〈제 1 주제 발표문〉

Foreign Investment Laws in Japan

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This report describes in two cases; one in which the foreigners to invest in the securities issued by the Japanese corporations and the other in which Japanese to invest in the securities issued by the foreign corporations.

I. Investment by Foreigners in Securities Issued by the Japanese Corporations;

A. Foreign Investment Law:

Foreigners were not allowed to obtain securities issued by the Japanese corporations before the enactment of the Foreign Investment Law in 1950. The only exception was that the foreigners were authorized to obtain the new shares of the increased capital for the shares which were possessed by them since before the World War II. No remittance of the dividend was permitted. In order to improve the balance of payment and to promote the introduction of foreign capitals which contribute to the developments of key industries, however, the Foreign Investment Law was enacted in 1950. Under this law, nevertheless, an authorization was required for a foreigner to obtain the Japanese shares. Furthermore, the acquisition of outstanding shares were not authorized other than in the case of technical assistance. Because of that, it was not possible for a foreigner to obtain the shares of the Japanese corporations through the Japanese stock market. The remittance was allowed only for the dividend, but not for the money received by the sale of the shares. Gradually, however, the restrictions on Foreign Investment Law were relaxed as the Japanese economy developed.

B. Relaxation of Restrictions:

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From August, 1971, acquisition of less than 25% of a total number of issued shares of one company (less than 15% in case of specified industries), or less than 10% for one foreign investor, were authorized. Furthermore, the acquisition of shares of the Japanese corporations by foreigners have become subject to automatic authorization, with exceptions of certain industries such as agriculture or forestry, if the company concerned should give a consent, from May, 1973. This meant that substantially all of the restrictions were completely removed. The restrictions on acquiring bonds were also completely removed in 1964. In October 1972, however, a stringent regulatory measure was enacted in which the net increase of investments by foreigners would be disapproved. This was for restricting the inflow of speculative funds from abroad. This measure, however, was abolished in 1973.

C. Recent Trend for Revision:

As stated above, the Foreign Investment Law in Japan has accomplished the liberation of capital transaction substantially completely in terms of application of the law while maintaining the principle of prohibiting the external economic transaction. Nevertheless, Japan cannot escape from criticism of being internationally closed as long as its principle is lodged on the prohibition. As such, the revision of the law for liberating the capital transaction in principle is now under discussion. We shall come back to this matter later in this report.

D. Importation of Foreign Capital and Patent Right:

These questions were widely debated with the liberation of capital transaction in 1968 near at hand. In other words, a danger was anticipated in which our industries may be harassed by the companies whose foreign parent companies having advanced technical development capabilities to monopolize basic patent rights. As a result, the report made by the Expert Study Committee of the Foreign Investment Council dated May 17th, 1967 indicated a possibility of applying Article 93 of the Patent Law. According to the said Article, the Minister of Trade and Industry can order a creation of patent license by his decision if such a creation is deemed necessary for the public interest. The said

report has indicated a possibility that this provision may be applied when the monopoly of the patent rights by foreign invested enterprises should force some Japanese corporations to suffer bankruptcy or create disturbance among the industries to cause a serious influence on the national economy. There is, however, a criticism directed toward the point of view adopted in this report, saying that this report excessively enlarges the sense of "public interest". According to the said criticism, the public interest should be limited to important cases in which the use of a patented invention is directly related to people's well being such as life, health or public facilities. In contrast to the said criticism, the above report interprets that such a case in which the monopoly of the patent right should give rise to major unemployment caused by bankruptcies of enterprises and well-being of the people as well as its economy are seriously jeopardized as a result, should be also included in the scope of the public interest. The criticizers criticize that it is wrong, from the standpoint of the spirit of the patent system, to interpret the public interest in such an expanded perspective. There is neither judicial precedent nor example of judgement by the Minister of Trade and Industry in relation to this matter as of now.

II. Investment by Japanese in Securities Issued by Foreign Corporations;

A. History of Liberation:

The restriction on investment by Japanese in foreign securities has been rapidly liberated with the background of a large surplus in the balance of payment and a sharp increase of foreign currency reserve. Since April, 1970, the investment in foreign securities has been allowed within a frame of a hundred million dollars. The same approval was also granted on insurance companies since January, 1971. In July, 1971, the acquisitions of listed foreign securities by general investors were liberated. Furthermore, in November, 1972, the domestic sales of beneficial certificates of foreign investment trust was liberated,

and from 1973, stocks of foreign corporations were listed in the Tokyo Stock Exchange Market.

