Kennedy School of Government
Case Program

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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 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 like the North American Free Trade Agreement and the General Agreement on Tariff 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 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

1 Alan Wolff, interview with author, November 1, 1996.

2 The Republican Party had gained control of the Congress for the first time in 40 years in the midterm elections of 1994. The Labor movement (AFL-CIO) who bitterly opposed the free-trade treaties because they believed it would result in the loss of US jobs, 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, and immediately began public hearings on the Whitewater scandal which involved the president and his wife. D'Amato was an unabashed supporter of Kodak's Section 301 petition. He called for a complete boycott in the US of all Fuji products, a move that even the Kodak management had to distance itself from. In the film dispute with Japan, the AFL-CIO estimated that US industry had lost an estimated 12,000 jobs over the last decade.

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with the US. It was not just the fact that the Japanese Government tightly regulated many aspects of the economy -- there were about 10,760 instances where a government permit was needed, (do you have a source?) but also that there were allegedly a myriad of "private barriers" arising from certain practices or arrangements between local firms which stifled foreign access to the Japanese economy.

The Japanese government for its part 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 that had resulted in disputes over semiconductors, a cornerstone of Japanese trade policy had become the use of international forums like the World Trade Organization (WTO) to resolve trade disputes where the emphasis was on a solution based on changing the rules rather than a demand for results.

Acting United States Trade Representative Charlene Barshefsky hoped that this case could accomplish what she and her staff had laboriously tried to achieve in 23 different sectorial agreements with Japan over the last four years. After almost a year of investigation and often intense deliberation into Kodak's claims, as well as several attempted but 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 to take unilateral action against the Japanese photographic industry. The management of Kodak had billed this suit to USTR "as the trade case of the century," claiming that "this would be the case that would finally allow the US to nail Japan."[3]

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 market. A ruling by the WTO Dispute Settlement Body could well set the precedent for broadening the definition of competition policy to include consideration of whether facially neutral laws of a sovereign nation, which are administratively abused by that government, contributed to problems of market access for foreign suppliers.

The case also was 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 the Thirty Year's War in Europe) 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 whose original intent, it can be claimed, was to protect the rights of its citizens or the cultural heritage of that nation. Many in the US who were concerned about ceding power to international organizations would watch this case and USTR's handling of it carefully.

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3 *Wall Street Journal*, May 24, 1996. "Kodak chief and Capital Lawyer, Heavy hitters on Trade Matters May Strike Out in Fuji Case" by Helene Cooper and Wendy Bounds p. A12.

Background on Kodak and Fuji

Eastman Kodak Company was the world's preeminent manufacturer of photographic imaging materials. In terms of brand name recognition around the globe, they were surpassed only by the likes of McDonald's, Coca-Cola and Disney.[4]

The Rochester, New York-based firm was the 247th largest company in the world[5] with sales in 1995 of over $14.9 billion. The company, which employed over 96,600 people worldwide, had net earnings that year of $1.25 billion.[6] 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 its 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 US through various methods of price controls and a combination of vertical and horizontal market restraints.

In 1921, following an appeal to the United States Supreme Court of a case brought by the Justice Department in 1915, Kodak entered into a Consent Decree which, 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, 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 to restrict 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 a portion 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, who argued that the restraints imposed in the decrees had become obsolete given various changes that had

4 *Economist*, November 16, 1996. "The Worlds Best Brands," p. 108

5 Global 500 poll, *Fortune Magazine*, August 15,1996, p. F5

6 Eastman Kodak Annual Report, 1995.

7 Ibid.

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

occurred in the photographic industry.[9] The US government appealed the judge's decision in the Court of Appeals and lost.

Fuji Photo Film, founded in 1934, was the 338th largest company in the world[10] with sales of $10.2 billion in 1995. The company, the largest manufacturer of film products in Japan, employed 29,903 people world-wide had net earnings of $685 million. It had about 70 percent of the Japanese market and 33 percent of the global market.

While 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 very clear: "We were in a race for survival with Kodak. We could almost see their numbers [that is, the numbers on the backs of the runners in a road race]."[11]

Kodak and Fuji had battled each other relentlessly across the globe. Both their successes and failures seemed to be a mirror image of each other. 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 advantage over Kodak. The similarities persisted even when viewed globally, as these two titans' could each lay claim to over a third of worldwide market share.

Competition in the Japanese Market

Kodak began selling its products in Japan in 1889 and by the 1930s, had established a thriving operation and developed long-term relationships with the major Japanese wholesalers (Kashimura, Ohmiya, Asanuma, and Misuzu), or *tokuyakuten*, and successfully used 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 limiting the US firm's ability to either 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 parlance of the Japanese bureaucracy at the time, the action was taken to "end confusion" in the importing business.[12]

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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 worldwide. 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. Judge Telesca also considered whether Kodak had (such) market power if the relevant market were limited to the United States where Kodak's share was much higher (70 percent). He found that Kodak did not possess monopoly power in the US because of two factors: 1) consumers were price sensitive and 2) other suppliers could increase their capacity if Kodak restricted output or raised its prices

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

11 Albert L. Sieg & Steven J. Bennett, *The Tokyo Chronicles* (Vermont: Oliver Wright Publications, 1994) p. 18.

12 Ibid., p. 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, from 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."[13]

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 the US film.[14] 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. Kodak allegedly refused.[15] Kodak claimed to have no records of those meetings, and for that reason doubted they took place. Two years later, Asanuma stopped buying the US firm's film product, a move the Kodak management allegedly 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."

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."[16]

Between 1971 and 1976, the Japanese government progressively dismantled its tariffs on photographic goods which were a high as 40 percent. In 1979, it also ended the prohibition on direct foreign investment in this sector including investments in distributors and photo processing facilities. With legal barriers to direct investment removed, Kodak established a local subsidiary to

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13 Ibid., p. 18.

14 *Asanuma - A Commemorative History of the First Hundred Years* (Japan: privately published, 1971). 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."

15 Asanuma claimed it made several trips to Rochester that year and met with the Kodak management because it was in the process of strategically reevaluating the film distribution market in Japan as a result of the liberalization of the market.

16 *Wall Street Journal*, August 14, 1995. "Manager's Journal: Kodak's Self Inflicted Wound", by Scott Lathan, p. A10

provide technical and marketing support to its exclusive distributor. They were confident that Nagase's network of 33 distributors and dealers was sufficient to compensate for the loss of Asanuma.[17]

In fact, by 1983, Kodak's sales soared and its market share of consumer color film had reached an all-time high of 15.8 percent. This was primarily attributed to Kodak's decision not to raise prices in response to the increased market cost of silver in 1980 (silver was a major component in the manufacture of film), which resulted in a wide differential between themselves and the higher-priced Fuji product. Other contributing factors were that Kodak had introduced the highly popular 110 cartridge film two years before its Japanese competitors, and that the decline of import quotas allowed them to bring more film into Japan.

But it was not until 1984 that it 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, hired Japanese sales people, managers, advertising and marketing experts.[18] In1986, Kodak listed its shares on the Tokyo Stock Exchange to allow for greater local participation in the company. To bolster their 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, which sold at an estimated 38 percent discount to its own brand in Japan.[19]

Fuji and Kodak ruthlessly attacked and counterattacked each other. Both firms rapidly introduced new products and advertised with outrageously large colored neon signs in the major metropolitan areas in order to capture that all important market share. In addition to the photographic film and paper market, they also went head-to-head in the photocopier and clinical blood analyzer markets.

While Fuji had always held an overwhelming market share over Kodak in Japan, it seemed to solidify its hold of about 70 percent of market share when it became the first company in the Japanese market to introduce the single-use camera in 1987 and the ISO 400 fast film in 1989.[20] Kodak did not match Fuji in the Japanese market with a single-use camera until a year later

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17 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.

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

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

20 The single-use camera is a plastic camera that comes with a roll of film. When you have the film developed, the camera is returned to the company by the photo finisher for reuse. The single-use camera was considered the brainchild of Fuji President Minoru Ohnishi.

and with the highly popular faster film until 1991. The marketing war in Japan became so intense that Kodak would have its blimp with "Go Kodak" printed on it buzz the Fuji Tower in Tokyo just to rile their management.

By 1995, Kodak had over 4,300 employees in Japan and had built its own network of affiliated photo processing laboratories through acquiring an equity position in several Japanese firms. It accounted for 8.3 percent of the local market in color film. While Kodak had total revenues of over $1 billion a year in Japan, less than half was from consumer film products. It also stopped trading its shares on the Tokyo Stock Exchange. (See Exhibit 1)

Kodak claimed that by the time the Japanese government had lifted all trading restrictions in this sector in 1979, Fuji Photo Film had already created the closed distribution system which had protected its business in Japan and its 70 percent market share to the present day. (See Exhibit 2)

The US Antitrust and Trade Framework

The United States had one of the 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 were articulated and enforced by the courts through case-by-case adjudication, with the final arbiter being the Supreme Court. While US antitrust doctrine was based on the premise of ensuring that the quality of competition was not injured, more often than not, noncompetitive behavior is interpreted as causing harm to specific individuals or business firms.

Under the American legal system, individuals or corporations could 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.[21] The goal of the private litigant 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 what was termed the "treble-damage remedy," a monetary multiplier of the actual damage incurred which was awarded if the plaintiff could prove the fact of injury and the amount it had lost.

Trade Policy

The president's primary vehicle for negotiating and implementing international trade policy was through the Office of the United States Trade Representative (USTR), which was a

21 Harry First, "Antitrust Enforcement in Japan," *Antitrust Law Journal* (The American Bar Association, Fall 1995), vol. 64, issue 1, p. 163.

cabinet-level agency within the Executive Office of the President. While the US Trade Representative was not a cabinet member per se, the official held the title of ambassador and was directly responsible to both the president and Congress, who had to confirm the appointment.

