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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

C. ITOH & CO., LTD.;
KYOKUYO CO., LTD.;
MITSUI & CO., LTD.;
NIPPON REIZO KAISHA, LTD.;
NIPPON SUISAN KAISHA, LTD.;
SHINKO SANGYO TRADING CO., LTD.;
TAIYO FISHERY CO., LTD.; and
TOSHOKU LTD.,

Defendants.

No. C-82-810

COMPETITIVE IMPACT
STATEMENT

Filed: June 30, 1982

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDING

The United States has filed a civil antitrust complaint under Section 4 of the Sherman Act (15 U.S.C. § 4), alleging that the defendants violated Section 1 of the Sherman Act (15 U.S.C. § 1). The complaint alleges a combination and conspiracy consisting of a continuing agreement, understanding, and concert of action among the defendants and various

COMPETITIVE IMPACT STATEMENT
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1 co-conspirators to fix the prices they paid for processed
2 Alaska tanner crab.

3 The complaint seeks a judgment by the Court that the
4 defendants engaged in an unlawful combination and conspiracy in
5 restraint of trade in violation of the Sherman Act. It also
6 seeks an order by the Court to enjoin and restrain the
7 defendants from any such activities or other activities having
8 a similar purpose or effect in the future.

9 II

10 DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED
11 VIOLATION OF THE ANTITRUST LAWS

12 Tanner crab is an edible salt water crustacean indigenous
13 to the waters along many parts of the Alaska shoreline, as well
14 as several other parts of the world. The most commercially
15 significant species of tanner crab harvested from Alaska's
16 fishing grounds are the C. bairdi and the somewhat smaller C.
17 opilio tanner crab. In 1980, U.S. fishermen harvested
18 approximately 121 million pounds of tanner crab from waters
19 within 200 miles of the Alaska shoreline and sold their catch
20 to processing companies operating in various parts of Alaska,
21 earning about \$55 million.

22 Tanner crab is processed and packaged in several different
23 ways. Frozen or canned crabmeat is produced by boiling the
24 crab in its shell and then extracting the meat for canning or
25 for freezing in blocks. Most commonly, however, the crabmeat
26 is frozen while still in the shell and sold as crab
27 "sections." Various methods are used in processing crab
28 sections. The most common method is to freeze 80 to 100 pound
29 bulk packs of boiled crab sections by immersing them in a
30 continuous superchilled brine solution. Another method is to

31 COMPETITIVE IMPACT STATEMENT
32 PAGE 2

1 freeze 20 to 25 pound packs of boiled crab sections in an air
2 blast freezer. A third method, recently developed for the
3 Japanese market, is to freeze uncooked sections in water
4 containing chemical preservatives.

5 The primary markets for processed tanner crab are the
6 United States and Japan. In 1980, approximately two-thirds of
7 the tanner crab harvested from waters off Alaska were processed
8 for export to Japan. Over twenty Japanese companies,
9 principally through their U.S. subsidiaries, purchased such
10 crab in 1980 paying a combined total of nearly \$48 million.

11 In recent years, the defendants have purchased, directly or
12 through their U.S. subsidiaries, large quantities of processed
13 Alaska seafood, including processed tanner crab, from Alaska
14 processors for importation to Japan. In 1980, the eight
15 defendants accounted for more than fifty percent of the
16 purchases made by Japanese firms of tanner crab processed in
17 the Dutch Harbor-Akutan area of the Alaska Peninsula, the most
18 important tanner crab processing region of Alaska. In all, the
19 defendants paid Alaska processors approximately \$24 million in
20 1980 for processed tanner crab.

21 The defendants are members of the Japan Marine Products
22 Importers Association ("JMPIA"), a trade association located in
23 Tokyo, Japan, whose membership includes the major Japanese
24 seafood importers. The JMPIA operates through a number of
25 committees, including a crab committee that deals with
26 processed crab imported from Alaska. Beginning at least as
27 early as 1979, the defendants used the JMPIA crab committee as
28 a forum to discuss, agree upon, and coordinate prices to be
29 offered to Alaska processors for processed tanner crab.

30 Defendants also communicated among themselves outside

31 COMPETITIVE IMPACT STATEMENT
32 PAGE 3

1 the context of JMPIA meetings to coordinate the conduct of
2 price negotiations with, and the price offers to be made to,
3 Alaska processors for the purchase of processed tanner crab.

4 The complaint alleges that the combination and conspiracy
5 had the following effects, among others: (a) the prices paid
6 for processed tanner crab were fixed at and depressed to
7 artificial and non-competitive levels; (b) Alaska processors
8 were deprived of the benefits of free and open competition in
9 the purchase of processed tanner crab; and (c) competition in
10 the purchase of processed tanner crab was restrained.

