargaining position by retailers (Scherer 1995, 2). Enforcement of the AML was also increased.

## The World Trade Organization

The WTO was established in April 1994 when the ministers from 112 nations gathered in Morocco and signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. The legal texts in this 550-page document spell out the results of the round's negotiations, which began in Punta del Este, Uruguay, in September 1986.

The forerunner of the WTO was the GATT, established following World War II to provide a mechanism for setting international trade standards and providing a voluntary forum for resolving disputes. The WTO went a step further. Article III of the agreement, the Dispute Settlement Understanding (DSU), defines an arrangement for a new "trade court," known as the Dispute Settlement Body. For the first time, a dispute settlement mechanism's text and procedures constituted treaty obligations (as opposed to "interpretations" or "understanding of practices"), and its use was mandatory (see appendix figure 1B.1 in chapter 1).

As soon as the WTO began operating in January 1995, the USTR in the Clinton administration, under the direction first of Ambassador Mickey Kantor and later of Ambassador Barshefsky, made vigorous use of the dispute settlement provisions of the Geneva-based international monitoring body, filing 20 cases in a 21-month period.[24] In 1996 alone, the United States invoked the dispute settlement procedure 14 times, compared with eight cases brought by Canada and seven by the European Union.[25]

24. Mickey Kantor was the USTR from January 1993 until April 1996, when he became secretary of commerce following the death of Ron Brown. Charlene Barshefsky, designated acting USTR by President Clinton in April 1996, was officially appointed to the position in January 1997.

25. The United States won the first case that it took to the WTO involving Japan's taxes on liquor imports. It signed a settlement agreement in another case involving European Union imports of grain. In a third case, the defending party, Portugal, changed its practice regarding the protection of patents as a result of the US complaint. The USTR settled on two other issues, one involving Japan's protection for sound recordings and the other, Turkey's discriminatory box-office tax on foreign films.

## Kodak Takes Action

In December 1993, Kodak hired George Fisher from Motorola to be its president and CEO. Fisher, a dynamic, results-oriented executive, came to the job with a well-earned reputation as an unrelenting fighter in developing market share.[26] Fisher was adamant in his belief that closed foreign markets were one of corporate America's major obstacles to global success. He unabashedly claimed, "I don't see anything wrong in getting the help of our government to help us be successful."[27]

Fisher's mandate at Kodak was to restructure and revitalize the ailing company. He stripped some $7.9 billion in tangential businesses away from Kodak and revamped those that remained into seven profit centers. Kodak stock was trading on the New York Stock Exchange at $40 a share when Fisher took over. By December 1996, it was trading at $82 a share.[28]

Yet Fisher had inherited a major problem. Despite its worldwide success, its considerable investment in the Japanese market, and a brand name that had been recognized for generations, Kodak could manage to carve out only about 10 percent of the market share in Japan. On May 18, 1995, Kodak filed a 280-page petition with the USTR under section 301 of the 1974 Trade Act, claiming that it was being denied full access to the consumer photographic film and paper market in Japan.[29] The entire submission, which took two years to produce, was prepared entirely by Dewey Ballantine's Washington office. Lacking an office in Japan, the international firm did not seek assistance from Japanese lawyers; its research was conducted with the help of several local marketing firms. The report, titled *Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Paper*, claimed that the wholesale price of a roll of color film in Japan was 3.1 times higher than in the United States, 3.6 times higher than in the United Kingdom, and 4.1 times higher than in Switzerland. It further claimed that even in the stores where Kodak film could be found, in four out of five purchases Japan's consumers were denied the benefit of Kodak's competitive wholesale price.[30]

26. Neil Weinberg, "Calling the Competition," *Forbes*, November 4, 1996, 146. As Motorola's CEO, Fisher successfully lobbied the US government to use threats of trade sanctions, under section 301 of the 1974 Trade Act, to open up the fast-growing cellular telephone market in Japan to his and other US firms. At the time (1994) Motorola was doing a thriving business in cell phones. Also see Matthew Fletcher, "Film Fight—Fuji vs. Kodak," *Asia Week Magazine*, July 5, 1996, www.asiaweek.com.

27. Fisher, quoted in Cooper and Bounds, "Kodak Chief and Capital Lawyer," A12.

28. New York Stock Exchange listing, *The International Herald Tribune*, December 3, 1996.

29. USTR press release, June 13, 1996.

30. Kodak's legal brief took a shotgun approach to possible trade violations by Japan; one of its claims was that Japan's actions were not only "unjustifiable" practices inconsistent with international trade law but a breach of the 1953 US-Japan Friendship, Commerce and Navigation Treaty and the 1961 OECD Code of Liberalization of Capital Movements.

Kodak's section 301 case focused mainly on Japan's "vertical market restraints," which are the impediments encountered by importers seeking access to the wholesale and retail distribution channels needed to convey their products to the end consumer (Scherer 1995, 2–3). The complaints by Kodak included the following:

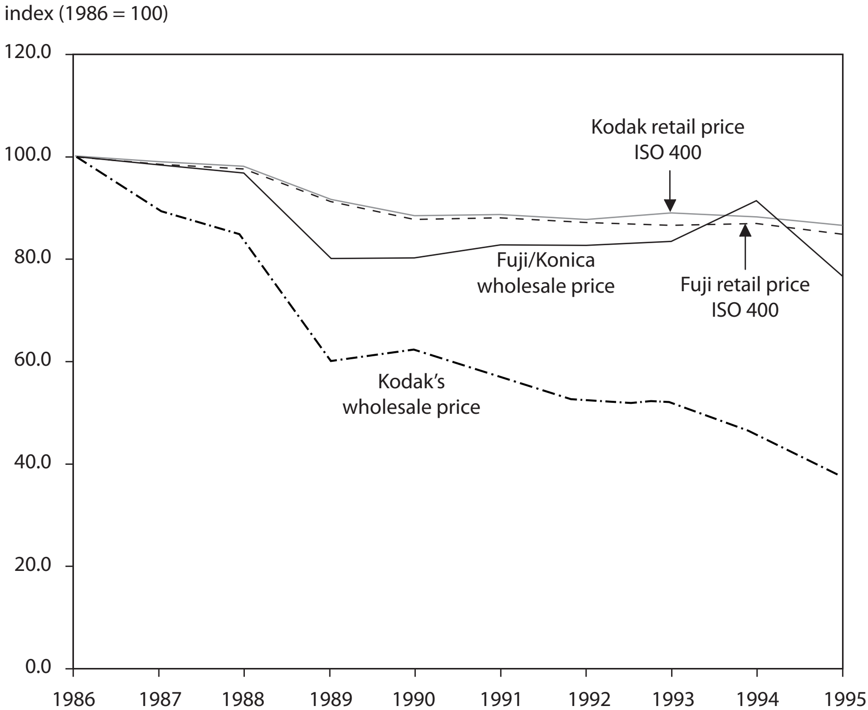
- Fuji controlled and enjoyed an exclusive relationship with all the leading wholesalers (*tokuyakuten*) of consumer photographic products, who in turn strongly influenced the distribution channels for consumer film down to the retail level.[31] Kodak claimed that the *tokuyakuten* were essential for doing business in Japan, but that the costs of setting up its own distribution network on the same level in order to compete fairly would be so high that doing business in Japan would be uneconomical. Because it was closed off from the existing distribution system, Kodak claimed that Fuji's 70 percent market share of film in Japan was the equivalent of a monopolistic market.
- Fuji controlled a network of photo-processing laboratories that served as a captive market for consumer photographic paper.
- The Fuji system was reinforced by a web of financial ties with the Mitsui Group of banks, one of the major lenders in the Japanese economy.[32]
- To maintain stable, high prices—up to four times higher than those in other major markets—Fuji and its affiliated dealers used a variety of anticompetitive practices, including resale price maintenance; horizontal coordination of pricing; opaque and discriminatory volume-based rebates; and reliance on its trade association, the Zenren, to monitor and enforce discipline on maverick retailers who discounted prices. (figure 3.2)[33]

31. According to the USTR's *National Trade Estimate Report on Foreign Trade Barriers—Japan* (March 1996), film is sold at 279,000 outlets in Japan. About half of all sales are made through photo-specialty stores (as compared with 3 percent in the United States). Another 23 percent are sold through supermarkets and department stores, 8 percent at tourist resorts and parks, 7 percent at convenience stores, 2 percent at drug stores, and the rest through kiosks and other channels. At the retail level, foreign film is available in only about 36 percent of all outlets and only about half the photo-specialty stores.

