

Washington International Law Journal

Volume 4
Number 1 *Competition and Trade Policy:
Europe, Japan and the United States*

3-1-1995

A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law

Hiroshi Iyori

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Antitrust and Trade Regulation Commons](#), and the [Comparative and Foreign Law Commons](#)

Recommended Citation

Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 4 *Pac. Rim L & Pol'y J.* 59 (1995).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol4/iss1/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

A COMPARISON OF U.S.-JAPAN ANTITRUST LAW: LOOKING AT THE INTERNATIONAL HARMONIZATION OF COMPETITION LAW

Hiroshi Iyori†

Abstract: This article focuses on the legislative history of the Japanese Antimonopoly Law and a comparison between the substantive provisions of the Japanese law and its U.S. origins. It begins with a historical overview of the fundamental differences between the economies of Japan and the U.S., as well as Japan through the postwar period and the contrasting contexts in which competition laws were enacted in each country. It offers a brief outline of the historical development of Japanese competition law, from the enactment of the Antimonopoly Law through amendments and defining judicial interpretations. The article then focuses on coverage, sanctions, and interpretation, particularly in the treatment of vertical price-fixing and other vertical restraints. The comparative problem of *keiretsu* and their treatment under U.S. and Japanese competition law is also addressed. The article concludes with a series of recommendations for reform of Japanese law and practice designed to promote greater international harmonization.

CONTENTS

- I. INTRODUCTION
- II. EVOLUTION OF ANTITRUST LAW IN JAPAN
 - A. *Differences in the Japanese and the United States Economies and Their Background*
 - 1. *The United States: Historical Overview*
 - 2. *Japan: Historical Overview*
 - B. *Japan's Inherited Antimonopoly Law*
 - 1. *Details of the Enactment of the Antimonopoly Law*
 - 2. *The Contents of the 1947 Antimonopoly Law*
 - 3. *The 1953 Amendments to the Antimonopoly Law and Labor Developments*
 - C. *Differences in Interpretation of Anticompetitive Agreements*
 - 1. *Issues*
 - 2. *Vertical Agreements*
 - 3. *Concerted Actions (Agreements) and Proof*
 - 4. *Particular Field of Trade*

† Professor of Law, Chuo University; Councillor, Mitsubishi Research Institute.

5. *Substantial Restriction on Competition*

6. *"Contrary to the Public Interest"*

D. *Keiretsu*

E. *Measures Taken Against Violations of Antitrust Laws*

1. *Administrative Cease and Desist Orders (haijo sochi) and Surcharges (kachokin seido)*

2. *Criminal Penalties*

3. *Suits for Damages*

F. *Organizations that Enforce Antitrust Laws*

G. *Issues Related to Antitrust Laws*

1. *Government Regulation and Industrial Policy*

2. *Law and Information Relating to its Application and Enforcement (unyō)*

3. *On the Legal System's Treatment of Suits for Damages*

III. CONCLUSION

I. INTRODUCTION

As reductions of import restrictions and tariff rates have continued under the General Agreement on Tariffs and Trade, international competition and economic friction between countries, particularly the industrial states, has intensified. Trade friction between Japan and the U.S. began in the 1960s with the rapid increase in Japan's export of textiles, steel, and color televisions. In each case, the dispute was resolved by Japan's adoption of voluntary export restrictions. However, the friction intensified in the 1970s and continued through the 1980s as the U.S. became dissatisfied with the closed nature of the Japanese market and the corresponding limits placed on the growth of U.S. exports. During the U.S.-Japan Structural Impediments Initiative ("SII") talks, the U.S. urged Japan to adopt policies to stimulate domestic demand. Various government restrictions, exclusionary business practices, and the *keiretsu* organizational structure, were also identified as barriers to market entry. In order to solve these problems, the U.S. demanded that Japan strengthen its Antimonopoly Law. In the aftermath of the SII negotiations, Japan's Antimonopoly Law was strengthened considerably.

As business becomes more international, antitrust laws will continue to constitute the legal foundation of the market economy. When a country has closed markets, what generally follows are demands by consumers and

trading partners to strengthen the country's antitrust laws and relax access-limiting government regulations. Often, the larger the country's market in the international arena, the more force this demand will carry. Antitrust laws provide the rules that regulate the conditions of economic competition. If there is an important difference between the antitrust laws of any two countries, the result will be a difference in the actual conditions of competition and market participation. There will likewise be a demand to harmonize both of their antitrust laws. Moreover, this demand for harmonization will likely not be limited to competition policies. For example, environmental and intellectual property issues were as important as competition regulations in the post Uruguay Round of the GATT, and both have become important themes in international harmonization.