11 III

12 EXPLANATION OF PROPOSED FINAL JUDGMENT

13 The United States and the defendants have stipulated that
14 the Court may enter the proposed Final Judgment after
15 compliance with the Antitrust Procedures and Penalties Act, 15
16 U.S.C. § 16(b)-(h). The proposed Final Judgment provides that
17 the entry of the Final Judgment does not constitute any
18 evidence against, or an admission by, any party with respect to
19 any issue of fact or law. Under the provisions of Section 2(e)
20 of the Antitrust Procedures and Penalties Act, the proposed
21 Final Judgment may not be entered until the Court determines
22 that entry is in the public interest.

23 1. Prohibited Conduct

24 Section IV of the proposed Final Judgment prohibits each
25 defendant from entering into, adhering to, participating in,
26 maintaining, furthering, or enforcing any agreement,
27 understanding, arrangement, combination, or conspiracy with any
28 other importer or group of importers to fix, depress,
29 establish, or adhere to the prices, range of prices or other
30 terms or conditions for the purchase of processed seafood from

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32 PAGE 4

1 any U.S. person or persons. "Processed seafood" is defined in
2 the Judgment as any fish or shellfish prepared in or off the
3 shore of Alaska by any commercial process, including canning,
4 packing, freezing, or the addition of chemical substances.

5 Section IV also prohibits each defendant from communicating
6 with any other importer or group of importers to exchange
7 information or opinions about the following subjects: current-
8 season or future prices for the purchase of processed seafood
9 from any U.S. person or persons; current-season or future price
10 offers or counteroffers made or received, to be made, or under
11 consideration for the purchase of processed seafood from any
12 U.S. person or persons; strategy, timing, or conduct of
13 negotiations for current-season or future purchases of
14 processed seafood from any U.S. person or persons; or the
15 quantity of processed seafood being or to be purchased from any
16 U.S. person or persons. Section IV further prohibits each
17 defendant from attending or participating in any meeting with
18 any other importer or group of importers during which such
19 defendant knows or has been advised that any importer will
20 discuss any of the above subjects.

21 2. Permissible Business Conduct

22 Section V of the proposed Final Judgment makes clear
23 that the Judgment would not prohibit the defendants from
24 engaging in certain business conduct, provided such conduct is
25 not undertaken for the purpose of circumventing the Judgment's
26 injunctive provisions. Specifically, each defendant may engage
27 in (i) any necessary communication or negotiation with any
28 other person in connection with a contemplated or actual
29 purchase or sale of processed seafood between such persons;
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31 COMPETITIVE IMPACT STATEMENT
32 PAGE 5

1 (ii) transactions or communications with its parent or
2 subsidiary or between the officers, directors, agents or
3 employees thereof when acting in such capacity; (iii) joint
4 ventures for purposes of processing, storing, shipping, or
5 harvesting fish or shellfish, and such transactions or
6 communications as are necessary to the operation, management or
7 business thereof; or (iv) any negotiation or communications
8 with any other person on questions of the definition of grading
9 and quality standards; on-site inspection, grading and contract
10 administration; shipping; packaging; and similar technical
11 matters. A defendant may also engage in any conduct, action,
12 activity or communication with any other person if such
13 conduct, action, activity or communication is required by a
14 statute, law, rule or regulation having the force of law in the
15 jurisdiction in which such conduct, action, activity or
16 communication takes place. As set forth in Attachment 1, the
17 exclusion of any reference to Japanese governmental
18 administrative guidance is not intended to prevent a defendant
19 from arguing in any subsequent proceeding relating to this
20 Judgment that conduct taken pursuant to administrative guidance
21 was, in fact, conduct required by a "regulation having the
22 force of law," or to preclude the Justice Department from
23 arguing that it was not so required.

24 Under Section V, a defendant may provide (i) any
25 information concerning the purchase of processed seafood to the
26 Government of Japan or any agency or department thereof,
27 provided that in the course of transmitting such information it
28 is not divulged to any other importer; (ii) information on
29 prices at which it has purchased processed seafood or on
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1 quantities of processed seafood purchased by or delivered to it
2 to a privately operated system of data exchange, under which
3 the data is aggregated in such a way that neither the identity
4 of the parties nor information relating to individual trans-
5 actions is disclosed to or reasonably ascertainable by any
6 other importer; or (iii) information concerning existing
7 contracts to any person to the extent such information has
8 already been publicly disseminated through regularly published
9 newspapers, trade journals or trade periodicals.