32. Mitsui was one of the traditional *zaibatsu* until the end of World War II, and Kodak claimed that its involvement exceeded the guidelines of the AML with the tacit approval of the JFTC. Mitsui is today part of a *keiretsu,* and it financed Fuji's interlocking financial ties with processing labs around the country.

33. Kodak alleged that it was through the Zenren and other trade associations that horizontal pressure (i.e., down the chain from manufacturer to wholesaler to retailer) was applied to maintain the retail price suggested by Fuji, thus preventing price reductions for consumers. A survey commissioned by Kodak in November 1995 concluded that the average price of film at a Zenren store was higher than at other stores.

**Figure 3.2 Indexed film prices in Japan, 1986–95**




Price stability was indirectly reinforced by the government of Japan through the JFTC, which "flexibly" interpreted and enforced the antimonopoly laws and used its authority to administer an industry competition code that prohibited a range of promotional activities at the retail level.

Kodak claimed that it simply sought access to retail shelf space in Japan and an end to anticompetitive price stabilization activity in that market. Fisher was adamant that he did not desire the US government to fight for guaranteed market share for imports or to impose trade sanctions on Japanese products. In the company's words, all it wanted was "to get on the shelves, get off the shelves and get on more shelves."[34] The remedies that Kodak urged the USTR to suggest would require extensive intervention by the Japanese government to change Fuji's practices and to force the JFTC into acting more aggressively against anticompetitive and monopolistic practices, including directing Fuji to terminate

34. Alan Wolff; unless otherwise noted, all quotes from Wolff are from a November 1, 1996, interview with the author.

- all practices that promoted horizontal and vertical price fixing;
- the exclusive distribution of Fuji film by primary and secondary wholesalers and ensuring that the wholesalers were free of any coercion restricting their willingness to distribute Kodak and other competitors' products; and
- rebates that illegally excluded competitors and induced resale price maintenance.

Also in May 1995, Kodak hired Ira Wolf, a former assistant USTR responsible for Japan and China (1992–95), to be its vice president and director of Japan relations at its Tokyo office. Wolf, who spoke Japanese, was the government liaison officer for Motorola in Japan (1990–92) when Fisher was its CEO.

Kodak's lead lawyer at Dewey Ballantine in Washington was Alan Wolff, who had helped to write section 301 of the 1974 Trade Act while he was deputy general counsel at the USTR. Wolff emphasized the importance of getting Kodak's products on the shelves: "It's the consumer who determines the level of trade. If we could get access to the Japanese distribution system and be able to price competitively, we would capture our fair share of the market." Indeed, Kodak's research showed that in Tokyo, where it had the strongest market presence (its film could be found in 54 percent of the retail outlets surveyed), it enjoyed twice the market share it had in Japan as a whole (Kodak claimed that its product was wholly absent from two-thirds of the Japanese market) (Alan Wolff at Dewey Ballantine, 1995).

The Kodak action coincided with a period of growing trade friction between the United States and Japan caused by contentious negotiations over the sale of US autos and auto parts in Japan. The US ambassador to Japan, former vice president Walter Mondale, who was very much involved in those negotiations, reportedly said to one American businessman in Tokyo, "I'm used to a system where elected leaders make decisions and bureaucrats implement them, but this place has it turned upside down."[35]

On July 2, 1995, the USTR initiated an investigation into Kodak's allegations under section 301 of the Trade Act of 1974, independently verifying them through the US Embassy in Tokyo and other sources. Eleven months later, it concluded that the US firm did have a substantial case, on the following evidence:

- When, under international pressure between 1964 and 1976, Japan dismantled its formal restrictions on imports and inward investment

35. Teresa Watanabe, "In Mondale, U.S. Firms Found an Adept Envoy; Diplomacy: Ambassador's Quick, Clear Understanding of Japan Helped American Business, Executives Say," *Daily Yomiuri Newspaper*, Japan, November 10, 1996 (syndicated article originally published in the *Los Angeles Times*).

in the industry, it simultaneously created an anticompetitive market structure as a "liberalization countermeasure" to restrict foreign producers' effective participation in the market.

- This restrictive market that the Ministry for International Trade and Industry (MITI) established under the liberalization countermeasures in the 1970s was still in place, maintained and tolerated by the government of Japan despite Japan's commitments to the United States regarding structural adjustments to the economy.
- The industrial policy of the Japanese government—a major component being the lukewarm enforcement of its AML—permitted anticompetitive practices by domestic manufacturers and trade associations that were serious violations of Japan's own laws on competition.

## Fuji Responds

In Tokyo, the top managers of Fuji Photo Film were not only stunned by the scope of the Kodak complaint but also offended by what they thought were outright malicious lies. They feared the harm those lies would do, not so much in Japan as in markets around the world where Fuji was spending enormous amounts of time and money cultivating an image and a reputation as a dynamic and innovative firm. Fuji's president, Minoru Ohnishi, complained that

> Kodak has violated all the standards of business ethics. It has shamelessly made false allegations against Fuji in a self-serving attempt to use political pressure to accomplish what its own lack of managerial effort and failed marketing strategies have not been able to accomplish. What is most troubling about Kodak's action is not that it attempted to tarnish Fuji with false allegations of anticompetitive practices, but that it attempted to exploit growing tensions between the US and Japan on trade issues to the detriment of a crucial bilateral relationship.[36]

Fuji wasted little time in huddling with their two key international strategists. Willkie Farr & Gallagher, a US-based law firm, had a long history of working for foreign firms, including work as counsel to the Japanese auto industry during the US-Japan auto talks. Edelman, an international public relations firm founded in the United States, had offices all over the world; its Washington office boasted Mike Deaver, the communications wizard of the Reagan White House, and used the lobbying firm of Downey Chandler, whose principals were a former Democratic congressman from New York (Tom Downey) and was a former Republican congressman from Washington state (Rod Chandler).

36. Fuji Film press release, May 1995.

During their brainstorming, they concluded that the small staff at the USTR would never have the time to investigate the case properly; they therefore resolved to neutralize Kodak's home court advantage by overwhelming the trade representative's office with documents refuting Kodak's evidence. "George Fisher understood the system and the built-in advantages any US company would have playing the [section 301] game," said Rob Rehg, senior vice president of Edelman. "We decided we would match them pound for pound in terms of paper."[37] They produced *Rewriting History,* their own 535-page rebuttal of Kodak's 280-page study.

The Fuji side spent millions of dollars creating a rapid response team that not only rebutted Kodak's claims but often "pre-butted" them. Between July 1995 and June 1996, Fuji representatives made 17 submissions to the American government, compared with Kodak's 9. After conducting three market surveys to Kodak's one, Fuji argued that more than three-fourths of the four primary film wholesalers that sell Fuji products purchased Kodak film or had relationships with Kodak film suppliers, claimed that Kodak had never approached the four major *tokuyakuten* (which Fuji was not preventing from carrying Kodak film), and blamed Kodak's low market share on its own failings, pointing out the far greater success of Konica, a film manufacturer that used two of its own distributors (Willkie Farr & Gallagher 1995). Over the months, journalists around the globe were showered with documents, letters, briefs, and even videotapes showing Kodak film being sold in Japan.

## The Agencies Take Action

### MITI Gets Involved

The Kodak case was filed at a time when MITI was working to formulate a new strategy for dealing with the United States on trade. In the spring of 1995, the US government threatened Japan with more than $6 billion in punitive duties under section 301 if it did not open up its home market to allow more US cars and car parts to be sold in Japan and to Japanese car companies overseas. Although this dispute was eventually settled, the government of Japan quietly decided it had had enough.[38] The next time

37. Rob Rehg, interview with author, Washington, DC, October 22, 1996.

38. Yataka Osada (professor of international law, Surugadai University, Japan), interview with the author, May 17, 1997. The Japanese attitude toward bilateral negotiations began to shift after a new five-year accord on semiconductors was reached in the summer of 1991. Both sides signed a document that called for a 20 percent target for US market access in Japan by the end of 1992. While Japan insisted that the deal's language explicitly noted that the target was neither a guarantee, a ceiling, nor a floor on foreign market share, the Americans publicly declared it a commitment.

the US government invoked section 301, Japan would simply refuse to negotiate on those terms.