Internationally, USTR had a number of enforcement tools at its disposal in trade cases that had been ratified by Congress to help break down foreign trade barriers. The most important of these were:

- Section 301 of the Trade Act of 1974
- The dispute settlement procedures of the World Trade Organization.

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

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

The Japanese Antitrust Framework

In Japan, the main legal framework for anticompetitive conduct was originally set in place by US General Douglas MacArthur who headed the victorious allied occupation as Supreme Commander for Allied Powers (SCAP) of Japan from 1945-51. As part of his effort to "democratize" Japan, MacArthur quickly introduced the notion of antitrust 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.[22]

Under SCAP's autocratic direction, the Japanese Diet (Parliament) approved an Anti-Monopoly Law (AML) in 1947, which established the Japan Free Trade Commission (JFTC) to assure the existence of competitive conditions by destroying cartels and preventing the re-

22 The four major *zaibatsu* until the end of World War II were Mitsubishi, Mitsui, Sumitomo, and Yasuda. In effect, these four companies were the military industrial complex of Imperial Japan.

emergence of large single firm monopolies. The JFTC was empowered to eliminate "substantial disparities" in economic power, if necessary by divestiture, and to prevent various devices for monopolization such as interlocking directorates, inter-corporate stockholding and holding companies.[23] The Diet also passed a Trade Association Act which prohibited groups of firms from operating restrictive practices.

The Peace Treaty of September 1951 returned full sovereignty to Japan. The Diet wasted little time in amending the US imposed antitrust laws. An amendment to the AML in 1953 permitted groups of domestic manufacturing firms in "depressed industries" to form cartels for the purposes of rationalization, improving technology, assessing quality, and increasing business efficiency.[24] In addition, the practice of resale price maintenance through linked relationships called *keiritsu's* was reinstituted. The Trade Association Act was repealed. The constituent firms of the old *zaibatsu* were drawn together again; this time however, instead of being centrally controlled by a holding company, relations between the various entities were looser and often indeterminate.[25]

The AML which was amended again in 1977 and 1991 empowered the JFTC to monitor all oligopolistic industries and investigate violations reported by any person.[26] If it found any

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23 In 1949 and 1950, before the end of the occupation, the AML was modified in the areas of interlocking directorates, stockholding and mergers, as SCAP was concerned that the economy was not developing fast enough. With China and North Korea going communist at that time, the US worried that a weakened Japan could affect their defense of that region.

24 Takatoshi Ito, *The Japanese Economy* (Cambridge, MA: MIT Press, 1989), p. 204. Depressed industries would be designated by the Ministry of International Trade and Industry (MITI) and 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." For example, the coal mining, aluminum, and shipbuilding industries received cartel designations at times during the 1970s and 1980s.

25 G.C. Allen, *The Japanese Economy* (New York: St. Martin's Press, 1992) p. 41. After 1953, the ability of the Fair Trade Commission 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

26 The AML was amended in 1977 to limit a bank's shareholding of a company to five percent of the company's equity and to introduce an "administrative surcharge" against cartels affecting prices. The 1991 reforms, which raised the amount of surcharge to be imposed by the JFTC were made following the Structural Impediments Initiative talks between the US and Japan in 1989-90.

Articles 25 and 26 of the AML allows for courts to rule on private action in antitrust cases, however, only after the JFTC determines first that there was unlawful conduct. If the matter is then taken to court, the plaintiff needs only to prove linkage between the damage and the illegal conduct. Harry First (*supra* note 26, p.147) notes: "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." Under the AML plaintiffs can only recover 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 damage. Professor Mitsuo Matsushita, of Seikei University, Japan, noted in a 1996 speech entitled *Private Enforcement of Competition Law*, that until 1993, no private plaintiff was ever successful in recovering damages under the AML. The breakthrough came when the Osaka High Court upheld the decision in what was known as the *Toshiba-Elevator Case*, in which a Japanese elevator service company using Article 709 proved that Toshiba, which manufactured elevators, illegally used anticompetitive tie-in clauses regarding maintenance and that its refusal to

practice of price-fixing or other market-rigging measures, it could order the payment of fines or "administrative surcharges" against a cartel. If the matter involved was criminal, the JFTC could 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 1985-94, the JFTC conducted only 109 cases, handing out penalties totaling $223.3 million.[27]

Rather than viewing antitrust as a legalistic mechanism for protecting the quality of competition, the Japanese viewed it 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."[28]

Part of the explanation for this attitude lay in the strong tendency in Japanese society to value cooperation over competition. This was 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 that the law's overall purpose was "to protect the democratic and wholesome development of the national economy as well as assure the interests of consumers in general."[29] This would later provide US negotiators with an insight into how Japan's government viewed the proper place for antitrust legislation at that time in its history. Protecting the consumer, the individual, was not paramount; the national economic interest was.

The Japanese cultural aversion to litigation also had stunted any significant doctrinal development of the AML through a paucity of precedent. Without such definition, enforcement of the highly detailed piece of legislation was infeasible.

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 trade talks between the two countries back on track.[30] As Professor Harry First of New York University Law School, a Japanese legal scholar, noted: "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,

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sell spare parts prevented the independent contractor from working in buildings with Toshiba elevators. Among other arguments, both sides in the *Toshiba-Elevator Case* cited legal precedents from Kodak antitrust cases in the United States.

27 "Rewriting History," a report prepared for Fuji Photo Film USA., July 31, 1995, by the US law firm of Willkie, Farr & Gallagher.

28 *Financial Times*, February 23, 1996. "The Watchdog That Refuses To Bite – Japan's Anti-Cartel Agency", by Michiyo Nakamoto, p .4

29 Harry First, p. 144.

30 This was an initiative by the Bush administration following the breakdown of negotiations over such issues as the importation of rice and lumber under the MOSS (Market Oriented Sector Specific) talks. The Japanese government considered both of those issues as strategic industries which underpinned their economy. The SII talks allowed both countries to table criticism of each other's approach to trade without tackling specific industry issues.

that antitrust was good economic policy. Doing something about antitrust became vital national policy simply because it was necessary for managing the trade relationship with the United States."[31]

As a result of the SII discussions, the JFTC published, in 1991, a 93-page English language document entitled, "The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices," which spelled out its detailed interpretation of the bounds between legality and illegality on 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.[32] Enforcement of the AML was also increased.

The World Trade Organization

The World Trade Organization had been 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 550-page document contained legal texts which spelt out the results of the negotiations since the round began in Punta del Este, Uruguay, in September 1986. The forerunner of the WTO was the GATT, the General Agreement on Tariffs and Trade. The GATT was set up following the Second World War as a mechanism for setting international trade standards and providing a voluntary forum for resolving disputes.

The WTO went a step further. Article III[33] of the WTO Agreement, the Dispute Settlement Understanding (DSU), defined an arrangement for a new "trade court," known as the Dispute Settlement Body (DSB).[34] For the first time, the text and procedures for such a dispute settlement mechanism constituted treaty obligations (as opposed to "interpretations" or "understanding of practices"), and its use was mandatory. (See Exhibit 3)

Since the WTO began operation in January 1995, USTR in the Clinton Administration, first under the direction of Ambassador Mickey Kantor and later Ambassador Barshefsky, had vigorously used the dispute settlement provisions of the Geneva-based international monitoring body, filing 20 cases in a 21-month period.[35] In 1996 alone, the US invoked the dispute settlement

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31 Harry First, p.174.

32 F. M. Scherer, *Retail Distribution Channel Barriers to International Trade* (Cambridge, MA: Harvard University, October 1995), p. 2.

33 "Understanding on Rules and Procedures Governing the Settlement of Disputes," WTO Agreement, documents supplement, annex 2.

34 John H. Jackson, William J. Davey, and Alan O. Sykes Jr., *Legal Problems of International Economic Relations: Cases, Materials and Text*, (St. Paul, MN: West Publishing Co., 1995), pp. 340-341.

35 Mickey Kantor was USTR from January 1993 until April 1996, when he became Secretary of Commerce following the death of Ron Brown. He resigned from the Clinton administration on November 7, 1996. Charlene Barshefsky was designated acting USTR by President Clinton in April 1996. She was officially appointed to the position in January 1997.

procedure 14 times, compared with eight cases brought by Canada and seven by the European Community.[36]

Kodak Takes Action

In December 1993, Kodak hired George Fisher from Motorola to be its president and chief executive officer. Fisher, a dynamic, results-oriented executive, came to the job with a well-earned reputation as an unrelenting fighter in developing market share.[37] 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 didn't see anything wrong in getting the help of our government to help US be successful."[38]

Fisher's mandate at Kodak was to restructure and revitalize the ailing company. Fisher divested Kodak of some $7.9 billion in tangential businesses 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.[39]

However, Fisher inherited a dilemma. Despite its worldwide success, its considerable investment in the Japanese market, and a brand name that was known for generations, Kodak was only able to manage about 10 percent of the market share in Japan.

On May 18, 1995, Kodak filed a 280-page petition with the Office of the United States Trade Representative (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.[40] [41] The entire submission, which took two years to compile, was prepared entirely by Dewey Ballantine's Washington, DC office, with its representatives traveling to Japan. The international law firm does not have an office in Japan, nor did it use a Japanese law firm for any assistance. It did, however,

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36 The US 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 (EU) 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. USTR settled on two other issues, one involving Japan's protection for sound recordings and another regarding Turkey's discriminatory box office tax on foreign films.