The closed nature of the Japanese market and the differences between the antitrust laws of Japan and those of the U.S. have emerged as critical trade issues. It is important to consider the results of these differences, how they arose, and what can be learned from them. This article examines U.S.-Japan antitrust laws and explores the differences in restrictions and methods of restriction.¹

Japan's Antimonopoly Law² was enacted in 1947 under the strong influence of U.S. antitrust laws. Although these laws continue to share many fundamental similarities, considerable differences have developed over time. This article touches on the ideological, social, and historical factors that have greatly influenced the development of both Japanese and U.S. antitrust law. European Union ("EU") competition law will also be examined.

¹ For a general comparison of United States and Japanese antitrust law, see MATSUSHITA MITSUO, *AMERIKA DOKUSEN KINSHI HÔ* [AMERICAN ANTITRUST LAW] (1982); MURAKAMI MASAHIRO, *DOKUSEN KINSHI HÔ NICHIBEI HIKAKU* [COMPARISON OF U.S.-JAPAN ANTIMONOPOLY LAW] (1991); Hiroshi Iyori, *A Comparative Analysis of Japanese Competition Law*, in *DIE JAPANISIERUNG DES WESTLICHEN RECHTS* (Coing et al. eds., 1989); Harry First, *Antitrust Law in the United States and Japan: A Comparative Essay* (1993) (unpublished paper). For a comparison of Japanese and German competition law, see John O. Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 *WASH. L. REV.* 471 (1984).

² *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu* (Law Concerning Prohibition of Private Monopoly and Protection of Fair Trade), Law No. 54 of 1947 [hereinafter Antimonopoly Law].

II. EVOLUTION OF ANTITRUST LAWS IN JAPAN

A. *Differences in the Japanese and the United States Economies and Their Background*

1. *The United States: Historical Overview*

In the 17th century, North America was colonized by West European immigrants. The United States of America was formed at the end of the 18th century. It was a new nation of immigrants with an ideological heritage based on Puritan notions of freedom, individualism, and democracy. These ideas became the fundamental principles of the nation during its revolutionary birth. The founders criticized centralization of political, social, and economic power, and segregated relations between government and business. They valued individual freedom and free competition which lay at the foundation of 17th century English common law in "the rule of illegal restraints on trade" and "the rule of illegal monopolies" which were incorporated into U.S. law. By the end of the 19th century, agreements restraining trade or monopolistic activity had been invalidated under the common law.

Nevertheless, monopolistic practices increased in the late nineteenth century after the industrial revolution. In response, the Sherman Act of 1890³ codified the common law rules restricting monopolies, imposed fines for restraints of trade and monopolistic activity, and allowed the use of cease and desist orders. The Act became the legal foundation for the private free enterprise system.

More than two decades later, the Federal Trade Commission Act of 1914 prohibited unfair methods of competition. It established the Federal Trade Commission ("FTC") as an independent regulatory agency outside the U.S. Department of Justice Antitrust Division and made the FTC responsible for enforcing antitrust law. Finally, the Clayton Act of 1914⁴ augmented the Sherman Act by prohibiting actions that restrained competition, such as price discrimination, tied sales, and stock acquisitions. Furthermore, it introduced punitive damages of three times the amount of actual harm to result from violations of the antitrust laws. From the Depression Era to the end of World War II, U.S. policy favored strong anti-

³ Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1-7 (1988)).

⁴ Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1988)).

trust enforcement. Thus, Franklin D. Roosevelt supported strengthening the application of the U.S. antitrust laws. Accordingly, in 1941, the Temporary National Economic Committee of Congress recommended various proposals to strengthen the antitrust laws. The creation of the Bretton Woods GATT system and the promotion of a system of international free trade after World War II marked the high point of U.S. antitrust policy. During this period, U.S. forces occupied and ruled Japan and enacted Japan's Antimonopoly Law premised on an American-style market economy system.

2. *Japan: Historical Overview*

Japan, as an island nation, has had a roughly homogeneous population since its inception in the 4th century. It has a strong Confucian influence and a tendency to value group harmony and order, but also a strong tradition of being open to foreign cultures. The economic structure has generally been conservative, but examples exist of unrestricted openness, such as the 16th century *rakuichi rakuza* policies under Oda Nobunaga (1534-1562) and Toyotomi Hideyoshi (1536-1598), which abolished guilds and eliminated local customs barriers and market fees. Although regionalism existed during the Edo Period (1615-1867), a national distribution market was maintained, and in the Meiji Period (1867-1912), a strong policy of openness and Westernization was adopted.