On March 15, 1996, Japan's top trade negotiator, Yoshihiro Sakamoto, who was vice minister for international affairs at MITI, fired the first shot across the Americans' bow. Speaking in English so that there would be no misunderstanding, he told an audience at the Foreign Correspondents' Club of Japan that "the era of 'bilateralism' is over. . . . This was not to say that bilateral frictions would disappear. But any such friction from now on would have to be solved in accordance with the WTO and other international rules and by following market mechanisms."[39]

MITI felt that for the first time, it had been given the perfect cover for not having to engage the USTR in bilateral negotiations under section 301. The film industry was not regulated by the government. There were no import restrictions, and all the companies operating in that industry were private and independent.[40] MITI maintained it was not a party in the section 301 dispute, contending that any allegations of anticompetitive business practices came under the jurisdiction of the JFTC, a quasi-judicial body that was a distinct branch of government. It also realized that Kodak Japan Ltd., a registered Japanese company, had never filed an official complaint with the JFTC alleging any anticompetitive practices. Nor, for that matter, had Kodak ever sought to resolve the matter by approaching Fuji or any other participants in the industry. The Japanese officials believed that eventually the case could end up before the WTO, which was their preference all along. It seized the opportunity to sit back and appear to take a tough stance against the United States.

Adding to tensions between the countries was the months-long trial of three US soldiers, who in March were found guilty of raping a schoolgirl in Okinawa. The public furor in Japan over the case pressured the United States to reduce its sizable military presence on the island; more broadly, it threatened the stability of the US-Japan security relationship, the touchstone to which the nations had always returned in eventually resolving disputes. Although Washington was keen to delink issues of security and trade, in Japan the Okinawa incident translated symbolically into a behind-the-stage power struggle, exacerbated by earlier suggestions from officials in the Clinton administration that trade and economic policy, rather than defense and regional security, would be the basis for a new US-Japan relationship.

39. Text of speech supplied by MITI.

40. Fact sheet supplied by MITI through Willkie Farr & Gallagher, November 1996. Japan had no tariffs on photographic color film and paper, unlike the United States (3.7 percent duty on imports) and the European Union (5.3 percent duty on film, and 7.6 percent on photographic paper). In 1995, the share of imports in the Japanese market was 18.7 percent for consumer color film and 29.6 percent for photographic paper.

On February 21, 1996, the JFTC announced it would look into possible anticompetitive business practices in the Japanese markets for color film and photographic paper.[41] The probe, conducted through the voluntary submissions of material and information by the concerned parties, would focus mainly on market structures and corporate interactions. The findings would be issued in a report by March 1997. This survey, undertaken by the JFTC's Economic Department, was separate from the Kodak private-party complaint made in August 1996 under Article 45-1 of the AML, which was being looked into by the Investigation Department. The JFTC survey was not itself an investigation, though the JFTC could take action against any problematic practices that it found. According to Kodak's vice president in Japan, Ira Wolf, "We were cooperating with the JFTC. They asked us questions and we gave them answers; but we did not volunteer any information."[42]

Three months later, Hashimoto attempted to bolster the JFTC's international image as a reliable regulatory body by appointing Yasuchika Negoro, the former head of the Tokyo High Prosecutor's Office, to chair its five-member executive council. All previous heads of the commission had been drawn either from MITI or from the Ministry of Finance. The weakness of its antimonopoly enforcement had earned the JFTC the not-undeserved reputation in its own country of being a watchdog without teeth. The commission had conducted 13 similar surveys since 1990, including one on the film industry in 1992,[43] without recommending that a single company be prosecuted for breach of the AML.

Either because of or despite its extensive experience and knowledge of conducting business in Japan, the management of Kodak Japan never formally submitted a request to the JFTC to investigate the alleged anticompetitive conditions in the Japanese photographic film and paper market, or brought any formal charges against Fuji in Japanese court or with a government agency. One option was to lodge complaints with the Office of Trade and Investment, part of an ombudsman system created to mediate market-opening disputes. Kodak's Fisher said bluntly, "We did not feel that the JFTC was the proper investigation forum. The JFTC had been part of the problem."[44]

41. The JFTC's announcement came two days before the first scheduled meeting between President Bill Clinton and Prime Minister Ryutaro Hashimoto, who had been heading a shaky coalition government for just over a month. As trade minister, prior to becoming prime minister, Hashimoto steadfastly fought US demands for "managed trade" during the auto and auto parts negotiations concluded in June 1995.

42. Unless otherwise noted, all quotes from Ira Wolf are from a November 15, 1996, interview with the author.

43. *The Highly Oligopolistic Industries Report* (1992), a study that included the film industry, examined the question of vertical market restraints and how they suppressed price competition.

44. Fisher, quoted in Nikkei News Service, August 12, 1996 (statement made in 1995).

Alan Wolff, the company's lead counsel, speculates that Kodak's lack of trust in the JFTC could be traced to an earlier experience: A Kodak executive in Japan who submitted documents to the commission in 1977 later discovered that it had leaked proprietary information to Japanese film companies. Wolff also contends that part of the Kodak strategy was to "engage the Japanese government so that any JFTC review would not be conducted in a vacuum" and delayed interminably.

## Barshefsky's Decision

To USTR Barshefsky and her dedicated team, the Kodak case was important because it put a spotlight on alleged anticompetitive practices in Japan that extended to other areas of the Japanese economy and all types of foreign consumer products. As she noted, "We see in this sector [photographic paper and film] the same market barriers that are present in sector after sector in Japan. These are systematic structural barriers, such as closed distribution systems and excessive regulation that we have been discussing with Japan for years. With the detailed evidence uncovered in this investigation, we now have a clear understanding of how these barriers have interacted to keep out competitive foreign products in a particular sector."[45]

The USTR saw the strategic advantages of this case: If the WTO Dispute Settlement Body ruled in favor of the United States, the office would accomplish at one stroke in an international forum what had taken four laborious years to achieve in 23 US-Japan sectoral agreements, negotiated using the threat of unilateral sanctions under section 301. Though hundreds of companies ask Washington to investigate unfair trade practices, the USTR accepts only about 14 cases per year, and even fewer are taken to Geneva for resolution by the WTO.

But there was certainly a downside to pursuing the matter. "If we lost, the fallout would not be predictable and scientific, it would be political," commented a USTR lawyer. She added, "It would be bad for the WTO if we lost because it would play to the skeptics in the Congress." To some American legislators, the GATT agreement was not a treaty but a statute, under which US law should not be subordinated to that of another body (Horlick 1995).[46]

Barshefsky was the target of political pressure from all sides. Kodak had spent millions of dollars in legal fees and lobbying efforts to see this

45. Barshefsky, quoted in the USTR press release, June 13, 1996.

46. In June 1995, Senate Majority Leader Robert Dole (R-KS) unsuccessfully proposed legislation that would have created a commission to review all adopted reports of WTO dispute settlement panels and the Appellate Body considered adverse to the United States; three such judgments in a five-year period would trigger a process leading to a possible congressional vote on withdrawing from the WTO.

complaint through as a section 301 case.[47] The company clearly wanted action. On March 28, 1996, testifying at a hearing of the House Ways and Means trade subcommittee, Fisher argued that "while certain discrete actions of Japan's government could be presented to a WTO panel for adjudication, its toleration of systematic anti-competitive activities that block market access is not covered by WTO rules."[48] At the same time, officials in the Clinton administration were pointing out to the USTR that a decision to put this case before the WTO would ensure that they would not have to deal with the potentially sensitive issue until after the president's November 1996 reelection bid.[49] "Kodak was fairly powerful politically," noted a USTR official. "They had friends in high places and it was hard to think that there wouldn't be a strong reaction if we lost. It wasn't a wonderful thing for us because it raised the stakes higher."