B. Disclosure System of the Foreign Securities:

1. Applicable laws:

The disclosure system of the foreign securities is lodged on the Securities and Exchange Law. Article 2, Section 1 of the said law gives a definition to the "securities" and Item 8 of the said Section defines that the securities or certificates issued by foreign countries or foreign judicial persons, stocks or bonds of the foreign corporations or beneficial certificates of foreign investment trust as being included in the securities, and therefore, foreign corporations are also subjected under the disclosure system of the Securities and Exchange Law. With respect to the disclosure of foreign securities, the following ministerial orders are applied:

With rerpect to:

- Securities issued by foreign countries—"Ministerial rule concerning public offering or secondary distribution of securities issued by foreign countries" (Rule No. 26 of Ministry of Finance, 1972).
- Beneficial cerificates of foreign investment trust: "Ministerial rule concerning public offering or secondary distribution of beneficial certificates of foreign investment trust" (Rule No. 78 of Ministry of Finance, 1972).
- Foreign securities: "Ministerial rule concerning public offering or secondary distribution of securities" (Rule No. 5 of Ministry of Finance, 1973).

  The characteristics of the disclosure system in Japan in relation to the foreign securities are described in the following.

2. Disclosure in the issuing market of the foreign securities:

When public offering or secondary distribution exceeding a hundred million yen is made in Japan for the total period of the past two years, a registration statement must be filed with the Minister of Finance like in the case of the domestic securities and a prospectus must be delivered to any person who wishes to obtain the foreign securities. The said registration statement and pro-

spectus must be composed in Form No. 7 specified by the Rule No. 5 of Ministry of Finance in 1973. The major differences from the Form No. 2 which is for the domestic securities are as follows:

a. Flexibility of statement:

As a general instruction for statement, the Form No. 7 specifies that "the items and the instructions are merely showing the general standard, so that if there is any circumstance in which the statement cannot be made but otherwise, the statement can be made in such a scope in which the investors are not led to any misunderstanding". By this provision, a certain flexibility is given in the statement of the registration statement and the prospectus correspondingly to the special nature of the foreign corporations.

b. Acceptance in principle of stating the financial statement in the manner practised in the home country:

In some cases, different accounting principles and procedures than those practised in Japan are practised in the home countries of the foreign corporations. Also, the financial statements those are publicized in the home countries of the foreign corporations are sometimes only the consolidated financial statements, unlike in Japan, corresponding to such a circumstance, the home-based practice will be approved with respect to the standards of financial statements if the Minister of Finance approves that such statements do not disqualify for the protection of the public interest or the investors. Therefore, a U.S. corporation can merely file the consolidated financial statements while a Japanese corporation is required to attach a consolidated financial statement with the nonconsolidated financial statement. On the other hand, the preparation of the consolidated financial statements is not mandatory for the corporations in France, although there is a standard for the consolidated financial statement in France approved by her Ministry of Finance, so that the French corporations are arbitrarily preparing the consolidated financial statements based on the said standard, although such a statement is not publicized. There are some differences in the said standard from those of Japan or U.S.A. It will be sufficient,

however, if the consolidated financial statements prepared in France is accompanied to the Registration Statement, provided that it is subjected under receiving an instruction by the Minister of Finance.

c. Items disclosed only in the home country:

More number of items are disclosed in U.S. than in Japan. For example, current replacement cost and financial reporting for segment are the ones. Even when there are such items which are not primarily required to be disclosed in Japan, those must be described in Japan also as long as those are required in the home country of the registrant. Such items, however, can be filed in the accompanied documents one month following the filing of the registration statement.

d. Description of business of the consolidated corporations:

The Form No. 2 for the registration statement filed by the Japanese corporation only requires the description of business related to the subject registrant. In case of the foreign securities, (1) the description of business of the registrant is made when only the non-consolidated financial statements are filed, (2) the description of business of the consolidated group is made when only the consolidated financial statements are filed and (3) the description of business can be made based on the statements those are accepted as the principal financial statements in the home country when both the non-consolidated financial statements and the consolidated statements are filed (therefore, the U.S.A. corporations can make the descriptions only with the consolidated groups).

e. Remuneration and pension of directors:

The Form No. 2 for the domestic corporations does not require the descriptions of the remunerations and pensions of the directors by each individual. On the other hand, with respect to the foreign corporations, the descriptions of the remunerations and pensions of the directors and officers during the past two business years are required. This provision shall not be applied, however, if the directors' remunerations and pensions are agreed by the vote at the general shareholders' meeting. Because U.S. corporations do not make such a

decision at their general shareholders' meeting, the remunerations and the pensions of the directors and officers must be disclosed by each individual. Although Japanese corporations are required to decide remunerations of the directors at the general shareholders' meetings, such a decision is not made with each individual of the directors but merely as a lump sum amount of the remunerations for all directors. Therefore, the remunerations of the directors in the Japanese corporations are not disclosed by each individual. Notwithstanding the fact, it is the requirement for a U.S.A. corporation to disclose the remunerations of directors and officers by each individual when it decides to file a registration statement in Japan.