The concept of a market economy and economic freedom was initially introduced during the Meiji Restoration along with the introduction of classical economic theory. The idea that free competition would promote the public welfare was widely held.⁵ The Meiji government built the foundation for a modern Western legal system, and treaties with Western nations opened the Japanese market to competition from the West. Until World War I, Japanese import restrictions were not allowed and import tariffs were kept below five percent. However, in order to catch up with the Western powers, the Meiji government adopted a policy of managing the economy for the promotion of industry using the slogans "Rich country, strong army" and "Promote industries and increase production." During this period there was a close relationship between government and business.

⁵ Sugihara Shirō, *Jiyūshugi to rekishi gakuha*, [Liberalism and Historical School], in KINDAI NIHON KEIZAI SHISŌSHI [HISTORY OF MODERN JAPANESE ECONOMIC THOUGHT] (Chō Satchio & Sumiya Kazahiko eds., 1969).

Given the strong tendency in Japan to think in terms of the group, cartels were considered to benefit the public welfare and were legalized.⁶

During the recession following World War I, the government increased market intervention and officially recognized and strengthened cartels. In addition to the Important Industries Control Law of 1931, various other enterprise and industry laws were enacted, before the National General Mobilization Law of 1938 placed the Japanese economy under centralized control.

The process of social and economic democratization, beginning after World War II, included labor and agricultural land reforms. The Supreme Commander for Allied Powers ("SCAP") repealed the laws fostering centralized control of the economy, and vigorously dismantled the *zaibatsu* and other excessive concentrations of economic power. However, the actual government policy for economic development after the war was similar to the centrally managed system employed before and during the war. Shortages of materials after the war were transitionally managed by the Temporary Materials Supply and Demand Adjustment Law.⁷ Operating under a policy of centralized resource management, the economic ministries rationed basic materials and capital. Thus, the structure of the economic ministries continued basically as under the Wartime Materials Mobilization Plan of 1938.⁸ During this period, almost no one responsible for implementing government policy other than the FTC considered the benefits of a market economy system based on free competition. The actual economy created after the war was a complicated mix, including elements of both a free market economy and centrally managed economy. This legacy played an important role in the development of antitrust policy in Japan.

⁶ Matsushita Mitsuo & Okada Totsuhiro, *Dokkihō ihan o meguru minji soshō ni kansuru hanrei bunseki* [Analysis of Judicial Precedents Concerning Civil Suits Involving Antimonopoly Violations], NBL, Nos. 453, 354, 356, 370, 371 (1986-87); Iyori, *supra* note 1, at 228-29.

⁷ See KŌSEI TORIHIKI I'INKAI, DOKUSEN KINSHI SEISAKU 30 NENSHI [30 YEAR HISTORY OF ANTIMONOPOLY POLICY] 16-32 (1977).

⁸ See SHŌKŌ GYŌSEISHI KANKŌKAI [COMMERCE AND INDUSTRY ADMINISTRATIVE HISTORY PROMOTION SOCIETY], 2 SHŌKŌ GYŌSEISHI [COMMERCE AND INDUSTRY POLICY HISTORY] (1955). In an essay in the November 1993 issue of the *Asahi Monthly* [*Gekkan Asahi*], Yukio Noguchi argues that it is necessary to destroy the residual elements he refers to as the "1940 system" — the administrative organization, financial, and agriculture production control systems which were established during World War II and continued into the postwar period.

B. *Japan's Inherited Antimonopoly Law*

1. *Details of the Enactment of the Antimonopoly Law*

Japan's Antimonopoly Law was enacted under the unilateral influence of the United States in connection with the economic democratization policy. SCAP proposed:

enacting a law that dismantles or prohibits private monopolies, restraints of trade, and undesirable interlocking directorates or holding companies, separates banks from their strong influence over trade, industry, and agriculture, and provides an equal opportunity for competition among participants in trade, industry, agriculture, and finance.⁹

Based on this memorandum, the government launched an inquiry into the enactment of the Antimonopoly Law.