The USTR began to carefully examine its options. In the process, officials distilled Kodak's list of grievances to two core issues that could form the basis for either acting unilaterally under section 301 or seeking a broader consensus. If it chose to go before the WTO panel, the United States would first cite alleged violations by the government of Japan of the 1994 GATT agreement, pointing to nullification and impairment of GATT benefits arising from the full panoply of "liberalization countermeasures" that were put in place and maintained to thwart imports in this sector.[50] In making this argument, it would cite Articles II, III, X, and XXIII:1(b) of the GATT. Moreover, though the WTO was empowered to rule only on current practices, the USTR would claim that the liberalization countermeasures put in place by MITI in the 1970s were still in effect in the photographic industry and that while the Japanese laws were on their face neutral, they were being abused administratively.

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47. "US Cites New Distribution Measures under Expanded Film Complaint," *Inside US Trade*, September 1997.

48. Fisher, quoted in "Kodak Steps Up Pressure for Bilateral Resolution of Film Dispute," *Inside US Trade*, March 29, 1996.

49. The wish to keep international trade from becoming a major issue in the November 1996 elections helps to explain President Clinton's decision in August 1996 to delay by six months the implementation of the Helms-Burton Act, which imposed sanctions on foreign firms that trade with Cuba. Though Clinton was reelected, the Republicans retained control of Congress; their party platform called for US law to supersede all trade agreements whenever disputes arose.

50. USTR press release, October 15, 1996. Specifically, the USTR claimed that (1) the government of Japan, under cover of investment restrictions, limited Kodak's access to the existing distribution system, which handled about 95 percent of the film sold in Japan; (2) the government of Japan restricted the use of marketing incentives through implementation of the 1962 Premiums Law (amended in 1977), which limited the types of premiums and promotional offers a firm could use to generate sales; (3) the Premiums Law regulated the content of advertising; and (4) the Premiums Law deputized local groups of competitors to set and enforce standards of competition.

MITI could be expected to present three counterclaims:

- The US charges were overly broad and vague as to which specific measures constituted a violation of which specific obligation under the GATT and what positive solution it was seeking.
- The theory of a government and business conspiracy was a myth, since the film industry had not been regulated for almost 20 years. The US position was purely historical and unfairly implied that the present government of Japan should be held accountable for the possible abusive behavior of previous administrations.
- If the US allegation that the government of Japan instituted effective "liberalization countermeasures" to block market access in the early 1970s were accepted, how then could one account for Kodak's dramatic rise in market share from about 8 percent in 1970 to almost 18 percent in 1983—a year before Kodak Japan set up its own formal distribution system, still in operation?

In essence, the Japanese argument would attempt to drive home the problematic implications of bringing such claims to the dispute settlement process at the WTO.[51]

The second case the United States might put before another WTO panel concerned the alleged violations by the government of Japan of the 1994 General Agreement on Trade in Services (GATS) arising from the requirements and operations of the Large-Scale Retail Stores Law[52] and measures such as the Guidelines for Rationalizing Terms of Trade for Photo Film and the Basic Policy for Distribution Systematization. The United States claimed that these constituted a serious barrier to foreign service suppliers as well as to importers of film and other consumer products, citing Articles III, VI, XVI, XVII, and XXIII:3 of the GATS. A USTR official observed, "We could bring this GATS case anytime. In effect, the GATS case was simply a backup to the GATT case. Even if the film case was resolved in the first panel, we would probably pursue this because it affects other trade problems."

The Japanese could argue that the Large-Scale Retail Store Law was no different from many building and zoning regulations in the United States

51. Official at MITI, interview with the author, Tokyo, November 14, 1996.

52. USTR press release, October 15, 1996. The Americans viewed this 1976 law as placing onerous requirements on prospective store owners, who had to complete lengthy and cumbersome negotiations with local authorities, merchants, and consumers, as well as MITI, before opening a store. The USTR contended that because large stores tended to carry more imported products than small stores, government limitations on their numbers severely constricted foreign manufacturers' access to the Japanese market—though large retail stores made up only 17 percent of the 279,000 retail outlets that sold film in Japan, they handled three-quarters of all sales.

or other countries. Moreover, the law itself did not regulate particular products like film. The USTR believed that MITI might further assert that its "administrative guidelines" did not hamper the distribution or sale of specific products, defending itself against the US argument that there was a "causal connection" between the distribution of film and paper and the "adjustments recommended" to private firms in an unregulated industry. While the Japanese government's "recommendations" did not carry an obligation under the law, considerable literature on the subject suggested that in the cultural context of Japanese society, they did in fact carry the same weight as law.

At the same time as the GATT and GATS questions were before the WTO, the US government could also request talks with the Japanese government under the 1960 GATT decision concerning consultations on restrictive business practices (RBP). Through this mechanism, according to a USTR official, the United States could bring forward the significant evidence of anticompetitive activities it had uncovered in this sector and ask the government of Japan to take appropriate action. In effect, this was a potential second track in the Kodak-Fuji dispute, which could take place either during or after the WTO panel hearings. Barshefsky expected the Japanese to counter, as they had done in earlier negotiations on this issue, with the "mirror image" argument and insist that business practices in both markets be examined simultaneously. A precedent of sorts for using the 1960 GATT decision as an alternative mechanism for substantive discussion was set in the auto talks in 1993–95, when the United States and Japan resorted to what was called the Auto Basket of Framework Negotiations as a way to circumvent the deadlock surrounding the Americans' section 301 claim. It had been the first major initiative by the Clinton administration in a trade dispute with Japan.

Barshefsky knew that unlike the unilateral action of section 301, such an approach would keep alive the possibility of a face-saving compromise right up to the public announcement of any WTO findings, as both sides would be shown the panel's recommendations and legal justifications and asked for their comments before a final verdict was rendered. While she felt that the case mounted by the USTR was strong, it was certainly not as clear-cut as Kodak had originally insisted. She had to answer a basic question: Which option would give the US government the most leverage in opening up the Japanese market?

Influenced in part by knowledge that the sanctions on imports threatened by a section 301 action would hardly be effective against Fuji, which has a major film manufacturing plant in Greenwood, South Carolina, and 30 other facilities across the United States; by fear that sanctions on Fuji would harm Polaroid (a major US firm that sells Fuji film in the United States under its own name); and by reluctance to escalate the trade conflict by imposing sanctions on other industries, Ambassador Barshefsky decided on June 13, 1996, to initiate dispute settlement proceedings against the government of Japan through the WTO (see appendix 3B). "This case is about increasing leverage against Japan in a WTO world," said a USTR official. "We are not as reluctant to take unilateral action as the Japanese think, and they will find there was no refuge in the WTO."[53]

The decision to refer this case to the WTO rather than proceed with it under section 301 was made after weeks of exchanging internal position papers that offered a spectrum of options. At one end were the "activist" policymakers who insisted that it was essential to establish quotas and timetables for market share. At the other end were those who favored a pure rules-based approach: change the rule, make discrimination illegal, and then sit back and see what happens. Tempering both of these groups were those who held what might be called an "affirmative action" view, not necessarily demanding specific outcomes but seeking to ensure that minority members (or foreign products or firms) received adequate consideration.

"This was a case of policy being determined from the bottom up, and there are a lot of questions out there that were all being posed for the first time," said a high-level source in the USTR. "Kantor and Barshefsky were pretty open-minded about the whole issue, but after a while, a consensus began to develop that Kodak had provided us with a level of detail we never had before to put to a neutral body. It was that level of proof which influenced our decision."

"This was the appropriate course of action for this case," said Dr. Laura Tyson, head of the president's National Economic Council. "It should allay any concerns that the US was turning away from the multilateral process."[54] Making sure the US government dotted its i's and crossed its t's in its submission to the WTO, Barshefsky requested that Kodak a submit a complaint to the JFTC concerning anticompetitive practices in its industry sector. Kodak did so but in very specific and narrow terms, presenting only a small part of the panoply of grievances it had lodged with the USTR. According to Ira Wolf, "It was a test to see if the JFTC would take any action. Kodak is also using this as a test to see if the JFTC will keep the investigation confidential." Former USTR Mickey Kantor insisted that while the United States has a strong case, "Trade is not a zero-sum game. It can be a win-win situation for everyone."[55]

Turning away from Japan to the other side of a different ocean, Kodak hired former deputy USTR Rufus Yerxa, then working at the Brussels law

53. At the time the original story was written in 1996, the case was still pending before the WTO, so the interviewee was talking in the future tense.

