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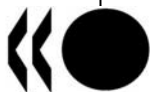

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development 06-Oct-2008

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2008)88
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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON CARTEL JURISDICTION ISSUES, INCLUDING THE EFFECTS DOCTRINE

-- Japan --

21 October 2008

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item V of the agenda at its forthcoming meeting on 21 October 2008.

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JT03252114

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1. Introduction

1. The Japanese Antimonopoly Act ("AMA") applies to entrepreneurs or corporations in general, and no distinction is made as to whether a company is a domestic company or a foreign one. There is no stipulation in the AMA that only violations committed within Japan will be subject to its regulations. For example, as to the prohibition of cartels that restrain competition through agreements between entrepreneurs, the latter part of Article 3 of the AMA stipulates, "No entrepreneur shall effect unreasonable restraint of trade." According to Paragraph 6 of Article 2 of the AMA, the meaning of the term "unreasonable restraint of trade" is defined as "such business activities, by which any entrepreneur, by contract, agreement or any other means irrespective of its name, in concert with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade". Accordingly, the cartel regulation under the AMA is generally to prohibit entrepreneurs from committing an act that will lead to the effect of substantially restraining competition in the Japanese market by an agreement or similar means.

2. The provisions of the AMA therefore apply to entrepreneurs or corporations in general. Accordingly, there is no difference between the regulation of domestic companies and that of foreign ones and the location of the act is not limited in the application of the AMA. However, in the application of the AMA to actual international cases, limitations from principles of international laws concerning jurisdiction, etc. and international comity are taken into account.

3. In the following sections, we would like to introduce Japan's viewpoint on jurisdiction issues, a case related to jurisdiction issues and a recent international cartel case.

2. Viewpoint on Jurisdiction Issues in Japan

4. With respect to jurisdiction issues in regulating international cartels, namely the indirect effects approach or the effects doctrine, the following report and view have been provided.

2.1 Study Group on Foreign Affairs Issues regarding the Antimonopoly Act

5. With respect to the international application of the AMA, the Study Group on Foreign Affairs Issues regarding the Antimonopoly Act, held by the General Secretariat of the Japan Fair Trade Commission (JFTC), examined the application of the AMA to foreign entrepreneurs and published a report in February 1990.

6. The report stated that there were two standpoints from which to approach the issue of the application of the AMA to acts committed outside of Japan by foreign companies: the territoriality principle and the effects doctrine. The territoriality principle is a standpoint in which the application of a country's laws is permitted only to acts committed within the territory of that country. The effects doctrine is a standpoint in which the laws of a country are applicable if an act committed outside the territory of that country has a certain degree of effects within the country. For the purpose of the application of the AMA, the "effect within a country" denotes the "effect of the restraint of competition on the country's market".

7. Meanwhile, the report stated that there were no substantial differences among the standpoints of OECD member countries concerning the application of competition laws to foreign companies. It was therefore regarded as not necessary to classify the applicable criteria into either the territoriality principle or the effects doctrine in applying the AMA to foreign companies. If a foreign company carries out an activity such as the export of goods to Japan, and the activity qualifies as an act violating the AMA, the

foreign company is regarded as violating the AMA and is subject to regulation. The existence of a branch office or a subsidiary of a foreign company within Japan is not a necessary condition for the application of the AMA. Accordingly, with respect to acts impeding competition in the domestic market, if there are facts constituting a violation of the AMA, it is appropriate to presume that even a company located in a foreign country will be subject to regulation by the AMA. While such an approach was indicated, it was also deemed necessary to pay attention to cooperative relationships with foreign countries in the implementation of regulatory measures based on the AMA, thus regulatory measures should not be always taken against foreign companies that were subject to the regulation.

2.2 The amicus curiae brief on Nippon Paper Industries Co., Ltd. vs. United States of America

8. In general, it is considered that extraterritorial application of the AMA is permitted under international law, assuming the existence of a close connection between the violations in question and Japan. However, with respect to the application of the AMA to criminal cases, the government of Japan has revealed the following standpoint.

9. The government of Japan submitted an *amicus curiae* brief to the Supreme Court of the United States in a criminal cartel case concerning a thermal paper used for faxes (in 1998). The brief suggested that:

10. "In accordance with international law, anticompetitive activities occurring within Japanese territory and committed by Japanese corporations fall within the scope of Japanese jurisdiction and are regulated by Japanese legislation. The criminal application of United States antitrust laws to such activities is invalid under well settled international law."

11. "While an extraterritorial application of the Sherman Act in the civil context might, as a bare majority of this Court held in *Hartford Fire*, 599 U.S. 764, be proper, this is entirely distinct, as a matter of international law and statutory construction, from a determination that such an extraterritorial reach would be appropriate in the criminal context."

12. "The fact that under *Hartford Fire* the United States and its citizens may attempt to reach out and seek civil legal relief against a foreign national for acts occurring abroad militates against, not in favor of, the extension of this doctrine to the criminal sphere."

13. As mentioned above, the government of Japan advocated for the adoption of the territoriality principle in criminal cases.