In January of 1946, the Planning section of the General Affairs Department of the Ministry of Commerce and Industry, later to become the Ministry of International Trade and Industry ("MITI"), drafted an Industry Structure Bill. This bill proposed: 1) restricting unfair trade practices; 2) systematizing notification for cartel agreements; and 3) regulating cartel abuses and important external restrictions. SCAP rejected the bill as it resembled the prewar Important Industries Control Law which strengthened cartels.

In July 1946, Judge P.T. Kime of the SCAP Antitrust and Cartel Division proposed a "tentative plan dealing with the promotion and support of free and fair dealing." In response, in November 1946, the cabinet created the Antimonopoly Law Study Committee which prepared the Antimonopoly System Report in December. On March 12, 1947, after negotiations with SCAP, the Antimonopoly Act Bill was presented to the Diet. It passed on March 31 during the last session of the Imperial Diet under the Meiji Constitution.

As it became clear that trade associations were in a position to control their members, the Trade Association Law was enacted in December of 1948 to supplement the Antimonopoly Law. It contained severe provisions restricting the activities of trade associations. This antitrust regime aimed to

⁹ SUPREME COMMANDER FOR ALLIED POWERS, MEMORANDUM (Nov. 6, 1945) Item 6-C.

establish a market economy system in Japan. Except for the economic democratization policy of SCAP, which received some support by scholars, the Japanese government did not have a competition policy comparable to that of the German government, influenced by Ordo-liberalism.

2. *The Contents of the 1947 Antimonopoly Law*

a. *Main Provisions*

As enacted in 1947, the Antimonopoly Law: 1) prohibited private monopolies, domestic and international concerted action and anticompetitive agreements, unreasonable disparities in enterprise strength (*futo na jigyo no ryoku no kakusa*), and the formation of private control associations and holding companies; 2) restricted interlocking directorates, mergers, stockholding by financial companies, ownership of corporate debt, and the transfer of management between companies; 3) empowered the government to issue cease and desist orders against entrepreneurs for violations of the law, and to impose fines against economic actors and juridical persons; 4) allowed exemptions for small scale trade associations; and 5) established the Fair Trade Commission (“FTC”) as an independent commission charged with applying the Antimonopoly Law.

The 1948 Trade Association Law divided trade association activities into three categories: prohibited activities, permitted activities, and approved activities. The statute included detailed regulations for controlling each category, and imposed a notification requirement on trade associations.

b. *Comparison with the Kime Proposal*

The wording of the 1947 Antimonopoly Law was different from that of the Kime Proposal, but the content was very similar. Both included provisions to deal with unreasonable disparities in enterprise strength and exemptions for small scale trade associations. The Kime Proposal covered “any person” (*nanibito mo*) (as in U.S. law), initially established fines for illegal activity, and included a provision for triple damages. Furthermore, parent corporations were to be made responsible for the actions of their subsidiaries, a section which applied generally to foreign corporations. There was no provision prohibiting the establishment of holding companies, but corporate stock holding was almost entirely forbidden. Finally, the

Kime Proposal suggested a three member enforcement committee (*Kosei Kanko Iinkai*) be established under the Chairman and Vice-Minister of the Ministry of Justice.

c. Comparison with the U.S. law

The Antimonopoly Law as enacted was stricter than U.S. antitrust laws. It not only included regulations contained in U.S. antitrust statutes and caselaw but also incorporated influential theories and recommendations from the aforementioned Temporary National Economic Committee. Japan's law was more stringent than U.S. law in its: 1) strict regulation of international agreements; 2) its uniform restrictions against corporate stock holding, ownership of debt, interlocking directorates, mergers; and 3) its regulation of unreasonable disparities in enterprise strength. Especially notable was the method of requiring approval for international agreements and corporate stockholding and mergers. A notification system for corporate stock ownership and mergers exceeding an established limit was not introduced in the U.S. until 1976. Moreover, U.S. law does not yet contain restrictions or filing requirements designed to control trade associations or international agreements.

d. The 1949 Amendments

The restrictions that were more severe in Japan than in the U.S. — e.g., restrictions on international agreements, corporate stock holding, ownership of debt, and mergers — became impediments to the introduction of U.S. capital into Japan. This difficulty was mitigated with the 1949 amendments to the Antimonopoly Law, which relaxed the stockholding restriction, replaced the prior approval requirements with a notification system, and brought the Antimonopoly Act closer in alignment with U.S. practice.