54. Tyson, quoted in Helene Cooper and Wendy Bounds, "US Choosing a Mild Course Shifts Kodak's Complaint Over Japan to WTO," *The Asian Wall Street Journal*, June 14, 1996, B5.

55. Mickey Kantor, speaking at the Arco Forum, Kennedy School of Government, Harvard University, October 17, 1996.

firm of Akin, Grump, Strauss, Hauer & Feld, to lobby the European Union to endorse the US case against Japan. Kodak had also been urging the German film producer Agfa-Gevaert to express interest in the case and to exert pressure on local politicians. Fuji tried to counter this move by hiring Frieder Roessler, the former head of the GATT legal affairs division, to drum up support for its position in Europe.[56]

During the summer and fall of 1996, there briefly appeared to be an opportunity for the governments of the two countries to find a way to settle out of court. Concurrent with the GATT consultations, a frustrated team at the USTR tried a new and separate initiative to engage MITI in bilateral talks, invoking a 1960 ruling by the GATT that called on members to be willing to have consultations on restrictive business practices. During the previous year, when the issue was being investigated under section 301, the Japanese had refused to negotiate. Once the matter was referred to the WTO, the two sides met in Geneva only twice, for a half day each time, during the 60 days allowed for "official consultations." US negotiators felt that the talks were going nowhere. One recalled, "We presented our side of the case and they just listened without any intention of responding."[57]

As Japan interpreted the 1960 RBP decision, however, consultations would not amount to an admission by Japan that restrictive practices existed, and any talks that did take place would concern only activities of private companies and not government measures. Furthermore, the Japanese wanted the Americans to agree in advance that if the two sides saw that harmful practices did exist, remedial action should be determined by the Japanese government to decide what action to take; moreover, the newly formed WTO should have no control over the agreement or ability to investigate it.[58]

On October 16, 1996, just as the WTO announced that the Dispute Resolution Body had agreed to form a panel to hear the US complaint against Japan, the Japanese government agreed to allow the European Union to join the talks only if the United States accepted the Japanese request for the talks to include discussions on restrictive practices in the American market. Two days later, the European Union and Mexico announced that they would join the US challenge against the Japanese trade barriers. The Commission declared in an official statement: "The EU is a significant player in

56. "EU to Be Third Party in US Film Case in World Trade Organization," *Inside US Trade*, October 18, 1996.

57. The USTR was under the impression that by the end of the decade Japan would be removing barriers like the Large Retail Store Law, which it eased during the 1989–90 SII talks, allowing US companies like Toys"R"Us to enter the Japanese market and do well. The USTR claims that the Japanese government's published deregulation plans committed to phasing out the law by 1991.

58. Japanese WTO Ambassador Minoru Endo, letter to Deputy USTR Booth Gardner, August 9, 1996, Office of the United States Trade Representative.

the Japanese consumer film market. Apart from this economic interest we also have a systemic interest in the operation of the Japanese distribution system and improved market access to the Japanese market, as well as the international dimension of competition raised by this case."[59]

While the United States acceded to two Japanese preconditions—that the talks would not be considered an admission of anything, and any agreement would be limited to areas of government responsibility—it balked at the idea of including restrictive trade practices in the US market and of limiting discussions on the Japanese market to the activities of the private sector. "It would be appropriate to discuss factors and conditions (such as market structure and government measures) relating to the structural and competitive environment in which business practices take place," noted Deputy USTR Booth Gardner.[60] The US interpretation of the RBP decision also did not rule out the WTO's later engaging in oversight of an agreement reached between the two parties. From a tactical point of view, a USTR official pointed out, US negotiators opposed the linkage in the talks because it would establish "equivalency" issues, thereby creating what has been termed a "mirror image" problem.

The RBP talks never took place. Although consultations under the 1960 GATT decision were hardly commonplace—indeed, none had ever been held—US trade officials were exasperated by the Japanese intransigence. Only a year earlier, the two countries had managed at the eleventh hour to end a decade-old dispute over automobiles with an agreement that addressed a range of barriers to market access affecting the sales of foreign autos and auto parts, both to buyers in Japan and to Japanese companies outside Japan. The film dispute was the first time that the Japanese had ever refused to discuss a matter bilaterally, deciding to force the issue rather than to concede or compromise. "We've not even been able to agree on the shape of the table,"[61] noted a USTR official. "So we've told the Japanese government, 'See you in court!'"

## Judgment in Geneva

It took three months to form a panel for the WTO dispute resolution procedure. In mid-November 1996, the Japanese delegation submitted the names of candidates from Switzerland, Brazil, and New Zealand. The

59. Statement quoted in "EU to Be Third Party in US Film Case in World Trade Organization," *Inside US Trade*, October 18, 1996.

60. Deputy USTR Booth Gardner, letter to Japanese WTO Ambassador Minoru Endo, August 21, 1996, Office of the United States Trade Representative.

61. This metaphor alludes to the six-month stalemate in the opening round of the 1968 Paris peace talks between the United States and North Vietnam.

United States agreed to all three, but the Swiss and the Brazilians both said they were unavailable. The two countries resumed their search.

After vainly going through almost 60 names, the two countries turned in frustration to WTO Director-General Renato Ruggiero and asked him to impose a panel. On December 17, 1996, Ruggiero persuaded the originally agreed-on Swiss and Brazilian candidates to accept the appointment. All three panel members had previous experience with the WTO: William Rossier of Switzerland had served as ambassador to the WTO and chairman of the WTO General Council; Victor Luiz DoPrado of Brazil was first secretary in the WTO delegation; and Adrian Macy of New Zealand, ambassador to Thailand, was formerly ambassador to the WTO.

Once the panel was formed, the chairman quickly realized that the complexity of this case—which would require that the panel consider 21 specific measures by the United States and wade through nearly 20,000 pages of documentation that both sides had presented as evidence—would make it impossible to render a judgment in the usual six months, as set out in the Uruguay Round Dispute Settlement Understanding.[62] A further six months would be needed.

The panel faced the difficult problem of making a ruling under the so-called nonviolation provisions of the GATT 1994 and the GATS. While most WTO disputes involve claims that a member has failed to carry out its obligations under a particular agreement, a matter that is relatively easy to assess, nonviolation complaints arise (under GATT Article XXIII:1, for example) when a member applies "any measure, whether or not it conflicts with the provisions of this Agreement" that denies another member benefits that it expects to obtain.

On December 5, 1997, the WTO panel issued its interim ruling. It concluded that (1) the United States *did not* demonstrate that the Japanese "measures" it cited individually or collectively nullified or impaired benefits to the United States within the meaning of GATT Article XXIII:1(b); (2) the United States *did not* demonstrate that the Japanese distribution "measures" it cited accorded less favorable treatment to imported photographic film and paper within the meaning of GATT Article III:4; and (3) the United States *did not* demonstrate that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1.[63] The final report was issued to the parties on January 30, 1998, and was circulated to WTO members on March 31, 1998. It was adopted by the Dispute Settlement Body on April 22, 1998.

Minoru Ohnishi, Fuji's president and CEO, said that that WTO "prove[d] its mettle" by ruling on the facts. It was an outcome, he claimed, that

62. *Inside US Trade*, June 13, 1997.

63. "Japan—Measures Affecting Consumer Photographic Film and Paper," Report of the WTO Panel, WT/DS44/R, March 31, 1998.

"most experts predicted." But a disappointed USTR Barshefsky faulted the ruling for "sidestep[ping] the real issues in this case and instead focus[ing] on narrow, technical issues."[64] Despite such sentiments, the United States chose to forgo an appeal out of its reluctance, according to US officials, to upset legal precedents established by the panel's final report. In particular, uncertainty over whether actions taken by the private sector (and officially tolerated by a domestic government) could be considered "measures" that would be actionable under Article XXX:1 was removed by the case: The panel said that such measures could indeed be actionable, and validation of this principle was regarded as a victory by the United States in its war against Japanese barriers, even if it had lost this particular battle.