37 *Forbes*, November 4, 1996. "Calling Competition" by Neil Weinberg", p.146. As chief executive officer of Motorola, George Fisher successfully got the US government to pressure the Japanese with threats of trade sanctions, under Section 301 of the 1974 Trade Act, to open up the cellular telephone market in Japan in 1994 to his and other US firms. In the mid-1990's, the cellular phone market in Japan was one of the fastest growing industries and one in which Motorola was doing a thriving business. Also see Asiaweek Magazine, July 5, 1996, "Film Fight-Fuji vs. Kodak" by Matthew Fisher, www.asiaweek.com/asiaweek/96/0705/biz1.html

38 *Wall Street Journal*, May 24, 1996. "Kodak chief and Capital Lawyer, Heavy hitters on Trade Matters May Strike Out in Fuji Case" by Helene Cooper and Wendy Bounds p. A12.

39 *International Herald Tribune*, December 3, 1996. New York Stock Exchange Listing, Business Section

40 USTR press release, June 13, 1996.

41 Fisher served on numerous trade advisory committees in the Clinton administration. While he was with Motorola, Fisher was one of five US business executives asked to accompany President Bill Clinton to the 1993 trade talks in Tokyo.

use several local marketing firms to help conduct its research. The submission, entitled "*Privatizing Protection*", claimed that the price of a roll of color film sold in Japan at the wholesale level was 3.1 times higher than in the US, 3.6 times higher in the UK and 4.1 times higher in Switzerland. It further claimed that even in the stores in Japan where Kodak film could be found, the consumers were denied the benefit of Kodak's competitive wholesale price in 4 out of 5 of their purchases.[42]

Kodak's Section 301 case primarily focused on the "vertical market restraints" in Japan, which are the impediments importers encounter obtaining access to the wholesale and retail distribution channels needed to convey their products to the ultimate consumer.[43] The Kodak complaints included the following:

- Fuji controlled and enjoyed an exclusive relationship with all the leading wholesalers (*tokuyakuten*) of consumer photographic products, who in turn exercised strong influence on the distribution channels for consumer film down to the retail level.[44] Kodak claimed that the *tokuyakuten* were essential facilities for doing business in Japan. If Kodak were to have to set up its own distribution network on the same level as the existing *tokuyakuten* in order to compete fairly, the cost would be so high that it would be uneconomical to do business in Japan. 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 which was one of the major lenders in the Japanese economy.[45]

- To maintain stable, high prices which were up to four times higher than other major markets, Fuji and its affiliated dealers used a variety of anticompetitive

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42 Kodak's legal brief to USTR took a shotgun approach to possible trade violations by Japan, including the premise that Japan's actions are not only "unjustifiable" practices inconsistent with US international trade legal rights but that they were a breach of the 1953 US-Japan Friendship, Commerce and Navigation Treaty and the 1961 OECD Code of Liberalization of Capital Movements.

43 F. M. Scherer, pp. 2-3.

44 *Mainichi Daily News*, July 16, 1996. According to USTR's 1996 National Trade Estimate Report, out of the 279,000 film sales outlets in Japan, 12 percent were photo stores (which sold about half the film purchased in the country); large-scale discount stores and supermarkets accounted for 23 percent of sales; and the remaining 65 percent was sold at resort areas, parks, and convenience stores. Nearly 70 percent of all film sold is purchased outside the two main cities of Tokyo and Osaka.

45 One of the traditional zaibatsu until the end of World War II, Kodak claimed that the Mitsui involvement exceeded the guidelines of the AML with the tactic approval of the JFTC. Mitsui is part of a keiretsu, which is a group of affiliated enterprises bound together by financial ties. Mitsui financed Fuji's interlocking financial ties with processing labs around the country.

> practices including resale price maintenance; horizontal coordination of pricing; opaque and discriminatory volume-based rebates; and a system of monitoring and enforcing discipline of maverick retailers who discounted prices through its trade association, the *Zenren.* (See Exhibit 4) [46] [47]

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

Kodak claimed that it only 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 want the US government to fight for guaranteed market share for imports or 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."[48]

That same month, Kodak hired Ira Wolf, The former the assistant United States Trade Representative responsible for Japan and China (1992-1995), 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 (1990-1992) when Fisher was its CEO.

Kodak's lead lawyer at Dewey Ballantine in Washington was Alan Wolff, who had helped write Section 301 of the 1974 Trade Act while he was Deputy General Council at USTR. Wolff emphasized the importance of getting Kodak's products on the shelves. "It's the consumer who

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46 "Privatizing Protection," May 1995, a report for Kodak in by the US law firm, Dewey Ballantine, claimed that the price of a roll of color film sold in Japan at the wholesale level was 3.1 times higher than in the US, 3.6 times higher in the UK and 4.1 times higher in Switzerland. It further claimed that even in the stores in Japan where Kodak film could be found, the consumers were denied the benefit of Kodak's competitive wholesale price in 4 out of 5 of their purchases.

47 Kodak alleged that it was through the *Zenren*, and other trade associations, that horizontal pressure (i.e., the process of working 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 a *non-Zenren* store.

48 Alan Wolff, interview with author, November 1, 1996. In its suggested remedies under Section 301, Kodak asked USTR to request that the government of Japan do the following:

- Direct Fuji to terminate all anticompetitive practices that promoted horizontal and vertical price fixing.
- Direct Fuji to terminate the exclusive distribution of Fuji film by primary and secondary wholesalers, and to ensure that the wholesalers were free of any coercion restricting their willingness to distribute Kodak and other competitor's products.
- Ensure that trade associations in the photographic industry terminated any price fixing.
- Direct Fuji to terminate rebates that illegally excluded competitors and induced resale price maintenance.
- Direct the JFTC to end its use of industry competition codes to restrict competition.
- Direct the JFTC to vigorously prosecute violations of Japan's antimonopoly law with respect to its consumer film and paper market

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."[49]

The timing of the Kodak action coincided with a period of contentious negotiations between the US and Japan as trade friction was growing over a dispute regarding the sale of US auto and auto parts in Japan. The US Ambassador to Japan, former Vice President Walter Mondale, who was very much involved in those negotiations, was reported to have said to one American businessman in Tokyo that, "I'm used to a system where elected leaders make decisions and bureaucrats implement them, but this place has it turned upside down."[50]

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

- When Japan dismantled its formal restrictions on imports and inward investment in this industry under international pressure between 1964 and 1976, it simultaneously created an anticompetitive market structure as a "liberalization countermeasure" to restrict foreign producer's effective participation in the market.

- The restrictive market structure established under the liberalization countermeasures in the 1970s by the Ministry for International Trade and Industry (MITI) remained in place today and was maintained and tolerated by the government of Japan, despite Japan's commitments to the United States regarding structural adjustments to the economy.

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49 Alan Wolff, interview with author, November 1, 1996. Kodak claimed that its film was available and able to compete on price in only 10 percent of the Japanese market. It also claimed that its product was wholly absent from two-thirds of the Japanese market. Kodak Japan defined "competitively priced" to mean a discount of 100 yen for multi-pack sales and 33 yen for single rolls of film to be the minimum necessary to be competitive at the retail level. In order to maintain this competitive pricing, it further claimed that between 1990-1995, it cut its wholesale prices by 30 percent. In a survey Kodak conducted of 2,028 photo outlets (.0072 percent of the total number of photo outlets in the country) in 144 cities in Japan (which equates to 19.8 percent of the total number of cities in the country) between November 1995 and January 1996, the company found that its product was priced competitively in only 34 percent of multi-pack sales and 17 percent of single roll sales. Kodak's strongest presence was in Tokyo, where their film could be found in 54 percent of the retail outlets surveyed. In short, Kodak's survey showed that price competition was virtually absent in the retail film market outside of a few big cities. In contrast, although only 14 percent of the film sold in Japan was sold in Tokyo, 27 percent of Kodak's sales were in Tokyo, which meant that Kodak had twice the market share in Tokyo than it had in Japan as a whole. Kodak used these figures in the Section 301 submission to show that where they had better access to the market, and were able to price competitively, they had a fair share of the market.

50 *Daily Yomuri Newspaper*, Japan, November 10, 1996. Syndicated article by Teresa Watanabe of the *Los Angeles Times*.

- The industrial policy of the Japanese government—a major component being the lukewarm enforcement of its Anti-Monopoly Law (AML)—permitted anticompetitive practices by domestic manufacturers and trade associations which were serious violations of Japan's competition laws.

Fuji Responds

Meanwhile in Tokyo, the management of Fuji Photo Film were not only stunned by the scope of the Kodak complaint, they were offended by what they thought were outright malicious lies, whose main harm was not so much in Japan, but 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 had violated all the standards of business ethics. It had 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 was most troubling about Kodak's action was 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."[51]

Fuji wasted little time in huddling with their key international strategists, the US law firm of Willkie Farr & Gallagher and the international public relations firm, Edelman. Willkie Farr & Gallagher had a long history of working for foreign firms. They were also counsel to the Japanese auto industry for the auto talks. Edelman had offices all over the world and the Washington DC office included Mike Deaver, the communications wizard of the Reagan White House, and used the lobbying firm of Downey Chandler. Tom Downey was a Democratic congressman from New York and Rod Chandler was a Republican congressman from Washington State.

During their brainstorming, they concluded that the small staff at USTR would never have the time to investigate the case properly, so they 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."[52] They produced their own 535-page rebuttal of Kodak's 280-page study *"Privatization Protection"* entitled "*Rewriting History."*

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51 Fuji Film press release, May 1995.

52 Rob Rehg interview with author, October 31, 1996

The Fuji side spent millions of dollars creating a "rapid response team" that not only rebutted Kodak's claims; it often "pre-butted" them. Between July 1995 and June 1996, Fuji representatives made 17 submissions to the American government compared to Kodak's nine.[53] Over the months, journalists around the globe were showered with documents, letters, briefs, and even video tapes showing Kodak film being sold in Japan.