10 Section V further permits participation by a defendant in
11 (i) joint ventures for purposes of processing, storing,
12 shipping or harvesting fish or shellfish, and such transactions
13 or communications as are necessary to the operation, management
14 or business thereof; and (ii) meetings called and chaired or
15 vice-chaired by an official of the Japanese Fisheries Agency at
16 which participants discuss their estimates of the total amount
17 of any processed seafood product or products that will be
18 imported into the Japanese market during a particular period,
19 provided that such meetings do not include discussions by
20 individual firms of their own import plans.

21 3. Affirmative Obligations

22 Section VI of the Final Judgment requires that each
23 defendant file annually, for a period of five years, with the
24 Justice Department an affidavit, prepared without direct or
25 indirect communication with any other defendant, that
26 identifies each JMPIA meeting it attended at which processed
27 seafood was discussed and each meeting with any other importers
28 during which any subject listed in Paragraph IV(B) of the
29 Judgment was discussed. The affidavit must provide a detailed
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1 account of any discussions relating to the purchase and
2 importation of processed seafood at the meeting, the date of
3 the meeting, and to the extent known, the names and company
4 affiliation of each person in attendance. Any communication
5 permitted by Section V need not be reported in the affidavit.

6 Under Section VII, each defendant must furnish annually,
7 for a period of ten years, a copy of the Final Judgment
8 (accompanied by a Japanese translation, where required) to its
9 president or chief executive officer, and to each of its
10 current (or successor) officers, directors, employees and
11 agents (whether located in Japan or the United States) who have
12 responsibility for making pricing decisions for, or purchases
13 of, processed seafood. Defendants are also obliged to advise
14 such persons within their companies of the requirements of this
15 Final Judgment, of the criminal and civil penalties which may
16 be imposed upon such persons or the company for violation of
17 the Final Judgment, and of the fact that the company's legal
18 advisors are available to confer regarding compliance questions
19 or problems.

20 Section VII further requires the defendants to provide each
21 member company of the JMPIA with a copy of the Judgment.
22 Finally, within sixty days after entry of the Final Judgment,
23 each defendant must file an affidavit as to the fact and manner
24 of its compliance with the obligations imposed by Section VII.

25 Section VIII provides the Justice Department with access,
26 upon reasonable notice and subject to any legally recognized
27 privilege, to each defendant's records and personnel in order
28 to determine compliance with the Judgment. Any interview
29 conducted in Japan by a Department representative is subject to
30 the Japanese Government's approval, as indicated in Attachment
31 1.

1 Under Section VIII, each defendant is required to provide
2 the Justice Department with notice prior to engaging in any
3 transaction or activity that, but for the provisions of
4 paragraphs V(D) and V(F) of the Judgment, would be prohibited
5 by the Final Judgment. Such notice shall describe the
6 transaction or activity and identify, if applicable, the
7 statute, law, rule or regulation that the defendant believes
8 requires such transaction or activity to be undertaken. In the
9 event the defendant is unable, despite the exercise of good
10 faith efforts, to provide such notice prior to engaging in the
11 required transaction or activity, the defendant shall do so as
12 soon as practicable but not later than thirty days thereafter.

13 Finally, Section VIII limits the circumstances under which
14 the Department may disclose information or documents obtained
15 by reason of this Section and entitles the defendants to be
16 given notice by the Department in some instances prior to such
17 disclosure.

18 4. Service of Process

19 Section X of the Judgment requires that each defendant
20 appoint a person located in the United States as its agent for
21 service of process in any proceeding relating to the
22 construction, implementation, modification, enforcement of
23 compliance, or punishment of any violation of the Final
24 Judgment. Each defendant must maintain such agent for the life
25 of the Judgment and, within ten days from the date of entry of
26 the Judgment, file with the Court and serve on the Department
27 of Justice a statement identifying such agent. In the event of
28 a need to appoint a successor agent, a defendant is required to
29 immediately file with the Court and serve on the Department a
30 statement identifying the successor agent.

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1 5. Scope of Proposed Judgment

2 The proposed Final Judgment will remain in effect for a
3 period of ten years from the date of entry. It applies to all
4 defendants and to all other persons in active concert or
5 participation with any of them who receive actual notice of the
6 Final Judgment by personal service or otherwise.

7 6. Effect of the Proposed Judgment on Competition

8 The relief in the proposed Final Judgment is designed to
9 prevent any recurrence of the activities alleged in the
10 complaint. The prohibitive language of the Judgment is
11 designed to ensure that each defendant will act independently
12 of its competitors in determining prices, terms and conditions
13 at which it will purchase processed seafood from U.S. persons.
14 The affirmative obligations are designed to ensure that each
15 defendant's employees are aware of their obligations under the
16 decree in order to avoid a repetition of behavior that occurred.