The US decision did not stop Kodak from firing its own broadside at the WTO. Without hesitation, Fisher called the verdict "totally unacceptable" and demanded that the US government "define a concrete plan to open the Japanese market."[65] Almost immediately, members of the House and Senate from both sides of the aisle renewed the call for action against Japan under section 301. Within two weeks of the final report's issuance, the Clinton administration announced a new effort to monitor the Japanese film and photographic paper sector to ensure that it was as open as Japan claimed. This initiative was backed by 218 members of the House of Representatives, who signed a letter warning the Japanese ambassador in Washington, Kunihiko Saito, that Congress was ready to put further pressure on Japan.[66]

Despite these strong statements, the United States did not threaten Japan with additional 301 action over market access in the film industry. In fact, some view the Kodak-Fuji case as signaling the end of two decades of fierce market-opening disputes between Japan and the United States. Beginning in the early 1990s, Japan's economic problems and the resurgence of the US economy muted US concerns about competing in Japan.

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64. Ohnishi, quoted in "Fuji Statement on Film Case," *Inside US Trade*, December 8, 1997. Barshefsky, quoted in "USTR Statement on Film Case," *Inside US Trade*, December 8, 1997.

65. Fisher, quoted in "Kodak Statement on Film Case," *Inside US Trade*, December 8, 1997. In a June 25, 1998, submission to the USTR, Kodak continued its attack on the WTO, complaining that "most of the decisions in the film case were not made by the panelists, who were largely absent from the process, but by WTO Secretariat staffers, who lacked both the competence and the mandate to do so"; it viewed this "inordinate role" as "wholly inappropriate and a serious breach of the organization's responsibility" (Kodak made the comments in a June 25 submission to the Office of USTR dealing with the year's review of the WTO Dispute Settlement Understanding. "Kodak Charges WTO Secretariat with Unfair Intervention in the Film Case," *Inside US Trade*, July 3, 1998).

66. "Text: House Letter on Japan Film," letter and signatures reprinted in *Inside US Trade*, February 20, 1998.

At the same time, the emergence of China as an economic power captured US attention. As less effort was devoted to US trade relations with Japan, the focus of US policy shifted to the security relationship and Japan's major macroeconomic problems.

Some observers add that the Kodak-Fuji case also marked a change in US threats of unilateral action under section 301. In the 1980s and early 1990s, the United States had turned increasingly to unilateral measures under section 301 as a way of resolving trade disputes. While Kodak had initially filed a 301 complaint against Japan, the USTR chose to take the case to the WTO instead. From this point forward, the United States increasingly used the WTO route rather than unilateral action to deal with trade disputes. Indeed, since the Kodak case, the United States has not resorted to retaliation under section 301 without first going through the WTO. One USTR official noted that as a result, industry was no longer filing as many section 301 complaints. For example, from 1995 to 2002, the private sector filed only six section 301 petitions (Iida 2004, 207).

Robert Zoellick, who headed the USTR in the Bush administration (2000–2005), cautioned those in Congress who believed that success in defending US trade interests was now measured by the number of WTO cases litigated at the WTO. While "the Administration does not shy away from bringing WTO cases to advance US trade interests," he noted, "it is important to recognize that losing offensive WTO cases does not necessarily advance US interests or produce meaningful results for affected US companies—as Kodak painfully learned in the last Administration."[67]

Finally, the Kodak-Fuji case was also significant because it established that WTO rules were not well suited for dealing with problems related to weak national enforcement of competition policy. The ruling also demonstrated the great difficulty of proving nonviolation complaints. It was clear that for the WTO to encompass matters of competition policy, international rules would have to be explicitly negotiated. In 1996, Europe proposed putting competition policy on the WTO agenda, including it in a list of four new areas known as the "Singapore issues." The United States was less than enthusiastic, however. Some Americans worried that a WTO competition policy regime would weaken domestic antitrust rules. Also raising concerns were jurisdictional complications between the US Justice Department and the Federal Trade Commission, which administered US antitrust policy, and the USTR, which was in charge of antidumping policies.

Eight years on from the Kodak-Fuji decision, the film and photographic paper market has been overtaken by digital imaging. Technology, not politics, proved to be the catalyst for change. Some argue that their preoccupation with the WTO case caused Kodak's managers to take their eye off what was really happening in the marketplace. As a result, Kodak, despite

67. "Text: Zoellick Letter to House Democrats," *Inside US Trade*, April 23, 2004.

its famed research and development capabilities, lagged behind new and more agile competitors. Although the company developed the first digital camera for sale to retail consumers in 1994 and holds 1,000 digital photography patents,[68] it is no longer leading the market in photographic products in the United States or around the world. By 2005, the value of Kodak's stock had dropped 70 percent from its high under George Fisher.[69]

68. Saul Hansell, "Kodak's New Image," *The International Herald Tribune*, December 28, 2004.

69. Claudia H. Deutsch, "Kodak Misses Targets But Says Its Digital Moment Will Come," *The International Herald Tribune,* September 29, 2005, 2. Kodak was removed from the Dow Jones Industrial Average in April 2004 after its market value sank to $7.8 billion from $26.6 billion in 1996.

## Case Analysis

The rules of the WTO focus on border barriers that inhibit market access and on policies that explicitly discriminate between domestic and foreign goods and services. But what happens if the barriers to trade are imposed by private practices that are tolerated (or encouraged) by the government? Are such practices actually covered by WTO rules? If they are covered, is the existing dispute settlement system an effective mechanism for dealing with them? If they are not covered, do new agreements on competition policy need to be negotiated? The trade conflicts between Japan and the United States over photographic film serve as a vehicle for exploring these questions.

### Policies and Private Behavior

American firms have long complained of facing unusual problems when they try to sell and invest in Japan. These problems were not due to traditional barriers, such as high tariffs or restrictive quotas, or for that matter policies that were explicitly discriminatory. US companies alleged, rather, that structural barriers such as the close ties and loyalties among Japanese firms and between the Japanese government and private sector—sometimes labeled "Japan Inc."—made market entry particularly difficult.

In Japan, transactions based on the invisible handshakes of tradition, mutual understanding, and implicit contracts between associates of long standing are more common than in most other developed economies. Examples range from labor relations, in which large firms offer employment guarantees, to supplier relationships, in which long-term business relationships between firms and their customers and between suppliers and distributors commonly are formalized through an exchange of equity, to long-term relationships between firms and their lead banks. These links form networks to which newcomers (be they Japanese or foreign) find entry difficult.

However, there may also be advantages to these structures, which combine some of the flexibility of markets with the security of transactions that occur within firms. Indeed, many pointed to Japan's extraordinary economic performance prior to 1990 as evidence of its superiority. In any case, should (or could) WTO rules regulate the behavior of private actors? Should it be considered a trade barrier if Japanese consumers prefer domestic products or if Japanese firms prefer to deal with one another?

### Rules or Managed Trade?

Some Americans came to the conclusion that Japanese business practices made intergovernmental agreements that focus on regulations and rules be ineffective in opening the Japanese market. Instead, they called for trade to be managed so that foreigners would be guaranteed a minimum market share. Others preferred to seek changes in rules. In the 1980s the United States had employed both rules (e.g., the Structural Impediments Initiative) and managed trade tactics (e.g., the semiconductor agreement) in its market-opening negotiations with Japan, and in the early 1990s the debate over these approaches continued.

A side letter to the semiconductor agreement signed in 1986 had set as a goal that 20 percent of the Japanese semiconductor market should go to foreign firms. Between 1986 and 1991, the share of foreign semiconductors actually increased from 9 to 30 percent. Many Americans therefore concluded that results-oriented approaches worked, and when the Clinton administration came into office in 1993 it sought to apply this approach to other sectors. The Japanese authorities drew the opposite conclusions from their experience with the semiconductor agreement: They felt that the government's agreement to control private-sector outcomes was a great mistake.

### Bilateral or Multilateral Challenges?

A second strategic issue was whether the United States should deal with Japan bilaterally or multilaterally. Although the United States had had some success in challenging Japan at the GATT on its policies relating to beef, citrus, and rice, for the most part it had used bilateral negotiations in its efforts to pry open Japan's markets. Americans pursued this approach in part because many of the concerns were not covered by WTO rules and in part because they felt that Japan's strategic dependence on the United States would lead it to be more forthcoming in a bilateral setting. The Japanese had acquiesced to these negotiations until the mid-1990s, but thereafter sought to insist that disputes be dealt with through the WTO.