MITI Gets Involved

The Kodak case was filed at a time when the Japanese Ministry for International Trade and Industry (MITI) was working to formulate a new strategy for dealing with the US on trade. In the spring of 1995, the United States 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 for 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 enough.[54] The next time the US government invoked Section 301 Japan would simply refuse to negotiate on those terms.

On March 15, 1996, Japan's top trade negotiator, vice minister for international affairs at MITI, Yoshihiro Sakamoto, fired the first shot across the American's bow. Speaking in English so that there would be no misunderstanding, he told an audience at the Foreign Correspondent's 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," he said.[55]

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53 The Japanese firm conducted three market surveys to Kodak's one. Fuji's main counterclaims were:

- It rebutted Kodak's "essential facility" argument with the historical argument that of the four major tokuyakuten, Kashimura and Ohmiya had not carried Kodak film since the end of World War II. They both dropped distributing the Japanese brand Konica in 1963 and 1964 respectively. Misuza carried multiple brands, including Kodak until 1968. Asanuma dropped Kodak in 1975.
- It attempted to dispel Kodak's "distribution bottleneck" theory by showing that its surveys found that 62 percent of the four major tokuyakuten's customers (retailers) carried Kodak film and that another 16 percent of those tokuyakuten's customers dealt with wholesalers that carried Kodak film. In all, claimed Fuji, 78 percent of customers of the four primary film wholesales (which exclusively sell Fuji products) either already purchased Kodak film, or had existing relationships with suppliers of Kodak film.
- It claimed that the four major tokuyakuten were independently owned firms who were not prohibited by contract with Fuji from carrying Kodak film. In fact, the tokuyakuten claimed that Kodak had never approached them with an offer.
- Fuji supported its claim that Kodak's low market share was a result of its own marketing efforts and its strategic business decision to form its own single distributorship by citing Konica, a Japanese film manufacturer who used two of its own wholesalers and had a market share of around 17 percent.

54 Interview with Yataka Osada, Professor of International Law, Surugadai University, Japan on May 17, 1997. The shift in the Japanese attitude towards bilateral negotiations began to take shape following a new five-year accord on semiconductors in the summer of 1991. Both sides signed a document which called for a 20 percent target for US market access in Japan by the end of 1992. Japan insisted that the deal's language explicitly noted that the target was neither a guarantee, nor a ceiling, nor a floor on foreign market share. The American's publicly stated that the target was a commitment.

55 Text of speech supplied by MITI, March 15, 1996.

MITI felt that for the first time that they had been given the perfect cover for not having to engage 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.[56] MITI contended that any allegations of anticompetitive business practices came under the jurisdiction of the Japan Fair Trade Commission (JFTC), a quasi-judicial body, which was a distinct branch government. They 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 approached Fuji, or any other participants in the industry to try and resolve the matter.

MITI maintained it was not a party in the Section 301 dispute. 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.

An additional tension at that time between the Japan and the United States involved the trial of three US soldiers who were found guilty of raping a schoolgirl on the Japanese island of Okinawa. The public furor in Japan over the case led to the US being pressured to reduce its military presence on the island. The issue put into question the depth of the US-Japan security relationship, which had always been the touchstone for eventually resolving disputes between the two countries. Although Washington was keen to de-link issues of security and trade, the symbolism in Japan from the Okinawa incident translated into a behind-the-stage power struggle between the two nations, which was compounded by earlier assertions from officials in the Clinton administration who postulated that trade and economic policy, rather than the traditional factors of defense and regional security, would be the basis for a new US-Japan relationship.

On February 21, 1996 the JFTC announced it would conduct a survey as to whether there had been anticompetitive business practices in the Japanese markets for color film and photographic paper.[57] 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 commission was scheduled to produce a report by March 1997.

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56 MITI, November 1996. Japan had no tariffs on photographic color film and paper as opposed to the US which imposed a 3.7 percent duty on imports and the European Community which had duties of 5.3 percent on film and 7.6 percent on photographic paper. In 1995, imports of consumer color film accounted for 18.7 percent of the Japanese market, while imports of photographic paper accounted for 29.6 percent of total market share

57 The JFTC announcement of the investigation of Kodak's allegations came two days before Prime Minister Ryutaro Hashimoto was due to meet President Bill Clinton for the first time. Hashimoto had been in office for just over one month heading a shaky coalition government. Prior to becoming prime minister, Hashimoto was trade minister, who steadfastly fought US demands for "managed trade" during the auto and auto parts negotiations which were concluded in June 1995. In October 1996, he was reelected as head of the Liberal Democratic Party (LDP) ticket and formed a single party minority government. The JFTC announcement preceded USTR's decision to resolve this dispute in the WTO by five months.

The JFTC survey by the Economic Department into anticompetitive business practices in the Japanese film industry was separate from the Kodak private party complaint made under Article 45-1 of the AML in August 1996 which was being looked into by the Investigation Department. The JFTC survey was not an investigation, although if it were to find any problems during its survey, the JFTC could take action against those practices. 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."[58]

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 the five member executive council of the JFTC. He is the first head of the JFTC not to have previously worked either at MITI or the Ministry of Finance. The weakness of antimonopoly enforcement in Japan had earned the JFTC the not undeserved reputation in its own country for being "the watchdog without teeth." The commission conducted 13 similar surveys since 1990, including one on the film industry in 1992,[59] and had not recommended prosecution of a single company for breach of the Anti-Monopoly Law.

Either because of, or despite its extensive experience and knowledge of how business was conducted in Japan, the management of Kodak Japan never made a formal submission 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 Japan in any legal or government setting. Kodak could also have taken their complaints to the Office of Trade and Investment, 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."[60]

Alan Wolff, lead counsel for Kodak's lead counsel speculated that Kodak's refusal to make a submission to the JFTC could be traced to the experience of a Kodak executive in Japan who submitted documents to the JFTC in 1977 and later discovered that proprietary information had been leaked by the Commission to Japanese film companies. Wolff also contended 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.[61]

Barshefsky's Decision

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58 Ira Wolf, interview with author, November 15, 1996.

59 "The Highly Oligopolistic Industries Report." A 1992 study, which included the film industry, examined the question of vertical market restraints and their effect of restraining price competition.

60 Nikkei News Service, August 12, 1996, article citing earlier statement made in 1995.

61 Alan Wolff, interview with author, November 1, 1996.

To Ambassador Barshefsky and her dedicated team at USTR, the Kodak case was important because it put a spotlight on alleged anticompetitive practices in Japan that extended beyond the film sector to other areas of the Japanese economy regarding all types of foreign consumer products.

As she noted: "We saw in this sector [photographic paper and film] the same market barriers that were present in sector after sector in Japan. These were systematic structural barriers, such as closed distribution systems and excessive regulation that we had been discussing with Japan for years. With the detailed evidence uncovered in this investigation, we now had a clear understanding of how those barriers had interacted to keep out competitive foreign products in a particular sector."[62]

From a strategic point of view, USTR felt that if the WTO Dispute Settlement Body ruled in their favor in this case, they would be able to accomplish through an international forum in one go, what they had laboriously achieved in 23 different sectoral agreements with the Japanese over the last four years in bilateral negotiations using the threat of unilateral sanctions under Section 301. Though hundreds of companies asked Washington to investigate unfair trade practices, USTR accepted only about 14 cases per year and even fewer were 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. Adding, "It would be bad for the WTO if we lost because it would play to the skeptics in the Congress."[63] To some Americans legislators, the GATT agreement was viewed as a statute, not a treaty, under which US law should not be subordinated to another legal body.[64]

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62 USTR press release, June 13, 1996.

63 USTR, interview with author, October 31, 1996

64 Gary N. Horlick, WTO Dispute Settlement and the Dole Commission, *Journal of World Trade*, vol. 29, December 1995, pp. 45-48. In November 1994, Senate Majority Leader Robert Dole (R-Kansas) reportedly said he would support the GATT if the Clinton Act) was submitted on June 4, 1995. It called for a Commission made up of five Federal Appellate Judges, appointed for a period of five years by the President in consultation with Congress. The Commission would review all adopted reports of the WTO dispute settlement panel and Appellate Body considered adverse to the United States. If the Commission found three such judgments in a five year period, then a process would begin which could lead to a Congressional vote on the US withdrawing from the WTO. A Senate vote on the amendment in August 1995 was blocked on procedural grounds by Robert Byrd (D-West Virginia). The Dole Amendment was never enacted in legislation, nor was it part of any informal agreement with the White House administration backed his proposal to allow for greater Congressional oversight of US participation in the WTO. In what became known as the "three strikes and you're out provision", the Dole Amendment (S.16: WTO Dispute Settlement Review Commission Act) was submitted on June 4, 1995. It called for a Commission made up of five Federal Appellate Judges, appointed for a period of five years by the President in consultation with Congress. The Commission would review all adopted reports of the WTO dispute settlement panel and Appellate Body considered adverse to the United States. If the Commission found three such judgments in a five year period, then a process would begin which could lead to a Congressional vote on the US withdrawing from the WTO. A Senate vote on the amendment in August 1995 was blocked on procedural grounds by Robert Byrd (D-West Virginia). The Dole Amendment was never enacted in legislation, nor was it part of any informal agreement with the White House.

