

Chicago-Kent College of Law

From the Selected Works of David J. Gerber

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International Trade and Competition Law in Japan

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Book Review

International Trade and Competition Law in Japan
By Mitsuo Matsushita. Oxford: Oxford University Press,
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*Reviewed by David J. Gerber**

The controversies that continue to rage over Japan's role in the international economy and, more specifically, its impressive and potentially ominous trade surpluses with the U.S. often circle around the question of what can be done about any of it. In the U.S., it is commonly assumed that an alliance between government and organized business in Japan is the culprit and that the problem can be eliminated by changing government policies. Not surprisingly, the Japanese tend to see the problem differently, depicting the trade balance as the natural result of organizational, technological and economic factors, and they tend to be skeptical of claims that it can be effectively remedied by changing laws.

The debate should, therefore, center on how the relevant components of the Japanese legal system actually operate. If, as some critics claim, these areas of law operate so as to exclude U.S. goods from the Japanese market, then U.S. criticisms and the policies based on them deserve careful consideration and perhaps support. If not, there is little point (other than to win votes in U.S. elections) in continuing to rail against a phantom problem. Yet knowledge about these areas of Japanese law in the United States is so thin and poorly disseminated that the controversy continues in a circle of denunciations rather than moving toward more effective responses to the problem.

Mitsuo Matsushita's *International Trade and Competition Law* promises to be of much value in moving the dialogue in that direction. It is a careful, insightful look at the three areas of Japanese law that U.S. critics often claim to be obstacles to successful penetration of the Japanese market by outside (i.e., primarily U.S. firms): competition law, foreign trade laws and industrial policy (basically, those elements of government policy that support particular industries). In it, Professor Matsushita not only examines each of these areas individually, but also places them in the broader context of Japanese governmental and regulatory objectives. He does not specifically address

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the controversy over their allegedly protectionist functions, but I suspect that at least on one level this book can be seen as the response of a concerned scholar and governmental advisor to the problems created by that controversy. "Let's find out what is actually happening rather than shouting about it" may be one message in the text.

Matsushita's project is, therefore, to describe these areas of law and provide insights into their operation. He begins by treating in 74 pages "The Legal Framework of Government Regulation of Business." This provides the background information that is necessary for understanding the more detailed discussion of competition law (roughly analogous to U.S. antitrust law) and foreign trade laws that follow. To each of these two areas, then, he devotes approximately one hundred pages in which he explains the postwar historical background, describes the development of relevant legal doctrines and examines the current status of law and practice.¹ He devotes less space (23 pages) to industrial policy, perhaps because it is both less central to the controversy and less susceptible to treatment as a distinct area of law.

The book's organization encourages the reader to see these three areas of law as interrelated responses to often interrelated regulatory concerns. To my knowledge, it is the first treatment of these materials in English that takes this approach, and it is an exceptionally valuable one. It recognizes that each of these areas is imbedded in the same institutional, political and intellectual matrix and that legal decisions and events in one often cannot be understood without reference to how the other areas operate. Perceiving the relationships between these areas is critical to understanding what is happening in any one of them. For a foreign observer merely to acquire information about Japanese competition law may often, for example, be of little value, unless that information is interpreted in light of Japanese industrial policy objectives. Similarly, criticism of one of these areas that does not take into account its interactions with the other areas may carry little weight.

It is, of course, always true that a legal subsystem (or area of law) operates against the background of the larger system of which it is a part and that effective interpretation requires knowledge of that context. This is particularly true in this situation, however, because relations among these areas of law are exceptionally dense.² The basic doctrines, concepts, goals and methods in each derive from a relatively small number of administrators in Japan's central bureaucracy, and thus the same basic governmental policies and discursive frameworks shape the operations of all three.

1. The book also includes the complete text of the Japanese "Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (the so-called Anti-Monopoly Law)."

2. Two recent books by U.S. scholars provide some insights into this complex of issues and consider aspects of this "relational density." See JOHN O. HALEY, *Authority Without Power: Law and the Japanese Paradox* (1991) and KENNETH L. PORT, *Comparative Law: The Role of the Law and Legal Process in Japan* (1996).

Much of the value of the book derives from the broad experience and extraordinary abilities that Professor Matsushita brings to the material. As professor of law at Tokyo University until recently reaching its (very early) mandatory retirement age,³ he was for many years the scholar and teacher primarily responsible for these areas of law at Japan's pre-eminent law faculty and primary training ground for top government officials. This means not only that Matsushita has been intimately involved with the development of these areas of Japanese law for several decades, but also that his own views have been highly influential in their development. The book is, therefore, the work of perhaps Japan's leading specialist in the areas of law concerned.

In Matsushita's case, however, the highest levels of expertise in the subject matter are combined with an exceptional ability to present difficult material in ways that make it accessible to foreign (especially Anglo-American readers). His ability to do this flows from his profound understanding of his readers' cognitive needs in approaching Japanese law. He knows, in other words, what those readers need to know in order to "receive" his message and to interpret accurately and effectively the "substance" of Japanese law in these areas.

This knowledge is produced, in turn, by applying a lively mind to broad experience with the process of transmitting this type of information to Anglo-American readers. Matsushita studied and worked for many years in the United States in his youth, acquiring facility and comfort with English and a deep understanding of relevant patterns of perception and habits of thought. This knowledge has been refreshed and deepened by frequent and often extended visits to Europe and the United States to teach in law schools, to talk and collaborate with other foreign law professors and to meet and negotiate with government officials. In these capacities and contexts he has developed the skill to recognize and surmount the cognitive and attitudinal obstacles that often prevent non-Japanese from adequately understanding Japanese law in general and the areas covered in this book in particular.

The result is a book that is both linguistically and conceptually accessible. It is not merely *in English*; it is *written for readers of English*. The difference is far greater than is often recognized. The language is clear and direct, and the book does not presuppose extensive knowledge of Japanese law or of the problems and issues in the fields of law involved. The style is, however, taut, and there is sometimes an almost Haiku-like condensation of material to its essences that demands — and rewards — careful reading.

In addition to its value in describing and explaining these areas of Japanese law, Professor Matsushita's book also suggests directions for further study and provides a fundament on which such scholarship can be built. For example, his basic premise that competition law, foreign trade laws and industrial policy must be understood in

3. Professor Matsushita is now professor of law at Seikei University in Tokyo.

light of each other highlights the need to explore the characteristics and dynamics of these relationships in the kind of depth that is beyond the scope of the current work. Similarly, this book examines the domain of law and practice, seldom exploring the impact of sociological, intellectual or other exogenous factors on the operation of these areas of law. Yet its insightful depiction of this domain provides a valuable base for exploring such factors.

This book will not end the controversy over Japan's trade surpluses — no book could, but it does provide informational tools for moving toward more constructive forms of discourse. By providing non-Japanese with an exceptionally valuable and insightful description of the areas of law around which controversy swirls and indicating how they fit together, the book enables them to understand more easily and effectively how this aspect of the Japanese system works and thus to evaluate claims about that system. Some will wish — for political or other reasons — to close their eyes to this picture and to remain "in the dark" on these issues, but Professor Matsushita's book goes a long way toward eliminating the excuse that acquiring a basic understanding of these areas of Japanese law is either impossible or exceptionally difficult.