Like the bananas case, the Kodak-Fuji dispute highlights the ways in which companies pursue competition with key rivals through nonmarket means and the methods that they use to get their grievances onto the trade agenda. In May 1995, Kodak filed a petition asking the Office of the USTR to initiate a section 301 action (an intervention against restrictions on US exports) against Japan, claiming that its sales had been impeded in Japan by the anticompetitive actions taken by the Japanese authorities. This filing had been preceded by an orchestrated public relations and lobbying effort in Congress and by the president's National Economic Council, which aimed at laying the groundwork for acceptance of the case by the USTR. A year later, the USTR chose to pursue the case at the WTO. It was significant that the Clinton administration chose not to implement this 301 case bilaterally and instead brought the case to the WTO.

The case was innovative because many of the US claims rested on Article XXIII:1(b) of the GATT. Under this provision, a WTO member can bring a case if a benefit to which it was entitled has been denied it as a result of the application by another member of any measure—even one that does not conflict with the agreement. This provision protects parties if, after signing an agreement, a member adopts another policy that has the effect of denying others the benefits they might have expected from the agreement. Thus, for example, a country would be barred from subsidizing competing domestic products after lowering a tariff on imports.

The United States argued that Japan had nullified and impaired trade concessions it had granted to the United States by adopting a number of measures that affected the distribution and sale of imported photographic film and paper. In particular, it claimed that the Japanese government had adopted (1) distribution measures that allegedly created a market structure by which imports were excluded from traditional distribution channels, (2) restrictions on large retail stores that allegedly limited the growth of alternative distribution systems for imported film, and (3) measures that allegedly disadvantaged imports by restricting the use of sales promotion techniques. From the US perspective, the case presented an opportunity to explore if bringing a dispute under the WTO's DSU could be an effective way of resolving a conflict over nontariff barriers not covered under the rules. From the Japanese perspective, the case presented an opportunity to escape the bilateral pressures to which it had been vulnerable.

The WTO panel made clear that winning under this provision is not easy. It found that Japan's distribution measures, restrictions on large stores, and promotion measures did not nullify or impair US benefits. It also rejected claims that the distribution measures resulted in less favorable treatment for imported products under GATT Article III (National Treatment). Significantly, the United States did not appeal the ruling.

This case study reveals how private actors in the US system can take the initiative in pressuring Washington to bring a case. Under the 301 legislation, any interested person can petition the USTR to take action (or the USTR can self-initiate such a case). In this instance, Kodak and its lawyers were the principal source of the information on which the USTR relied to pursue the case. It was a collaborative effort (much like the cotton case brought by Brazil). Here too we see how WTO cases may reflect deliberate corporate initiatives.

The case study allows us to think about the factors considered by government officials as they decide whether to bring a case. The most straightforward is the wish to change a particular foreign policy, but trade authorities might sometimes have other reasons: This dispute suggests that bringing a case and losing it might be preferred to rebuffing a domestic constituent seeking assistance. Thus cases can act as institutional safety valves.

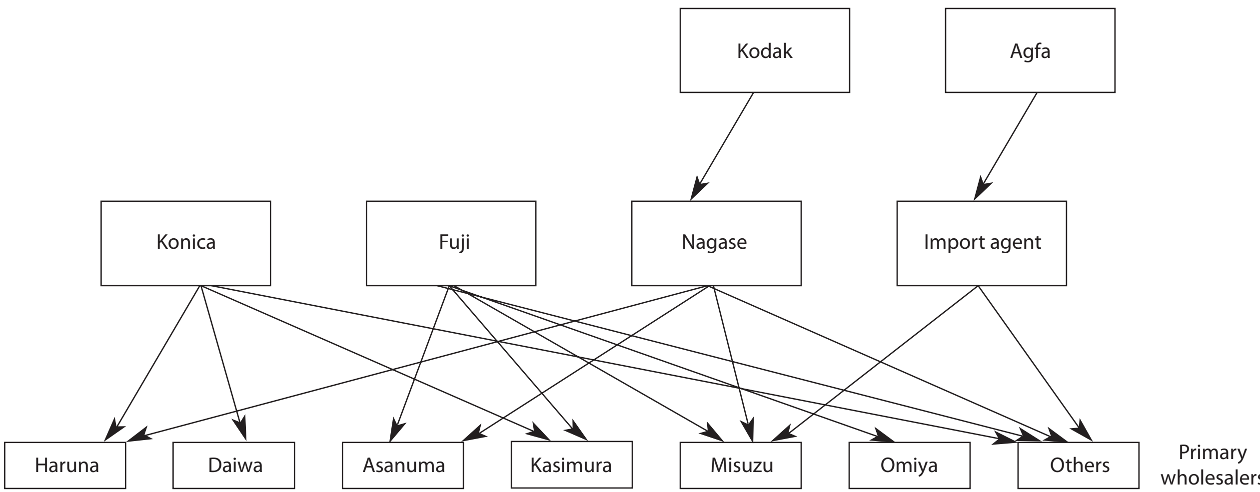
Cases might also be used strategically to expose weaknesses in the existing rules and influence the trade agenda, thereby setting the stage for future negotiations. In this way, a short-term defeat for Kodak could lead to a longer-term victory enjoyed by a much broader set of players. Indeed, the Kodak-Fuji case was significant because it established that as they stood, the WTO rules were not well suited to deal with problems growing out of the weak enforcement of competition policy. WTO panels have sometimes been accused of judicial activism, but in this case the panel was clearly reluctant to interpret Article XXIII:1(b) very broadly. The panel stressed that this remedy "should be approached with caution and treated as an exceptional remedy."

The film case suggests that rules on competition policy will have to be explicitly negotiated if such issues are to be effectively covered by the WTO. Indeed, the European Union has tried to introduce competition rules into the WTO, but it was eventually rebuffed at the WTO ministerial held in Cancún in 2003. Resistance was particularly strong from developing countries, which argued that accepting additional obligations would be too burdensome. Moreover, support from the United States was only lukewarm. In part this lack of enthusiasm reflected the wariness of many US experts on antitrust issues, who were concerned about how these rules might be enforced in a highly politicized trade regime.