The political pressure on Barshefsky did not end there. Kodak had spent millions of dollars in legal fees and lobbying efforts to see this through as a Section 301 case.[65] They clearly wanted action. On March 28, 1996 Fisher testifying at a hearing of the House Ways & Means trade subcommittee argued that "while certain discrete actions of the 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."[66]

At the same time, officials in the Clinton administration were pointing out to USTR that a decision to put this case before the WTO would ensure that they would not have to deal with the potentially politically sensitive issue until after the president's November 1996 reelection bid.[67] "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."[68]

USTR began to carefully examine their options. In the process, they distilled Kodak's list of grievances to two core issues which could form the basis for either acting unilaterally under Section 301 or seek a broader consensus. If it chose to go before the WTO panel, the US would first cite alleged violations by the government of Japan of the 1994 General Agreement on Tariffs and Trade, and nullification and impairment of GATT benefits arising from the full panoply of "liberalization countermeasures"[69] that were put in place and were maintained to thwart imports in this sector. The legal precedents cited in this argument were articles II, III, X and XXIII (1b) of the GATT.

While the WTO was only empowered to rule on current practices, USTR would claim that the liberalization countermeasures of the 1970s designed by MITI regarding the photographic industry had been perpetuated and were still effective and that while the Japanese laws were facially neutral, they were allegedly being abused administratively.

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65 *Inside US Trade*, September 1997 "US Cites New Distribution Measures Under Expanded Film Complaint"

66 *Inside US Trade*, March 29, 1996 "Kodak Steps Up Pressure For Bilateral Resolution of Film Dispute"

67 The precedent of avoiding international trade as an issue in the November 1996 elections was set in August 1996 when President Clinton exercised his prerogative, granted in legislation, of delaying by six months the implementation of the Helms-Burton Act regarding sanctions against foreign firms who traded with Cuba. On a separate, but politically related issue, it is worth noting that the US Labor movement contributed an estimated $35 million dollars to the president's successful reelection campaign. The Republicans retained control of Congress campaigning on a party platform adopted at their convention in San Diego in August 1996 which called for US law to supersede all trade agreements in case of a dispute.

68 USTR, interview with author, October 31, 1996.

69 USTR press release, October 15, 1996. 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. 4) That the Premiums Law deputizes local groups of competitors to set and enforce standards of competition.

MITI could be expected to counterclaim with three arguments:

- The US claims were overly broad and vague as to which specific measures constituted a violation of what specific obligation under the GATT and what positive solution it was seeking.

- The government and business conspiracy theory 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.

- Even if one accepted the US allegation that the government of Japan instituted effective "liberalization countermeasures" to block market access in the early 1970s, how then could one account for Kodak's dramatic rise in market share from about 8 percent in 1970 to almost 18 percent in both 1981 and 1983—a year before Kodak Japan set up its own formal distribution system which it operated today?

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.[70]

The second case the US might put before another WTO panel were 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[71] and measures such as the Guidelines for Rationalizing Terms of Trade for Photo Film and the Basic Policy for Distribution Systematization, which the US claimed constituted a serious barrier to foreign service suppliers as well as imports of film and other consumer products. The legal precedents cited in this argument were articles III, VI, XVI, XVII and XXIII (3) of the GATS.

"We could bring this GATS case anytime. In effect, the GATS case was simply a backup to the GATT case," noted a USTR official. "Even if the film case was resolved in the first panel, we would probably pursue this because it affects other trade problems."

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70 MITI, interview with author, Tokyo, November 14, 1996.

71 USTR press release, October 15,1996. The American view of this 1976 law required prospective store owners to complete a lengthy and cumbersome negotiation process with local authorities, merchants, and consumers as well as MITI before opening a store. In order to obtain approval of those parties, the store owner had to agree to various restrictions imposed by his local competitors, including limitations on store size, hours of trading, advertising, prices and merchandise carried. USTR contended that because large stores tended to carry more imported products than small stores, the Japanese government's limitations on the number of large stores severely constricted an important channel to the Japanese market for foreign manufacturers. Large retail stores accounted for 17 percent of the 279,000 retail outlets that sold film in Japan, but they handled three-quarters of all sales.

The Japanese could argue that the Large Scale Retail Store Law was no different from many building and zoning regulations in the United States or other countries. Moreover, the law itself did not regulate particular products like film. On the question of its "administrative guidelines," USTR believed that MITI might argue that they did not adversely impact the distribution or sale of specific products. The US argued 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 Japanese government "recommendations" did not carry an obligation under the law, there was considerable literature on the subject to argue that in the cultural context of Japanese society, it did in fact carry the weight of the 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, the US could discuss with the government of Japan the significant evidence of anticompetitive activities it had uncovered in this sector and to ask the government of Japan to take appropriate action.[72] In effect, this was a potential "second-track" in the *Kodak v. Fuji* negotiations with Japan, which could take place either during or after the WTO panel hearings. As in earlier negotiations on this issue, Barshefsky expected the Japanese to counter with the "mirror image" argument to 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 US and Japan resorted to what was called the Auto Basket of Framework Negotiations as a way circumventing the deadlock surrounding the American's Section 301 claim. It was the first major initiative by the Clinton administration in a trade dispute with Japan.

Barshefsky knew that unlike the unilateral action of Section 301, the possibility of a face-saving compromise in this case existed 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 USTR had a strong case, it was certainly not as clear-cut as Kodak had originally presented. She had to decide, which option would give the US government the most leverage in opening up the Japanese market?

On June 13, 1996, Ambassador Barshefsky, decided to initiate dispute settlement proceedings against the government of Japan through the World Trade Organization rather than seeking sanctions through Section 301.[73] (See Exhibit 5.) "This case was about increasing leverage

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72 USTR, interview with author, October 22, 1996.

73 USTR said that it would not continue to treat the Kodak case as a Section 301 matter, which under US law would permit retaliatory sanctions if Japan refused to negotiate a settlement. The decision was influenced in part by the fact that Fuji has a major film manufacturing plant in Greenwood, South Carolina and so sanctions on imports would hardly be effective. By 1997, Fuji would have invested $700 million dollar in the multipurpose plant creating 1,200 new jobs for American workers in the area. Since 1988, Fuji had invested $2 billion dollars in 30

against Japan in a WTO world," said a USTR official. "We were not as reluctant to take unilateral action as the Japanese think, and they will find there was no refuge in the WTO."[74]

The decision to refer this case to the WTO, rather than proceed with it as a Section 301 case, came about after weeks of exchanging internal position papers. The debate as to how to proceed with the case revolved around a spectrum of options. At one end were the "activist" policy makers who advocated that it was essential to establish quotas and timetables for market share. At the other end were those who were in favor of a pure rules-based approach. Change the rule, make discrimination illegal and then sit back and see what happens. Both of these views were tempered by what might be called an "affirmative action" approach, a view which did not necessarily demand specific outcomes but tried 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 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."[75]

"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."[76] Making sure the US government dotted all its i's and crossed its t's in its submission to the WTO, Barshefsky requested that Kodak file a submission to the Japan Fair Trade Commission (JFTC) concerning anticompetitive practices in their industry sector. Kodak did, but made a very specific and narrow complaint to the JFTC, which was only a small part of the panoply of grievances it lodged with 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."[77] Former USTR Ambassador Mickey Kantor insisted that while the US has a strong case, "trade was not a zero-sum game. It could be a win-win situation for everyone."[78]

On the other side of a different ocean, Kodak hired former Deputy USTR Rufus Yerxa, working at the Brussels law firm of Akin, Grump, Strauss, Hauer & Feld to lobby for support from

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other facilities across the US. Also, if the US had initiated sanctions against Fuji in the US it would have affected another major US company, Polaroid, which sells Fuji film in the US under its own name. Although under Section 301, the US could impose sanctions against Japan on industries other than the photographic industry, it was felt this would further exacerbate the trade conflict.

74 USTR, interview with author, October 31, 1996.

75 Ibid.

76 *Asian Wall Street Journal*, June 14, 1996. "U.S. Choosing a Mild Course Shifts Kodak'

77 Ira Wolf, interview with author, November 15, 1996.

78 Mickey Kantor, Arco Forum, Kennedy School of Government, Harvard University, October 17, 1996.

the European Union to endorse the US case against Japan. Kodak had also been pressing the German film producer, Agfa-Geveart, to express interest in the case and to put political pressure of its local politicians. Fuji tried to counter this move across the Atlantic by hiring Frieder Roessler, the former head of the GATT legal affairs division.[79]

For a brief time during the summer and fall of 1996, it looked like there was an opportunity for the governments of the two countries to find a way to "settle out of court" through bilateral negotiations in Geneva. Concurrent with the GATT consultations, a frustrated team at USTR tried a new and separate initiative to engage MITI in talks based on a 1960 ruling by GATT which 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 refused to negotiate. Once the matter was referred to the WTO, the two sides met only twice, for a half-day at a time, during the 60 days allowed for "official consultations." US negotiators felt that the talks were going nowhere. Said one American negotiator, "We presented our side of the case and they just listened without any intention of responding."[80]

However, Japan's interpretation of the 1960 RBP decision included the stipulations that consultations would not amount to an admission by Japan that restrictive practices existed and that any talks that did take place would be limited to 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, it should be up to the Japanese government to decide what action to take and that the newly formed WTO should have no control over nor have the ability to investigate the agreement.[81]

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 these talks only if the US 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. According to an official statement by the Commission, "The EU is a significant player in 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

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79 *Inside US Trade*, October 16, 1996

80 USTR, interview with author, October 31, 1996. By 1995, the USTR was under the impression that Japan would be phasing out barriers like the Large Retail Store Law (LRSL) by the end of the decade, which they eased during the 1989-90 Structural Impediments Initiative (SII) talks. The easing of LRSL allowed US companies like TOY'S R' US to enter the Japanese market and do well. USTR claims that the Japanese government had made a written admission that the law should be phased out in its published deregulation plans in 1991.