3. *The 1953 Amendments to the Antimonopoly Law and Labor Developments*

a. *The situation after the occupation*

In April 1952, the Occupation ended and the Peace Treaty came into effect. Occupation laws and policies, including the Antimonopoly Law, were reexamined. Government ministries in charge of economic policy had little understanding of the relationship between the Antimonopoly Law and the market system. During the recession which followed the Korean War, there were demands to relax the Antimonopoly Law and to enact an Antimonopoly Exemption Act, which the FTC resisted. The argument for relaxing the Antimonopoly Act was that Japan, unlike the U.S., was a small country poor in resources, and therefore could not entrust economic management to free competition. In 1952, the Export Transaction Law was passed to allow export cartels. Also, the Small and Medium Sized Enterprise Stabilization Law was passed to allow cartels among small and medium sized enterprises.

b. *The 1953 amendments to the Antimonopoly Law*

In 1952, the West German Bundestag considered a bill for a competition law. This bill included exemptions for various cartels, including depression cartels, rationalization cartels, and export cartels. The 1953 amendments to the Japanese Antimonopoly Law provided for similar exemptions to permit depression and rationalization cartels. In addition, the amendments deleted regulation of activities that only slightly affected competition, preventative regulations, and regulation of unreasonable disparities in enterprise strength. At the same time, the Trade Association Act was repealed and the regulation of conduct creating "substantial restraints of trade in particular areas of trade" was shifted into the Antimonopoly Law.

c. *Industrial policy*

Japan's principal economic ministries were able to allocate money for industrial development and control foreign currency under the 1949 Foreign Exchange and Foreign Trade Control Act. Through these means, they

fostered the development of basic industries. After the 1952 depression, the ministries, especially MITI, began to implement an industrial policy which restricted competition. Restrictions included enactments of exemption laws and production curtailment recommendations (*kankoku soan*). Subsequent to the 1953 Amendment which weakened the Antimonopoly Law, the FTC began to enforce competition policy through a compromise with the economic ministries. They tacitly consented to use restrictive informal guidance, avoiding further relaxation of the Antimonopoly Law and enactment of exemption laws.

However, after a series of blows to monopolistic practices, the FTC began to actively enforce the Antimonopoly Law, and industrial policy makers gradually began to appreciate antimonopoly policy. A proposal to further weaken the Antimonopoly Law failed in the Diet in 1958. In 1959, measures liberalizing trade were implemented. From about 1960, cartel regulations were strengthened according to price policy, while consumer policy was improved and market economic policy was diffused.

d. The 1977 amendment and recent trends

In 1977, the Antimonopoly Law was further strengthened by the introduction of a surcharge system and other measures. These measures were designed to counter price increases and other forms of abusive conduct of big business associated with the oil crises. A second factor which helped to bolster the Antimonopoly Law was the U.S.-Japan Structural Impediments Initiative talks in 1991.

C. Differences in Interpretation of Anticompetitive Agreements

1. Issues

Agreements that restrict competition are the most relevant to the closed market customs (*sizyo heisateki kanko*) which were discussed in the U.S.-Japan SII talks. Under Japan's Antimonopoly Law, the basic provisions that prohibit anticompetitive agreements are article 3 and former article 4. Both of these provisions correspond to section 1 of the Sherman Act's prohibition against "restraints of trade." Article 3 prohibits "unreasonable restraints of trade" and former article 4 prohibited "concerted practices." Article 4 was repealed under the 1953 amendments.

Article 2 paragraph 6 of the Japanese Antimonopoly Law defines an “unreasonable restraint of trade” as “any entrepreneur [who], by contract, agreement or any other concerted action, irrespective of other names, with other entrepreneurs, mutually [restricts] or [conducts] their business activities.” Former article 4 defined “concerted practices” as “entrepreneurs [who] jointly fix, maintain or increase prices” (paragraph 1), but it provided that “[this article] does not apply in case the affect of such concerted activities on competition within a particular field of trade is negligible.” (paragraph 2). The definition of “unreasonable restraint of trade” under article 2 paragraph 6 was construed as being the same as “concerted practices” under former article 4. The difference between article 3 and former article 4 was thought to lie in the degree of the effect on competition required. Many FTC decisions applied both of these provisions.¹⁰

In comparison, section 1 of the Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is deemed to be illegal.” Under U.S. law, concerted actions “in restraint of trade or commerce” are regulated, but under the Japanese Antimonopoly Law, concerted activities that “substantially restrict competition in a particular field of trade contrary to the public interest” are regulated.