3. Cases of Legal Measures against Foreign Entrepreneurs

14. The JFTC took legal measures against a foreign entrepreneur located outside Japan in a private monopolization case against Nordion (1998). In addition, the JFTC took legal measures against entrepreneurs that manufacture and sell marine hose including foreign ones for the first time in an international cartel case (2008).

3.1 Private Monopolization Case

3.1.1 Case against MDS Nordion Incorporated (Recommendation decision issued on 3 September 1998)

15. MDS Nordion Incorporated (hereinafter referred to as "Nordion") is an entrepreneur manufacturing and selling a kind of radioisotope, Fission Product Molybdenum-99, which is used exclusively for Technetium-99m (a radiopharmaceutical for diagnosing cancer). Nordion is located in

Canada. The Fission Product Molybdenum-99 produced and sold by Nordion accounts for a majority of the worldwide production volume and most of the sales volume of Molybdenum-99. In addition to Nordion, Fission Product Molybdenum-99 is also produced and sold by some other companies, including the Institut National des Radioelements of Belgium, which ranks second in the world in production and sales. However, there is no company manufacturing and selling this product in Japan.

16. The JFTC found that Nordion excluded the business activities of other Molybdenum-99 manufacturers/sellers, by concluding contracts that were effective for 10 years beginning in 1996 with two companies that purchased all the Molybdenum-99 in Japan (there were only two customers in the Japanese market). Therefore, the JFTC issued a recommendation to Nordion on 24 June 1998 because such act was in violation of Article 3 of the AMA ("Prohibition of private monopolization") (the recommendation decision was issued on 3 September 1998).

17. The JFTC decision recognized that Nordion substantially restrained competition in the field of trade of Fission Product Molybdenum-99 within Japan. Nordion had no branch office and business office in Japan, and all Nordion's competitors were located outside Japan. However, the JFTC decision also recognized that the exclusive purchase contract between Nordion and the two Japanese companies was concluded in Tokyo.

3.2 International Cartel Case

3.2.1 Case against Bridgestone Corporation, etc. and 4 other parties (Cease and desist order issued on 20 February 2008)

18. For the purpose of preventing the decline of the contract price, 8 entrepreneurs (see Appendix) manufacturing and selling marine hose (Note 1) collaboratively determined the prospective recipient of orders so that they could help it receive the orders for specified marine hose (Note 2) beginning around 10 December 1999.

- In case a specified marine hose was to be used in Japan, the United Kingdom, the French Republic or the Republic of Italy, the entrepreneur that had its head office in the country where the hose was to be used was designated as the prospective recipient of orders. If there was more than one such entrepreneur, one of the relevant entrepreneurs was the prospective recipient of orders.

- In any case other than above, the entrepreneurs predetermined shares for each of them, and the coordinator (Note 3) designated the prospective recipient of orders in consideration of factors including such predetermined shares.

- The price at which the prospective recipient would receive the order was determined by the prospective recipient itself, and all the other entrepreneurs cooperated to ensure that it would successfully receive the order at the determined price.

19. In accordance with these agreements, the 8 entrepreneurs, contrary to the public interest, substantially restrained competition in the field of trade of specified marine hose ordered by marine hose consumers located in Japan.

20. Given the above findings of facts, the JFTC issued cease and desist orders and surcharge payment orders on 20 February 2008 because such acts are in violation of Article 3 of the AMA ("Prohibition of unreasonable restraint of trade").

21. This is the first case in which the JFTC took legal measures against an international cartel including foreign entrepreneurs.

Note 1

22. Rubber hose used to transport oil between tankers and facilities including oil storage facilities, which conforms to specifications and inspection standards set by the Oil Companies International Marine Forum

Note 2

23. Marine hose whose orders are placed after consumers of marine hose ask multiple entrepreneurs for estimated prices

Note 3

24. A person who was commissioned by the 8 entrepreneurs to handle the tasks including that of designating recipients of orders of specified marine hose

APPENDIX

Table 1. Entrepreneurs subject to the cease and desist orders and the amount of surchage

Name of Entrepreneur	Location	The cease and desist order	The surcharge payment order
Bridgestone Corporation	Japan	○	2,380,000yen
Dunlop Oil & Marine Limited	UK	○	—
Trelleborg Industries SAS	France	○	—
Parker ITR S r.l.（Note 1）	Italy	○	—
Manuli Rubber Industries S.p.A	Italy	○	—
The Yokohama Rubber Co., Ltd.	Japan	—	—
Comital Brands S.p.A（Note 2）	Italy	—	—
Manuli Oil & Marine (USA) INC.（Note 3）	USA	—	—

（Note 1）ITR Rubber S r.l changed its trade name on 24 April 2002.

（Note 2）ITR S.p.A got ITR Rubber S r.l to succeed to its business concerning manufacturing and selling marine hose on 19 December 2001 and changed its trade name to the current trade name on 29 December 2004.

（Note 3）This company was extinguished on 26 December 2006.

（Note 4）”○” means the addressee of the cease and desist order.

（Note 5）”－” means a violator, which is not subjected to the cease and desist order or the surcharge payment order.