81 Letter from Japanese WTO Ambassador Minoru Endo to Deputy USTR Ambassador Booth Gardner, August 9, 1996.

market access to the Japanese market, as well as the international dimension of competition raised by this case."[82]

While the US conceded to the Japanese preconditions that the talks would not be considered an admission of anything and that any agreement would be limited to areas of government responsibility, it balked at the idea that quid-pro-quo the talks should include restrictive trade practices in the US market and that discussions on the Japanese market should be limited in scope 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.[83] The US interpretation of the RBP decision also did not exclude the possibility that the WTO would engage in oversight of an agreement reached between the two parties. From a tactical point of view, US negotiators opposed the linkage in the talks because it would establish 'equivalency,' issues and create what has been termed a 'mirror image' problem.[84]

The RBP talks never took place. Although no one else had ever held consultations under the 1960 GATT decision, US trade officials were exasperated at the Japanese intransigence. Only a year earlier, the two countries managed at the eleventh-hour to end a decade-old dispute over automobiles with an agreement which addressed a range of market access barriers regarding the sales of foreign auto and auto parts 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," noted a USTR official.[85] "So we've told the Japanese government, 'See you in court!'"[86]

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 US agreed to the candidates but the Swiss representative and the Brazilian representative both said they were unavailable. The two countries resumed their search.

After going through almost 60 names with no mutual agreement, the two countries turned in frustration to WTO Secretary-General Renato Ruggiero and asked him to impose a panel. On

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82 *Inside US Trade*, October 18, 1996 "EU To Be Third Party in U.S. Film Case In World Trade Organization."

83 Letter from Deputy USTR Ambassador Booth Gardner to Japanese WTO Ambassador Minoru Endo, August 21, 1996.

84 USTR official, interview with author, October 31, 1996.

85 This is a reference to the six-month stalemate that occurred at the opening round of the Paris Peace Talks in 1968 between the United States and North Vietnam.

86 USTR interview on October 31, 1996.

December 17, 1996, Ruggiero convinced the originally agreed to Swiss and Brazilian candidates to accept the position. Along with the New Zealand candidate, they constituted the panel. All three had previous experience with the WTO: William Rossier of Switzerland had served as ambassador to the WTO and chairman of 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—due to fact that it was asked to 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 mean that the panel would not be able to render a judgment in the usual six months as set out in Uruguay Round Dispute Settlement Understanding.[87] It would take a further six months.[88]

For the panel, the case posed the difficult problem of making a ruling under the so-called non-violation provisions of the GATT 1994 and the GATS. Most WTO disputes involve claims that a member has failed to carry out its obligations under a particular agreement, but GATT Article XXIII:1, for example, also allows complaints if a member applies "any measure, whether or not it conflicts with the provisions of this Agreement" that denies another member with benefits that it expects to obtain. These are termed non-violation complaints.

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" cited by the United States individually or collectively, nullified or impaired benefits to the United States within the meaning of GATT Article XXIII:1 (b). (2) that the United States **did not** demonstrate that the Japanese distribution "measures" cited by the United States accorded less favorable treatment to imported photographic film and paper within the meaning of GATT Article III:4. (3) Finally, the United States **did not** demonstrate that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1.[89] 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 DSB 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, "Most experts predicted."[90]

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87 *Inside US Trade*, June 13, 1997 "WTO Panel on U.S.-Japan Film Case to Delay Report Until End of Year"

88 During the proceedings The United States and Japan each made two submissions, while both the European Union and Mexico provided briefs as third parties in support of the US position. "EU Expresses Concern over Access to Japanese Consumer Film Market in Fuji-Kodak Case," EU Press Release IP/97/29, Brussels, April 15, 1997.

89 World Trade Organization WT/DS44/R, March 31, 1998 "Report of the Panel on Japan-Measures Affecting Consumer Photographic Film and Paper."

90 *Inside US Trade*, December 8, 1997. "Ohnishi: Fuji Statement on Film Case"

But a disappointed USTR Barshefsky commented that the ruling "sidesteps the real issues in this case and instead focuses on narrow, technical issues."[91] Despite such sentiments, the United States did not appeal the WTO's decision. US officials said the US chose to forgo an appeal on the grounds that it did not want to upset legal precedents established by the panel's final report. In particular, before the case, there was uncertainty over whether actions taken by the private sector (that were officially tolerated by a domestic government) could still be considered as "measures" that would be actionable under Article XXX:1. The panel said that indeed such measures could be actionable, and this principle was regarded as a victory by the US in its battles against Japanese barriers, even if had lost in this instance.

The US decision did not stop Kodak from firing its own broadside at the WTO. Fisher's immediate reaction to the verdict was to call it "totally unacceptable" and demanded that the US government "define a concrete plan to open the Japanese market."[92] Almost immediately, senators and congressmen from both sides of the aisle renewed the call for action against Japan under Section 301. Within two weeks of the final report being issued, 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 sent a letter to the Japanese Ambassador in Washington, Kunihiko Saito, warning him that Congress would put further pressure on Japan.[93]

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 say the Kodak-Fuji case marked the end of two decades of fierce market-opening disputes between Japan and the United States. Japan's economic problems beginning in the early-1990's, and the resurgence of the US economy made US concerns about competition in Japan less salient. In addition, the emergence of China as an economic power captured US attention. US trade relations with Japan became less visible, and the focus of US policy towards Japan shifted to the security relationship and Japan's major macro-economic 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 1990's, 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, USTR chose to take the case to the WTO

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91 *Inside US Trade*, December 8, 1997. "Barshefsky: USTR Statement on Film Case"

92 *Inside US Trade*, December 8, 1997. "Kodak Statement on Film Case". In a June 25, 1998 submission to 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 so." Adding, "the inordinate role played by the staff in deciding this case was wholly inappropriate and a serious breach of the organization's responsibility to its members to ensure that decisions are rendered in a competent and fair manner." Source: *Inside US Trade*, July 3, 1998. "Kodak Charges WTO Secretariat With Unfair Intervention in The Film Case.

93 *Inside US Trade*, February 20, 1998 "Text: House Letter on Japan Film"

instead. From this point forward, the US 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 though the WTO. One USTR official noted that as a result, industry was no longer filing as many Section 301 complaints. For example, from 1995-2002, the private sector filed only six Section 301 petitions.[94]

Ambassador Robert Zoellick, who headed USTR in the Bush Administration (2000-2005) cautioned those in Congress who believed that the new measure of success in defending US trade interests was increasing the number of WTO litigated cases. 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."[95]

Finally, the Kodak-Fuji case was also significant because it established that WTO rules were not well suited to deal with problems related to weak national enforcement of competition policy. The ruling also indicated that it was very difficult to prove a case under non-violation. Therefore, if the WTO were to encompass competition policy considerations, it was clear that international rules would have to be explicitly negotiated. In 1996, Europe proposed putting competition policy onto the WTO agenda, including it in a list of four new areas known as the "Singapore issues." However, the United States was less than enthusiastic. Some in the US worried that a WTO competition policy regime would weaken domestic antitrust rules. In addition, jurisdictional issues existed between the US Justice Department and the Federal Trade Commission, which administered US antitrust policy, and the USTR, which was in charge of anti-dumping.

Eight years on from the Kodak-Fuji decision, the film and photographic paper market has been overtaken by digital imagery. Technology, not politics, proved to be the catalyst for change. Some argue that the preoccupation of Kodak's management with the WTO case caused it to take its eye off what was really happening in the market place. As a result, Kodak's 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 held 1,000 digital photography patents,[96] it no longer led the market in photographic products in the United States

94 USTR official and facts on 301 petitions in Keisuke Iida, "Is the WTO Dispute Settlement Effective?" *Global Governance*, April 1, 2004, p. 207.

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

96 *International Herald Tribune*, December 28, 2004 "Kodak's New Image" by Saul Hansell

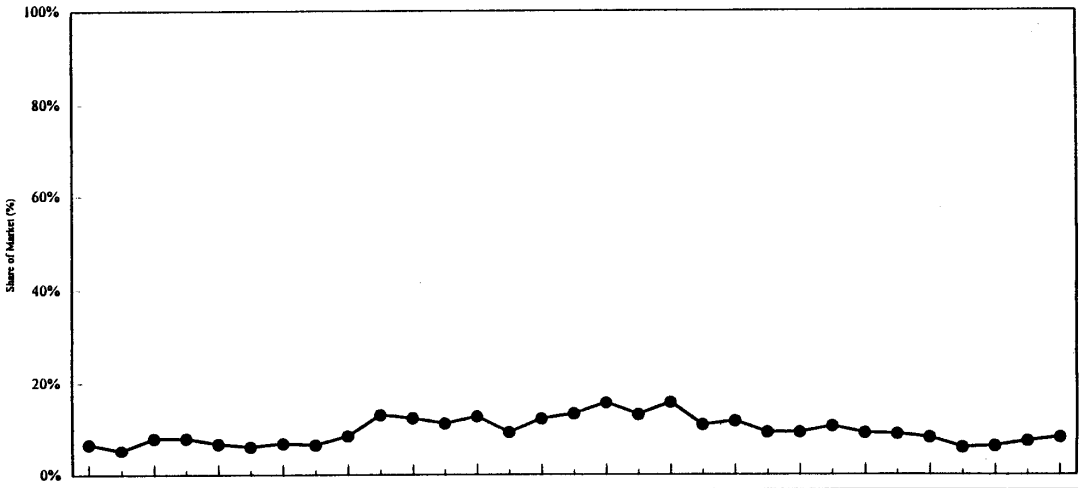
or around the world. By 2005, the value of Kodak's stock had dropped 70% from its high under George Fisher.[97]

97 *International Herald Tribune*, September 29, 2005 "Kodak Misses Targets But Says Its Digital Moment Will Come", by Claudia H. Deutche. 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.