17 The Department of Justice believes that the proposed Final
18 Judgment contains adequate provisions to prevent further
19 violations by the defendants of the type upon which the
20 complaint is based. The Department believes that disposition
21 of the lawsuit without further litigation is appropriate
22 because the proposed Judgment provides all the relief which the
23 United States sought in its complaint, and the additional
24 expense of litigation would not result in additional public
25 benefit.

26 IV

27 REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

28 Section 4 of the Clayton Act (15 U.S.C. § 15) provides that
29 any person who has been injured as a result of conduct
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1 prohibited by the antitrust laws may bring suit in federal
2 court to recover three times the damages suffered, as well as
3 costs and reasonable attorney's fees. Entry of the proposed
4 Final Judgment will neither impair nor assist the bringing of
5 such actions. Under the provisions of Section 5(a) of the
6 Clayton Act (15 U.S.C. § 16(a)), the Judgment has no prima
7 facie effect in any subsequent lawsuits that may be brought
8 against these defendants.

9 V

10 PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

11 As provided by the Antitrust Procedures and Penalties Act,
12 any person believing that the proposed Final Judgment should be
13 modified may submit written comments to Joel E. Leising,
14 Attorney, Antitrust Division, United States Department of
15 Justice, Washington, D.C. 20530, within the 60-day period
16 provided by the Act. These comments, and the Department's
17 responses, will be filed with the Court and published in the
18 Federal Register. All comments will be given due consideration
19 by the Department of Justice, which remains free to withdraw
20 its consent to the proposed Judgment at any time prior to
21 entry. The Judgment provides that the Court retains
22 jurisdiction over this action, and the parties may apply to the
23 Court for any order necessary or appropriate for its
24 modification, interpretation or enforcement.

25 VI

26 ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

27 The Department considers the substantive language of the
28 Judgment to be of sufficient scope and effectiveness to make
29 litigation on relief unnecessary, as the Judgment provides all
30 relief which reasonably could have been expected after trial.

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VII

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials or documents were considered determinative by the United States in formulating the proposed Final Judgment. Therefore, none are being filed pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b).

Respectfully submitted,

Joel E. Leising

JOEL E. LEISING *by CSS*

Ranzeley Wallace

RANGELEY WALLACE *by CSS*

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Dated:

ATTACHMENT 1

CSS:JEL
60-11-110

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Re: United States v. C. Itoh & Co., Ltd., et al.

Gentlemen:

In the course of negotiating a settlement of the above-captioned case, defense counsel expressed concern that the wording of three provisions of the consent decree did not completely reflect the parties' understanding and, accordingly, sought to include certain clarifying language. The Department felt that the inclusion of such

language was unnecessary since the provisions, as written, implicitly encompassed the points defense counsel sought to make explicit. Nonetheless, the Department agreed to set forth in writing its interpretation of the provisions involved.

This letter thus serves to memorialize the Department's understanding with respect to the following provisions, and does not in any manner modify or alter the terms of the proposed decree:

Section III - This section states that the Final Judgment applies to a defendant's officers, directors, agents, and employees. This provision should be read to mean that such individuals are bound by the provisions of the Judgment during their tenure, employment or agency with a defendant company.

Section V, Paragraph D - This section states that nothing in the Judgment shall prohibit a defendant from, among other things, engaging in conduct required by a "regulation having the force of law in effect in the jurisdiction in which such" conduct takes place. An issue that could arise under this provision is whether conduct taken pursuant to Japanese governmental "administrative guidance" is "required by ... regulation having the force of law." The Department takes the view that administrative guidance, as that term is generally used and understood, is not legally binding and as such does not have the force of law; but that there may be unusual circumstances in which conduct undertaken pursuant to what may be characterized as administrative guidance is, in effect, conduct compelled under force of law by the Japanese Government. It is understood that the omission in this section of the Judgment of express reference to "administrative guidance" is not intended to preclude a defendant from attempting to establish in any subsequent proceeding relating to this Judgment that conduct taken pursuant to administrative guidance was, in the circumstances, conduct required by a "regulation having the force of law," or the Department from seeking to establish that it was not.

Section VIII, Paragraph A(1)(c) - This section grants the Department the right to interview a defendant's personnel for purposes of monitoring or securing compliance with the Final Judgment. The provision makes clear that the person to be interviewed shall not be required to engage in international travel for purposes of the interview. The interview may be conducted in the United States if the person to be interviewed resides or is present in the United

States, and may be conducted in Japan subject to approval from the Japanese Government having been sought and obtained by the Justice Department or other appropriate U.S. Government officials.

Sincerely yours,

Charles S. Stark, Chief
Foreign Commerce Section
Antitrust Division