2. *Vertical Agreements*

Section 1 of the Sherman Act applies not only to horizontal agreements that restrict competition, but also to restrictive vertical agreements.¹¹ Similarly, under the competition law of the EU, Article 85 of the Treaty of Rome regulates both restrictive horizontal and vertical agreements.

In Japan, early FTC decisions applied article 3 and former article 4, as well as article 6 which prohibits international agreements that contain

¹⁰ Bank Interest Agreement Case, Judgment of Dec. 22, 1947 (Teikoku Ginkō), FTC [decision] no. 1, 1947, 1 Shinketsushū 1; Plywood Bidding Agreement Case, Judgment of Aug. 30, 1949, (Yuasa Mokuzai Kōgyō K.K.) FTC [decision] no. 2, 1948, 1 Shinketsushū 62 [hereinafter Plywood Bidding Agreement Case]; Butter Price Agreement Case, Judgment of Sept. 18, 1950, (Hokkaido Butter K.K.), FTC [decision] no. 78, 1950, 2 Shinketsushū 103; Phonetic Record Price Agreement Case, Judgment of Oct. 5, 1951 (Nihon Columbia K.K.), FTC [decision] no. 5, 1951, 3 Shinketsushū 107; Soy Sauce Price Agreement Case, Judgment of Dec. 25, 1957 (Noda Shōyu K.K. v. Kōsei Torihiki Iinkai), Tokyo Kōsai [High Court], 9 Shinketsushū 57 [hereinafter Soy Sauce Price Agreement Case].

¹¹ Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

provisions listed in former article 4 paragraph 1, to vertical agreements.¹² However, in a March 1953 decision on appeal from an FTC decision concerning the agreement in the Newspaper Distribution Area Case (*shinbun hanro kyōtei jiken*), the Tokyo High Court held that neither article 3 nor former article 4 was applicable to a vertical agreement, because a vertical agreement was not a “concerted practice.” Vertical agreements are regulated under article 15 as contracts that purport to bind a third party (*daisanha kōsoku keiyaku*). Although there is much scholarly criticism of this decision,¹³ the Japanese FTC no longer applies article 3 to vertical restraints, and instead treats anticompetitive vertical agreements as unfair trade practices under article 19.¹⁴ This decision can best be understood against the background of the prewar conception of cartels as focusing on raw materials (*seisanzai*). Similarly, under German law, article 1 of the 1957 Law Against Restraints on Competition, which prohibits cartels, is applied only to horizontal agreements.

It is appropriate to include vertical agreements as “unreasonable restraints of trade” protected under article 3 for several reasons. In real consumer goods distribution transactions (*shohizai ryutsu torihiki*), vertical and horizontal agreements are intertwined in a complicated manner. Vertical agreements such as unreasonable *keiretsu* transactions (*futo na keiretsu torihiki*) are included in closed market customs (*shijo heisa teki na*

¹² Marukin Shōyu Int'l Contract Case, Judgment of Mar. 20, 1950 (Marukin Shōyu K.K.), FTC [decision] no. 19, 1949, 1 *Shinketsushū* 129; Butter Price Agreement Case, Judgment of Sept. 18, 1950, (Hokkaido Butter K.K.), FTC [decision] no. 78, 1950, 2 *Shinketsushū* 103; Cosmetics Price Agreement Case, Judgment of Sept. 14, 1994 (Honten v. Shinseido Tokyo Hantai K.K.), Tokyo Kōsai [High Court], 1507 HANJŪ 43 (reversing Judgment of Sept. 27, 1993, Tokyo Chisai [District Court]); Newspaper Sales Territory Agreement Case, Judgment of Mar. 9, 1953 (Asahi Shimbunsha v. Kōsei Torihiki I'inkai), Tokyo Kōsai [High Court], 6 *Kōminshū* 435, 4 *Shinketsushū* 145; Phonetic Record Price Agreement Case, Judgment of Oct. 5, 1951 (Nihon Columbia K.K.), FTC [decision] no. 5, 1951, 3 *Shinketsushū* 107. Article 19 was also applied in the International Contract Cases.

¹³ Fukumitsu Ieyoshi, *Tate no ketsugō ni yoru torihiki seigen* [Vertical Agreements as Restraints of Trade], 5 KOBE HŌGAKU ZASSHI, nos. 1, 2 (Oct. 1955). Opponents of the decision include Professors I. Fukumitsu, S. Imamura, A. Tansō, A. Shōda and M. Matsushita. Professor Yoshio Kanazawa is a supporter who had criticized the earlier FTC decision before the Tokyo High Court decision.