Exhibit 1

Kodak's Market Share in Japan

Consumer Color Roll Film



Years	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
Imports from U.S.	6.8	5.4	8.1	8.1	6.9	6.3	7.0	6.7	8.6	13.1	12.4	11.3	12.8	9.4	12.3	13.4	15.7	13.2	15.8	11.0	11.8	9.4	9.4	10.7	9.2	9.0	8.2	6.1	6.4	7.5	8.3

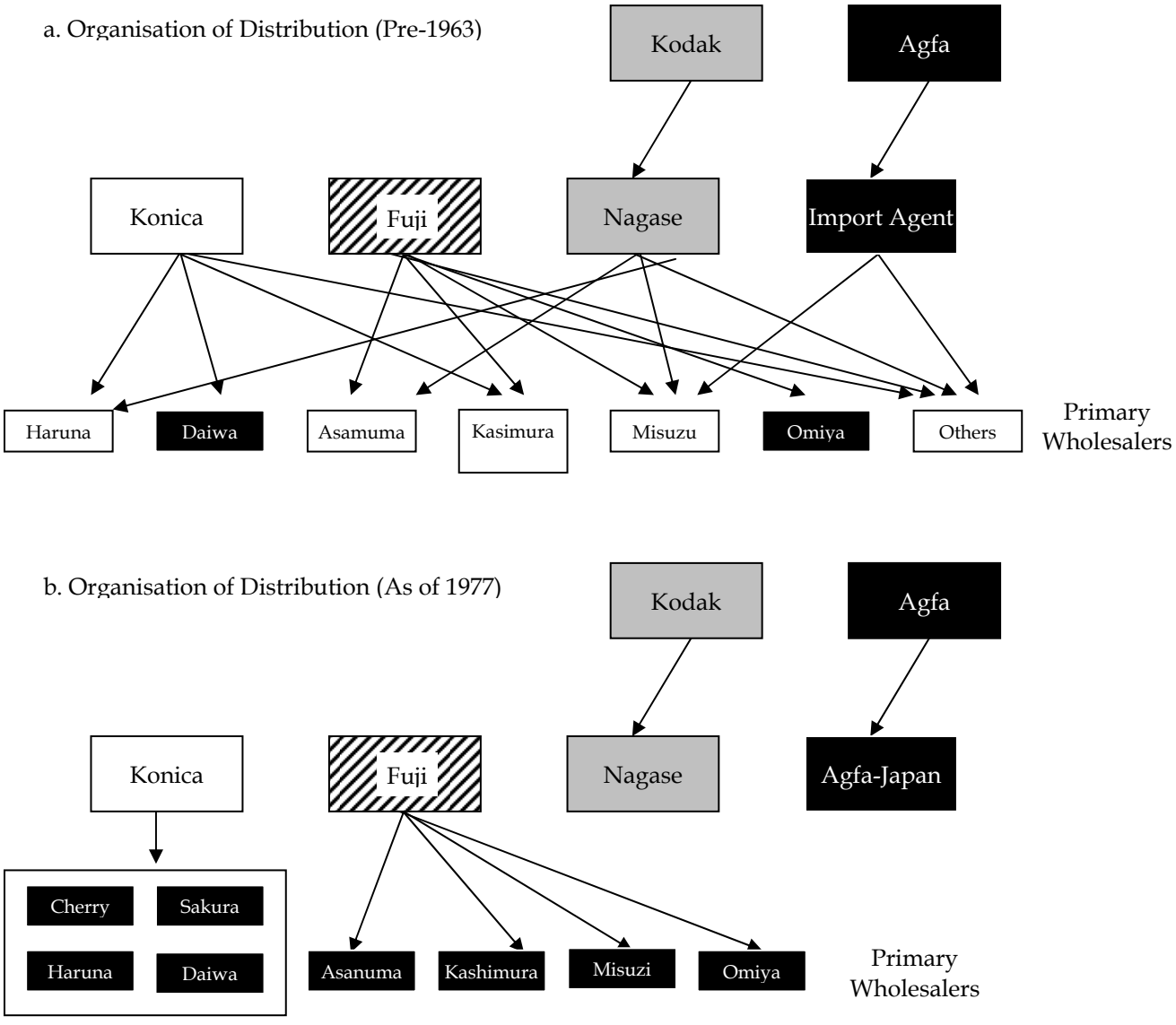
Sources:
Imports from U.S.: Japan Tariff Association, Imports of Commodity by Country, volumes 1965-95; Apparent Consumption: Photo Market 1995 at 52-54.

Notes Regarding Film Definitions:
Market Share Imports and Apparent Consumption
1965-75: 862-441 (color negative rolls), 862-443 (negative roll), and 862-445 (other negative); 1976-87: 37.02-221 (color negative 35mm) and 37.02-223 (color negative roll); 1988-95: 3702.31-011, 3702.53-011, 3702.54-011 (color negative 35mm), and 3702.31-090 (color negative roll)

Source: "Privatizing Protection," May 1995, a report for Kodak in by the US law firm, Dewey Ballantine

Exhibit 2

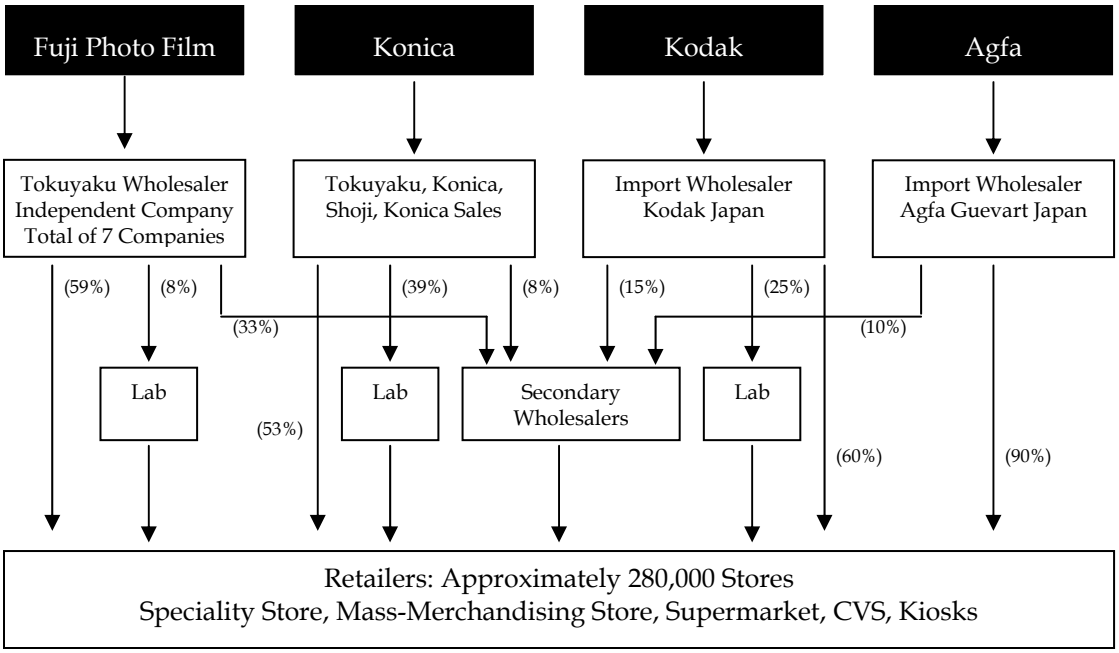
Changes in Film Flow as a Result of "Liberalisation Countermeasures" in Distribution



Source: "Privatizing Protection," May 1995, a report for Kodak in by the US law firm, Dewey Ballantine

Exhibit 2 (cont.)

Photo Market's Description of
Film Distribution in Japan
After Kodak Filed Complaint



Source: "Rewriting History", 1995 Report by the US Law firm Willkie Farr & Gallagher.

