

Date	October 23, 2007	Court	Tokyo District Court, 46th Civil Division
Case number	2007 (Wa) 11136		
– A case in which the court found that the configuration of goods may not be regarded as an "indication of goods or business" as specified in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act.			

This is a case where the plaintiff alleged that, while the configuration of the artificial fish reef manufactured and sold by the plaintiff (the "plaintiff's product") was well-known as an indication of goods or business, the configuration of the artificial fish reef manufactured, sold, or otherwise handled by the defendants (the "defendants' product") was almost identical to the configuration of the plaintiff's product, and therefore that the defendants' act of manufacturing, selling, or otherwise handling the defendants' product constitutes an act of unfair competition as specified in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act. Based on such allegation, the plaintiff sought an injunction against the manufacturing, sale, etc. of the defendants' product, destruction of the defendants' product, etc., and the payment of damages.

In this judgment, the court held that, as a general theory, if the configuration of certain goods has unique characteristics and has become widely known among consumers as an indication of goods made by a certain person as a result of a long, continuous and exclusive use thereof or short-term use thereof with intensive advertisement activities, etc., the configuration of said goods or business shall be protected as an "indication of goods or business" as specified in Article 2, paragraph (1), items (i) and (ii) of the Unfair Competition Prevention Act. The court further held that, while the existence of such unique characteristics should not be immediately denied given that the unique characteristics of the configuration of goods are determined by the function of the goods, it should be interpreted that, in comparison with other goods in the same category, the configuration of goods is required to have unique design features that strongly appeal to the perception of consumers, etc. and to have such a level of distinctiveness that allows consumers to perceive, at a glance, that said goods were made by a certain business entity. Therefore, in this sense, it is often difficult to consider any configuration that is simply determined by the functions of the goods as an indication of goods with unique design features and a source-identifying function.

The court found that the entire configuration of the plaintiff's product is difficult to grasp because the shape of steel frame and the method of attaching water-permeable cases inside said frame construction differ depending on the positions, etc., to which

such cases were attached and that, while the plaintiff alleged that multiple water-permeable cases may be arranged inside the steel frame construction, if necessary, this feature of the configuration should be considered to have also been determined by the purpose, functions, and effects of the plaintiff's product as an artificial fish reef and may not be considered to be distinctive enough for consumers to perceive, at a glance, that said product was made by a certain business entity. The court further held that, in consideration of the fact that, in the market of artificial fish reefs, it is common for consumers to select products based solely on the function, utility, and effects thereof, it may be found that the characteristics and essential feature of the configuration of the plaintiff's product as alleged by the plaintiff are nothing more than structural, functional features of the plaintiff's product and that consumers select the plaintiff's product based on the function of the plaintiff's product as an artificial fish reef and its excellent fish attracting effect, and therefore that the characteristics of the plaintiff's product alleged by the plaintiff may not be considered to be a well-known indication of goods that has customer appeal in itself. The court added that, even based on the presumption that the essential feature (water-permeable cases) alleged by the plaintiff is recognized, the water-permeable cases used for the plaintiff's product are very different from the gabions of the defendant's product in terms of appearance and shape and that, if the two products were considered to be similar in terms of configuration in disregard of such specific differences in terms of appearance and shape, it would be equivalent to recognizing similarity as long as the product in question has the function and effect as a "water-permeable case containing seashells" and would therefore be inappropriate in consideration of the fact that Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act aims to protect the business reputation embodied in a distinctive configuration of goods only if the goods have such a level of distinctiveness that consumers can perceive, at a glance, that those goods were made by a certain business entity. On these grounds, the court held that the defendants' act does not constitute an act of unfair competition as specified in said item.