¹⁴ Taishō Pharmaceutical Case, Judgment of Dec. 10, 1955 (Taishō Seiyaku K.K.), FTC [recommendation] no. 3, 1955, 7 *Shinketsushū* 99; Nihon Suisan Case, Judgment of Nov. 7, 1964 (Nihon Suisan K.K.), FTC [recommendation] no. 6, 1965, 13 *Shinketsushū* 146; Kaō Sekken Case (1965), Judgment of May 20, 1965, FTC [recommendation] no. 6, 1965, 13 *Shinketsushū* 14; Meiji Shoji Case (1971), Judgment of Oct. 11, 1968, FTC [decision] no. 1, 1966, 15 *Shinketsushū* 67, *aff'd on first appeal* (*kōkoku*), Judgment of July 17, 1971 (Meiji Shoji K.K. v. FTC), Tokyo Kōsai [High Court], 18 *Shinketsushū* 167, *aff'd on second appeal* (*jōkoku*), Judgment of July 11, 1975, Saikōsai [Supreme Court], 29 *Minshū* 951.

kanko). Moreover, article 3 was enacted specifically to regulate all kinds of agreements that artificially restrict competition.

Although it is possible to regulate vertical agreements under article 19 as unfair trade practices, the only sanction available is a cease and desist order. No surcharge or criminal penalties can be applied. Since vertical agreements have the same restricting effect on competition as horizontal agreements, sanctions such as a surcharge and criminal penalties should be adopted to completely eradicate and prevent vertical agreements.

In its Guidelines of July 1991, the Japanese FTC indicated its belief that vertical agreements could be included as "unreasonable restraints of trade" under article 3. The Guidelines state: "The content of restrictions of business activities in this context does not need to be identical in all firms (for example, distributors and manufacturers), but is sufficient if the conduct restricts the business activities of each firm and is for the purpose of achieving a common purpose, such as the exclusion of any specific firm."¹⁵ The Guidelines also indicated the FTC's intention to treat concerted boycotts (*kyodo boycott*) barring market entry (*shijo san' nyu*), which had been dealt with as unfair trade practices, as unreasonable restraints on trade. As the guideline stated: Because these boycotts "[result] in substantial restraint of competition in the market, such conduct constitutes an unreasonable restraint of trade and violates article 3 of the Antimonopoly Act."¹⁶

3. *Concerted Actions (Agreements) and Proof*

Anticompetitive agreements are agreements among competitors to restrict competition. Under section 1 of the Sherman Act, anticompetitive agreements are prohibited under the rubric of "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." The existence of such agreements may be based on circumstantial evidence. In *Interstate Circuit, Inc. v. United States*,¹⁷ the United State Supreme Court held:

¹⁵ FAIR TRADE COMMISSION, GUIDELINES RELATING TO DISTRIBUTION AND TRADING PRACTICES 13-14 (1991).

¹⁶ *Id.* at 11.

¹⁷ *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

(i) In many cases, competitors / parties do not formally agree, and if proof of the execution of a formal agreement is required, the enforcement of the antitrust laws is unreasonably limited;

(ii) If a concerted action which is unnatural as a matter of the course of events, and which cannot be justified by prior or following circumstances was conducted in addition to other circumstances, such a concerted action can constitute a violation of the antitrust laws; and

(iii) If competitors hold a meeting with the intention to restrict competition, such a meeting may be a per se violation of antitrust laws.

However, mere conscious parallelism does not constitute a violation of the antitrust laws.¹⁸ In addition, circumstantial evidence is required to prove the violation of antitrust law.

In the European Union, concerted practices are regulated. Contracts and implied agreements are included among prohibited concerted practices. The requirements for proof are almost the same as those in the United States.¹⁹

In Japan, a concerted action under article 3 and former article 4 is interpreted as an implied agreement or mutual communication of intention. The existence of such implied agreement or mutual communication of intention can be proven by circumstantial evidence. The Japanese FTC held, in its decision of August 1949 regarding a plywood sheet bid rigging agreement,²⁰ that in order to constitute concerted action, the fact that there is the appearance of identical acts is not sufficient. In addition to such appearance, mutual communication of the parties must exist." The FTC similarly found concerted action in its decision of December 1955²¹ regarding a price-fixing agreement in an oil products bid. The Tokyo High Court supported this FTC decision in its opinion of February 1956. It held that "it is obvious that we can reasonably find the same facts regarding

¹⁸ *Theater Enter. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

¹⁹ *See, e.g., Case 48/69, Imperial Chem. Indus. Ltd. v. Commission*, 18 E.C.R. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 (1972).