Exhibit 3

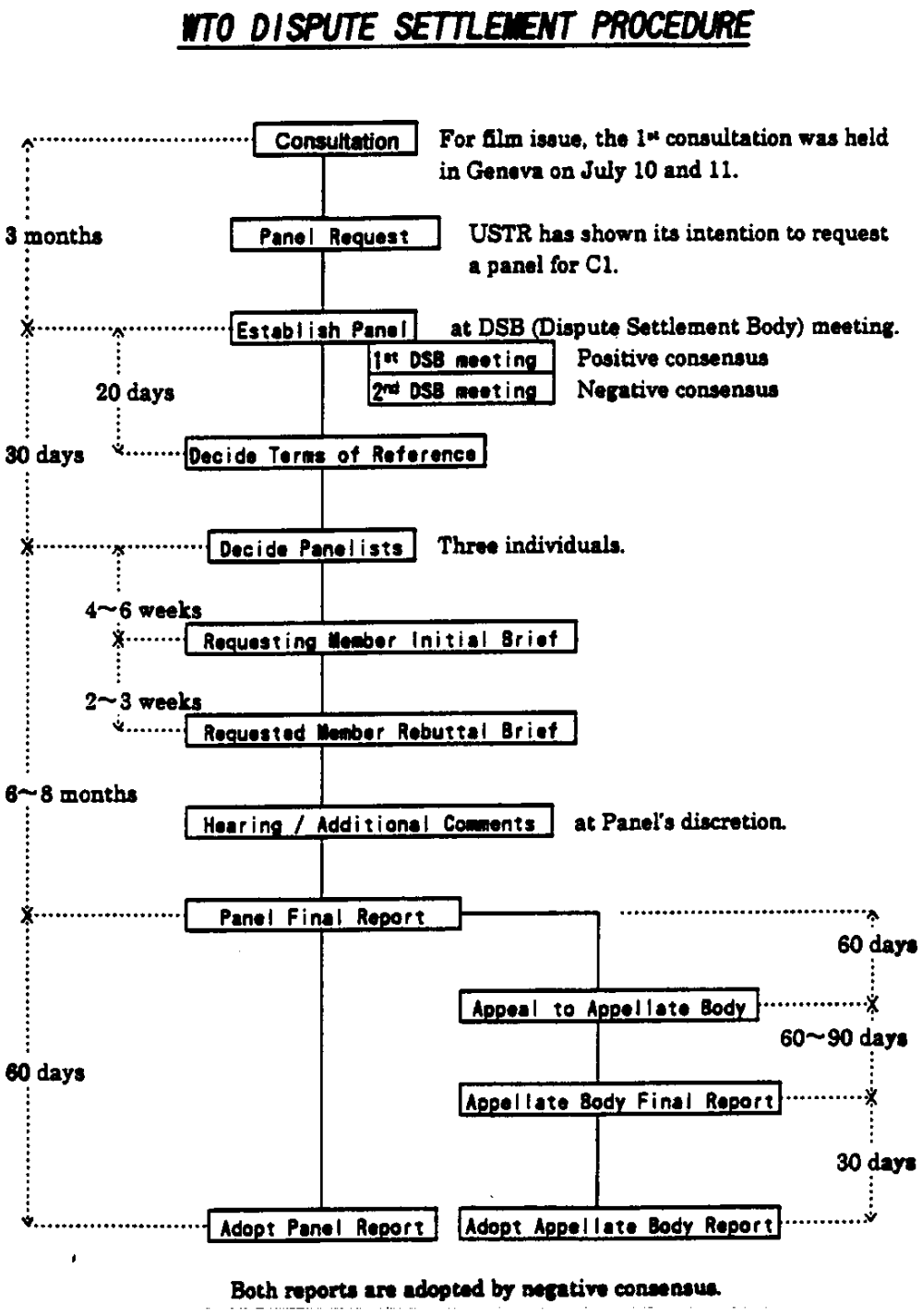

WTO DISPUTE SETTLEMENT PROCEDURE
Consultation
For film issue, the 1st consultation was held in Geneva on July 10 and 11.
3 months
Panel Request
USTR has shown its intention to request a panel for C1.
Establish Panel
at DSB (Dispute Settlement Body) meeting.
1st DSB meeting
Positive consensus
2nd DSB meeting
Negative consensus
20 days
30 days
Decide Terms of Reference
Decide Panelists
Three individuals.
4~6 weeks
Requesting Member Initial Brief
2~3 weeks
Requested Member Rebuttal Brief
6~8 months
Hearing / Additional Comments
at Panel's discretion.
Panel Final Report
60 days
Appeal to Appellate Body
60~90 days
60 days
Appellate Body Final Report
30 days
Adopt Panel Report
Adopt Appellate Body Report
Both reports are adopted by negative consensus.

Exhibit 3 (cont.)
WTO Dispute Settlement Procedure

Article III[98] of the WTO Agreement, the Dispute Settlement Understanding (DSU), defines the arrangements for the world's new "trade court," the Dispute Settlement Body (DSB), which effectively is the WTO General Council acting in a specialized role.[99] For the first time, the text and procedures constitute treaty obligations (as opposed to "interpretations" or "understanding of practices") and their use is mandatory. There are 10 stages to the proceedings under the WTO. They are:

- The parties must attempt to resolve their differences through consultations.[100]
- If that fails, the parties must avail themselves of GATT's conciliation and mediation services. (In practice, this step rarely happens.)[101]
- If consultations fail, a panel may be established to hear the dispute.
- Three panel members are selected from a list of 20 (panel members are usually agreed to by both sides).[102]
- The panel's terms of reference are set (the decisions expected of the panel are specified).
- The panel hears the disputing and other interested parties and issues its report (the panel proceedings are not public. The panel receives two written submissions and hears one oral argument from each side in the dispute.[103]
- The report is considered for adoption by the DSB (i.e., the General Council) by a procedure that assumes adoption unless their is a consensus against adoption.[104]

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98 "Understanding on Rules and Procedures Governing the Settlement of Disputes," which is annex 2 to the WTO Agreement and which is set out in the documents supplement.

99 John H. Jackson, William J. Davey, and Alan O. Sykes Jr., *Legal Problems of International Economic Relations: Cases, Materials and Text*, (St. Paul, MN: West Publishing, 1995), pp. 340-341.

100 If consultations fail to settle a dispute within 60 days after the request for talks, the complaining party may request the establishment of a panel.

101 This informal process, through the Office of the Director-General, may be used in addition to or in lieu of the panel.

102 The DSU provides for the WTO Secretariat to propose panel members, both governmental and nongovernmental. Traditionally the GATT Director-General selects panel members in consultation with the parties in dispute. Under the DSU, in the event parties do not agree on panel members, the WTO Director-General may appoint the panel on his authority, in consultation with the chairs of the DSB and the relevant council or committee.

103 Other WTO members may intervene and present arguments to the panel, however, the panel considers only issues raised by the principal parties. After deliberation, the panel prepares a draft report detailing its conclusions. Traditionally the panel has submitted its description of the dispute and of the parties' arguments to those parties for comment. Under the DSU, panels would be required to submit their legal analysis for comment as well. This process is expected to take about six months.

104 John H. Jackson, William J. Davey, and Alan O. Sykes Jr., p. 343n. "The switch from requiring a consensus for adoption to requiring a consensus to block adoption is a very significant change from GATT dispute settlement procedures. It appears that it was adopted in hopes that it would satisfy US complaints about the GATT system and thereby result in the US using the system in the future instead of taking unilateral action as it had done in the past.

Exhibit 3 (cont.)

- Under the new DSU is the possibility of an appeal by any party to the dispute to the appellate body, and the adoption of its report by the DSB, again by reverse consensus.[105]
- Assuming that either the panel report or the appellate report is adopted, the implementation of its recommendations is monitored.[106]
- If the recommendations are not implemented, the possibility of authorizing withdrawal of concessions is considered.[107]
- The panel is only empowered to rule on current trade practice violations by governments. Private actions by corporations are not actionable under the GATT.

Basically, other GATT parties were willing to make the changes as a way to reign in US unilateralism in trade matters."

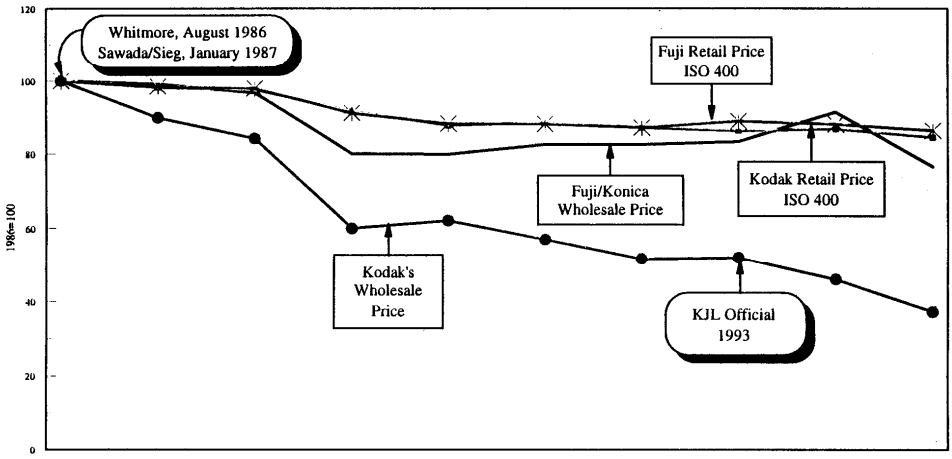
105 The DSU creates a standing appellate body with seven members, appointed for four-year terms and representative of WTO membership, which will hear appeals in panels of three members. The appellate body is limited to considering issues of law covered in the panel report and legal interpretations developed by the panel. The time allowed for in this process is three months.

106 The DSU requires a losing respondent to indicate what action it plans to take to implement the panel's recommendation within a reasonable period of time, usually not exceeding 15 months.

107 If the recommendations are not implemented, the prevailing party may be entitled to seek compensation or authority to suspend concessions previously made to that member.

Exhibit 4

Kodak Pricing Quotes in GOJ Submission Referred to Very Limited Time Periods; Kodak Japan did Reduce Prices Substantially Since 1986



Index of Wholesale & Retail Prices, 1986 = 100

Years	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
Fuji/Konica Wholesale	100.0	99.1	96.7	80.1	79.9	82.6	82.6	83.4	91.4	76.7
Kodak ISO 400	100.0	98.1	97.5	91.7	87.7	88.5	87.1	86.3	86.8	84.6
Kodak Wholesale	100.0	89.8	84.2	60.0	62.1	57.0	51.7	52.0	46.1	37.3
Fuji ISO 400	100.0	98.4	97.9	91.1	88.2	88.1	87.1	88.9	88.1	86.4

Sources:
1/ Changes in the average unit value of domestic shipments used for wholesale prices changes. Domestic shipments = total shipments-exports. PHOTO MARKET 1996, at 309-310; export shipments of color roll film from PHOTO MARKET 1996, at 330-331.
2/ Other retail prices: CAMERA TIMES, Photo-Retailer Sales Analyses from March 1986 through March 1995.
3/ KJL selling price: exit price for color negative film provided by Eastman Kodak.

Source: "Privatizing Protection," May 1995, a report for Kodak in by the US law firm, Dewey Ballantine

Exhibit 5

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.[509] 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[510]—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 concessions 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."

Exhibit 5 (cont)

THE GENERAL AGREEMENT ON TARIFFS AND TRADE
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, offering 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 factors* 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.