3. Disclosure of foreign securities in the trading market:

a. Kinds of reports:

Issuing corporations of foreign securities must file a periodic securities report at every a business year, like in the case of the issuing corporations of the domestic securities, when such corporations are listed in the Japanese Stock Exchange Market, registered in the Securities Dealers Association in Japan or if such corporations possess securities which were registered with the Minister of Finance for public offering or secondary distribution. If the business period extends for one year, a semi-annual report must be filed. In addition to those, a current report must be filed if a certain major event such as public offering or secondary distribution of the securities should be made in the foreign countries.

b. Duty of file:

Like in the case of the issuing corporations of the domestic securities, the issuing corporations of the foreign securities need not file the above mentioned periodic securities reports, semi-annual reports and current reports when such securities are not listed in the Japanese stock exchange market, not registered in the Securities Dealers Association in Japan and no registration of public offering or secondary distribution of the securities in Japan is made. In Japan, the listing of the securities in the stock exchange market is made by the

application of the issuing corporation. The registration with the Securities Dealers Association is made by the application by a member of the Securities Dealers Association upon a consent by the issuing corporation. The registration with the Minister of Finance for public offering and secondary distribution of securities is done by the issuing corporation. Otherwise than such active participation of the issuing corporation, the securities of such a corporation shall be neither listed, registered nor filed. The above mentioned duty of file arises when either one of the listing, registration or filing is existing. This means that the duty of file is dependent on the intention of the issuing corporation. Because of that, the foreign corporations are not obliged to disclose even if their securities are sold over the counter in Japan, in case they do not apply for listing in the stock exchange market in Japan, do not agree to register with the Securities Dealers Association and do not make distribution of securities in Japan.

c. Standard for report:

Like in the case of the registration statement, the preparation of the periodic securities report is also flexibly treated. The manner of stating the registration statement described above also applies here. With respect to the semi-annual reports by the foreign corporations, the Form No. 10 is specified. The manner in which the statement is made is also flexibly treated here. The items which are required to be described in the current report with the foreign corporations are identical as those with the domestic corporations.

C. Listing of Foreign Securities:

1. The current state of the foreign stock market:

In 1973, foreign securities were listed in the Tokyo Stock Exchange Market for the first time. Since then, securities of 17 foreign corporations were listed (14 U.S. corporations, 2 French corporations and 1 Dutch corporation).

Among 14 U.S.corporations, 2 of them have later delisted. Therefore, the securities of 15 foreign corporations are currently listed in the Tokyo Stock Exchange Market. No new listing was made since 1976. This fact signifies

that the foreign stock market in Tokyo is not much active. The following statistics demonstrates such a state.

While approximately 8,000 stocks were traded in average per day in 1974, the trades were reduced to approximately 3,000 stocks in 1978. The number of shareholders in Japan were approximately 1,500 persons in average per a listed stock in 1974, but the number was reduced to approximately 750 persons in 1978. Because of this, foreign corporations have lost interest in listing in the Japanese stock exchange markets. The primary reason for such a phenomenon was because of the rise of the exchange rate of yen. Because of this, the Japanese investors have lost interest in investing in foreign securities, especially in the U.S. securities. This is purely the problem of the economy, so that it can not be solved by revising the legal system. There was a necessity, however, for revising the listing requirements for the foreign securities, so that from 28th February, 1979, new requirements were implemented. This matter is discussed in the following.

2. Revision of listing requirements:

In order to list foreign shares in the Tokyo Stock Exchange Market, the said shares were required to have been distributed in Japan in a certain extent. In other words, in order for the shares to be listed, a certain number of floating shareholders and floating shares must exist in Japan. These standards were recently abolished, and the foreign shares would be recognized as qualified for listing as long as "the state of circulation in the sotck exchange markets, etc. in the home country is smooth". Also, the delisting would be decided only when the state of circulation in the home country has become extremely bad. Conventionally, the shares were delisted when the number of floating shareholders has become less than 300 persons and if the number is not restored to 300 persons within two years, or when the number of floating shares has become less than three hundred thousand shares and if the number is not restored to three hundred thousand shares within two years. Such requirements for listing were abolished, because even if the circulation of any particular foreign shares

in the Tokyo Stock Exchange Market should momentarily drop, formation of a fair price can be maintained as long as a smooth circulation of the shares are maintained in the markets of the home countries.