# Appendix 3A

**Figure 3A.1 Changes in film distribution in Japan as a result of liberalization countermeasures**

**Organization of distribution (pre-1963)**



**Organization of distribution (as of 1977)**

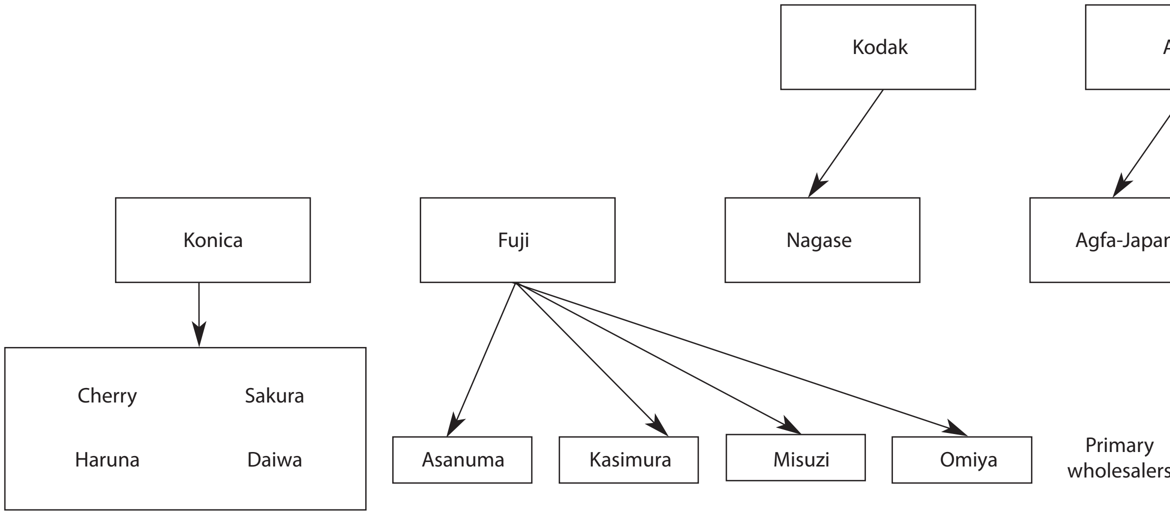
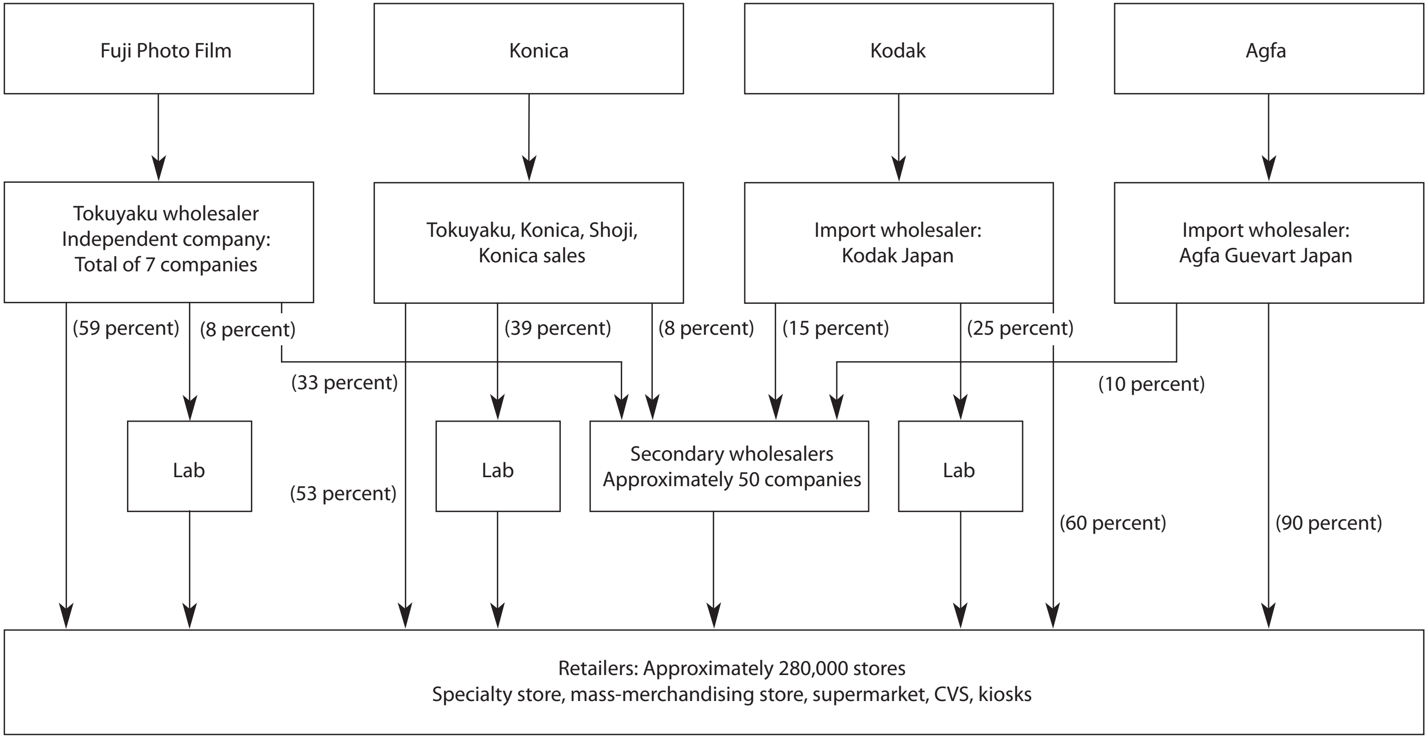


**Figure 3A.1 Changes in film distribution in Japan as a result of liberalization countermeasures** *(continued)*

***Photo Market's*** **description of film distribution in Japan after Kodak filed complaint**




*Source:* Dewey Ballantine (1995).

# Appendix 3B
# Japan—Measures Affecting Photographic Film and Paper First Submission of the United States of America, February 20, 1997

## III. LEGAL ARGUMENT

### A. Summary of Argument

#### 1. Nullification or Impairment (Articles II and XXIII:1(b))

377. The United States negotiated for and received concessions from Japan on photographic film and paper over a period of 30 years and three successive rounds of multilateral trade negotiations: the Kennedy Round in 1967, the Tokyo Round in 1979, and the Uruguay Round in 1994. Through laws, regulations, and other measures, including administrative guidance, the Government of Japan has upset the competitive relationship between imports and domestic products. Through its application of distribution countermeasures, the restrictions on large retail stores, and promotion countermeasures, the Government of Japan has frustrated the United States' reasonable expectations of improved market access for imported film and paper that accompanied each round of negotiations, thus nullifying or impairing benefits accruing to the United States. Japan's actions could not have been reasonably anticipated at the time the United States negotiated for the tariff concessions in each round of multilateral tariff negotiations.

378. The text of the GATT 1994 incorporated all of the protocols and certifications relating to tariff concessions that had entered into force under the GATT 1947 before the effective date of the WTO Agreement—including Japan's tariff concessions in the Kennedy and Tokyo Rounds. Thus, the benefits accruing to the United States under these concessions, as well as the concessions arising from Japan's schedule attached to the Marrakesh Protocol, are GATT 1994 benefits. As demonstrated below, the competitive relationship between imported and domestic photographic materials has been, and continues to be, upset as a result of Japan's measures.

379. The combination of measures implemented by the Government of Japan represents a systematic and elaborate plan to obstruct the market access that Japan's trading partners reasonably expected from the tariff concessions they received. The United States asks the panel to conclude that the Government of Japan has applied measures that have nullified or impaired benefits accruing to the United States within the meaning of Article XXIII:1(b) of the GATT 1994, impairing the benefits of tariff conces-

sions granted to the United States under Article II in three successive rounds.

**2. National Treatment (Article III)**

380. The Government of Japan designed and applied distribution countermeasures "so as to afford protection" to Japanese photographic film and paper after Japan eliminated its import restrictions, lowered tariffs, and liberalized investment restrictions. The distribution countermeasures are requirements directly affecting the internal sale, offering for sale, and distribution of imported photographic film and paper products, within the meaning of Article III:4. Through the application of these requirements, the Government of Japan has not fulfilled its obligation to accord "treatment no less favorable" to like products of national origin. The United States asks the panel to conclude that the Government of Japan has applied measures which impair the opportunities of foreign firms to distribute and sell imported products and, as a result, that those measures are inconsistent with Japan's obligations under Article III.

**3. Publication and Administration of Laws (Article X)**

381. In designing and implementing the various measures that comprised its liberalization countermeasures plan, the Government of Japan generally made it extremely difficult for its trading partners—or private businesses attempting to compete in Japan's market—to understand the precise nature of the Government's actions or their consequences. Throughout the period during which the liberalization countermeasures were developed, and continuing to the present, the Government of Japan has relied heavily on non-transparent forms of administrative action, and has promoted and used a web of public-private sector relationships to implement its protectionist measures.

382. The United States asks the Panel to conclude that the Government of Japan's actions in implementing and maintaining its liberalization countermeasures are inconsistent with Japan's obligations under Article X:1 of the GATT 1994 to publish "laws, regulations, judicial decisions and administrative rulings of general application . . . promptly in such a manner as to enable governments and traders to become acquainted with them."

### *Article II*
### *Schedules of Concessions*

1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(*c*) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(*a*) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
(*b*) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;

(*c*) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (*a*) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or

elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(*b*) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

### *Article III*
### *National Treatment on Internal Taxation and Regulation*

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offer-

ing for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (*a*) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(*b*) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

### *Article IX*
### *Marks of Origin*

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.

4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.

6. The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

### *Article X*
### *Publication and Administration of Trade Regulations*

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments thereof, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(*b*) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(*c*) The provisions of subparagraph (*b*) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the contracting parties with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

### *Article XIII*
### *Non-discriminatory Administration of Quantitative Restrictions*

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

(*a*) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (*b*) of this Article;

(*b*) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;

(*c*) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with subparagraph (*d*) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;

(*d*) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

3. (*a*) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; *Provided* that there shall be no obligation to supply information as to the names of importing or supplying enterprises.

(*b*) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph.

(*c*) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

4. With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI, the selection of a representative period for any product and the appraisal of any special fac-

tors affecting the trade in the product shall be made initially by the contracting party applying the restriction; *Provided* that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the contracting parties, consult promptly with the other contracting party or the contracting parties regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.