Conventionally, the capital, the profit ratio of capital and the dividend ratio of capital were employed as the listing requirements for the foreign corporations. However, because it is inappropriate to depend on the amount of capital when sizing the business scale of the foreign corporations and because the profit ratio or dividend ratio of capital which are calculated on the basis of the amount of capital is meaningless, these were abolished from the listing requirements.

3. Reduction of listing fee and annual fee:

In order to alleviate the burden of the listing corporations, each of the listing fee and the annual fee were reduced to a half.

4. Other matters investigated:

a. Filing period for periodic securities report:

Among 15 foreign corporations which are currently listed in the Tokyo Stock Exchange Market, not a single West German corporation is included. On the other hand, many Japanese shares are listed in the stock exchange market in Frankfurt. I have actually surveyed a few years ago why the German corporations are not interested in listing in Japan. The reasons which became evident as a result are as follows.

a-a. The listing of shares in the Japanese market is costly:

I have often heard Germans say that "it is costly to list the shares in Japan". What it means is that the listing fee and the annual fee which must be paid to the stock exchange are high. As stated above, these were recently reduced. Another factor is that the auditing of the financial statements included in various reports which are to be filed to the stock exchange at the time of listing and after the listing must be audited by the certified public accountant or the auditing corporation in Japan. The auditing by Wirtschaftsprüfer in West Germany is not enough, and it means that in order to list the shares in Japan, the corporation must receive a double auditing. As a result, the foreign

issuing corporations must spend an additional cost for such a duplicated auditing. The Japanese shares which are listed in the Frankfurt Stock Exchange are audited by Japanese or U.S.A. certified public accountants but not by Wirtschaftsprüfer in west Germany. A reciprocal treatment is demanded by the people concerned in the West Germany.

a-b. Filing period for periodic securities reports:

According to Article 24 of the Securities Exchange Law in Japan, listed corporations are required to file periodic securities reports with the Minister of Finance within 3 months after each business year. To satisfy this requirement is extremely difficult for West German corporations by the following reason. According to the West German company law, the general shareholders' meeting can be held within 8 months after the end of the business year. Although the settlement of account is made by Vorstand and Aufsichtsrat, it is normal that 3 to 5 months of time is needeed to finalize the said settlement. As a result, it is quite impossible to file the reports required under the Japanese law. Although some argue in Japan that the filing period of the reports should be extended for foreign corporations, it has not yet been realized.

a-c. Contents of disclosure:

Under the Japanese law, production capacity, actual production and production planning are required to be disclosed. No such practical descriptions are required in West Germany.

As mentioned earlier, the remunerations of directors of the foreign corporations must be stated by each individual. Such a practice is not existing in West Germany. Under the Japanese law, names, addresses of major shareholders as well as number of shares owned by such shareholders must be stated, but to make such statements are not possible with West German corporations which issue bearer shares. Even with the corporations whose shares are registered, however, the beneficial shareholders cannot be identified when the central depository system comes into picture, and therefore, how to grasp those shareholders is also a matter of question for Japan, too. Semi-annual reports are

parts of legal system in Japan. It is not quite so in West Germany; the semi-annual reports are merely made voluntarily, and the manner of statement in the said report is much simpler than those in Japan.

Such differences of systems described above are the big reasons why the West German shares are not listed in the Japanese stock exchange markets.

In addition to those reasons, West German corporations are probably not finding any economic attraction in listing their shares in the Japanese stock exchange markets.

D. Central Depository System of the Foreign Securities:

The sale of foreign shares listed in the Tokyo Stock Exchange are all settled by the central depository system. Under this system, the share certificates of the foreign shares purchased by the Japanese investors are not handed over to the purchasers but are held under a commingled custody in the home country. The investors in Japan have partial ownership of shares through brokers and Japan Securities Clearing Corporation (JSCC). In other words, the investors entrust the shares with the brokers, and the brokers entrust such shares with JSCC. The share certificates thus entrusted are held by custodian agencies in the home country. As the shares are entrusted as stated above, the brokers open the accounts for their customers and JSCC for the brokers. The settlements of transactions with the foreign shares are made through entries into those accounts. As a result, no effective delivery of the share certificates are made. Since the shares of U.S.A. are registered shares, those shares are transferred to the name of JSCC, and therefore, JSCC is the registered shareholder in effect and the investors are the beneficial shareholders. The names of the actual shareholders are not known to the issuing corporations. Because of that, the dividends are collectively received by JSCC from the issuing corporations which are then distributed to the beneficial shareholders through the brokers. In practice, JSCC assigns the payments of dividends to the transfer agents. The transfer agents receive lists of shareholders from the brokers with whom the beneficial shareholders open accounts, and based on the said lists, the

amounts of dividends are notified to the beneficial shareholders. The beneficial shareholders who received the said notices go to the specified banks to receive the dividends. The voting right of the shareholders are exercised in the following manner.

The transfer agent sends out a form for instruction for voting together with notice of the general shareholders' meeting using the list of beneficial shareholders. By signing this form and sending it back to the transfer agent, the shareholder orders JSCC which is the registered shareholder to exercise his voting right as instructed by himself. JSCC prepares a proxy in pursuance of the said instruction and sends it to the issuing corporation. This is a so-called "indirect method". JSCC intervenes between the issuing corporation and the beneficial shareholders so that the communication between the issuing corporation and the shareholder is disconnected. This is not necessarily an ideal situation. Therefore, a direct method is now under consideration in order to carry out the central depository system of the share certificates in Japan. Please refer to my treatise introduced in a publication commemorating 60th birthday of Professor Chung with this respect.

III. The Recent Revisions of the Foreign Investment Law in Japan;

The newspapers on April 21st., this year, reported our Government's policy in wholly revising the Foreign Investment Laws in Japan. According to the said article, the currently enacted the Law Concerning Control of Foreign Exchange and the Foreign Investment Law shall be merged into one law as well as wholly revising their contents. The reason for proposing to revise the laws is because of the increasing criticisms by other countries against Japanese control on the foreign exchange. As stated earlier, under the current law in Japan, the external economic transaction is prohibited in principle while it was exceptionally liberated in terms of application of the law. As a result, the liberation of the restriction has in effect progressed considerably. But still, the applications for the permission, the authorization and the approval of the

Government are quite cumbersome. Foreign countries criticize Japan and say "Japan is a closed nation" or "no matter how you want to open an economic transaction with Japan, the procedure is difficult to understand". The Government's objective is to quickly revise the law in consideration of the fact that the Summit Meeting is going to be held in end of June in Tokyo, and demonstrate its effort for the liberation of the foreign exchange control in Japan. Let me explain the substance of the proposed revision in connection with the capital transaction. The capital transactions shall be liberated provided that it can be regulated in any of the following emergencies: (1) when exchange market is disturbed by a sharp foreign exchange market fluctuation, (2) when Japan's balance of payment sharply worsens and (3) when credit squeeze becomes ineffective by a rapid and a large inflow of funds from abroad during the period when a tight money policy is employed in our country.

If this revision should materialize, the trade of foreign securities by Japanese and acquisition of Japanese securities by foreigners (portfolio investment) shall become all liberated during the normal period. When a Japanese corporation issues a bond in a foreign country, it can do so by simply filing an application in advance to the authority. The same applies when foreign corporations issue bonds in Japan. When a foreigner wishes to directly invest into Japanese industries, he can do so freely if he files an application to the authority in prior to his investment, provided that the Government can take necessary corrective measures when any bad effect is anticipated on the exceptional four industries related to agriculture and forestry, fishery and other industries.

CONCLUSION

When dealing with foreign countries, it is important that every aspect is well balanced. The same applies with the international transaction of the securities. In that sense, it is a good thing that Japan is trying to liberate the external economic transaction in principle by basically revising the Foreign Investment Law and Law Concerning Control of Foreign Exchange. The liberation is not,

however, sufficient. Japan shall have to mutually adjust with the foreign countries with respect to the provisions of the Company Law or Securities and Exchange Law. This is evident from my earlier description which I have made by comparing the Japanese law with the German law. The similar problem exists between Japan and U.S.A. On November 2nd, 1977, SEC of U.S.A. has proposed the revision of Form 20-K which is provided for the issuing corporations in Foreign country. If this revision should materialize, a strict disclosure shall be required with the foreign corporations in the same way as with the U.S.A. corporations. The Federation of Economic Organization in Japan is expressing a strong opposing opinion against this proposal of SEC. Although it is a known fact that a mutual compromise is necessary between each of the various nations, it is at the same time not an easy task to accomplish. It concludes to the fact that how to harmonize the protection of the nation's investors with the policy to liberate international capital transactions.