²⁰ Judgment of Aug. 30, 1949 (FTC v. Yuasa Mokuzai Kōgyō K.K.), FTC [decision] no. 2, 1948, 1 Shinketsushū 62.

²¹ Judgment of Dec. 1, 1955 (FTC v. Nihon Sekiyu K.K.), FTC [decision] no. 1, 1953, 7 Shinketsushū 70; *aff'd on appeal*, Judgment of Feb. 9, 1956 (Nihon Sekiyu K.K. v. Kōsei Torihiki I'inkai), Tokyo Kōsai [High Court], 7 Gyōshū 2949.

price-fixing agreement as the FTC's decision if we examine the evidence listed in the FTC's decision as a whole. Therefore, the fact finding of the defendant does not conflict with reasonable inference."²² This Japanese decision is not so far from that of U.S. antitrust law. However, the mere existence of exchanged price information does not guarantee that the FTC will find price-fixing. In the FTC decision of July 28, 1994, regarding an elevator maintenance agreement, the FTC denied the proof of agreement despite the existence of a mutual exchange of price information.

4. *Particular Field of Trade*

While in the U.S., concerted actions "in restraint of trade or commerce among the several States, or with foreign nations" are regulated under section 1 of the Sherman Act, in Japan, concerted actions that "substantially restrict competition in a particular field of trade" are prohibited as an "unreasonable restraint of trade" under article 3 of the Antimonopoly Law. In Japan, it is particularly unnecessary to discuss the term "among the several States, or with foreign nations." This phrase is included because of the Sherman Act's status as federal law. The Sherman Act does not contain the clause "a particular field of trade." "A particular field of trade" is interpreted in Japan as a market in which the competition is restricted. Considering that section 1 of the Sherman Act is interpreted not to protect competitors but to protect competition, I do not think that there is any difference between it and the Japanese Antimonopoly Law. In the case of anticompetitive agreements, because a restricted trade or market is identified and specified by such agreements, further identification of a trade or a market by the concept of "a particular field of trade" is meaningless. However, if a "particular field of trade" under the provision of an "unreasonable restraint of trade" is given its own definition beyond the aforementioned meaning and is considered to be an independent requirement, it is possible that the scope of an "unreasonable restraint of trade" is significantly narrowed and that the regulation thereof would be restricted.

It should be noted that even though the term "a particular field of trade" under article 3 (unreasonable restraints of trade) and the term "a particular field of trade" under article 15 (merger control) are the same, their

²² Judgment of Feb. 9, 1956 (Nihon Sekiyu K.K. v. Kōsei Torihiki I'inkai), Tokyo Kōsai [High Court], 7 Gyōshū 2949.

function and meaning are quite different. For example, in the case of corporate mergers, the issues to be considered are what field of trade is affected and how this field is affected. Fields of trade correspond to the kinds of products handled by such companies and the geographical area of their business activities. In this case, the definition of the term "a particular field of trade" has extremely significant meaning. It is inappropriate, therefore, in terms of the nature of regulated activities and the intentions of the legislators, to interpret the term "a particular field of trade" in cases of "unreasonable restraints of trade" in the same manner as "unreasonable restraints of trade" in the provision of merger control. If we do not recognize these points and interpret "a particular field of trade" as a separate requirement, the regulation of activities that constitute unreasonable restraints of trade become substantially restricted. If we appropriately interpret "a particular field of trade," as the transactions that are subject to the agreement, there is no difference between the U.S. and Japanese law. However, in Japan this point had not been made clear by court decisions or academic discussion.²³

5. *Substantial Restriction on Competition*

The anticompetitive agreements which are regulated are agreements that restrict competition. Under U.S. law, such regulated agreements are characterized as agreements "in restraint of trade and commerce" while under Japanese law, they are agreements that "substantially restrict competition." What then are the differences between agreements "in restraint of trade and commerce" and agreements that "substantially restrict competition?"

In the United States, interpretations of the term "restraint of trade" differ according to the type of conduct subject to the restraint. Thus, interpretations of section 1 of the Sherman Act for restrictive activities to which the "per se illegal" rule applies are significantly different from those applied to activities to which the "rule of reason" applies. The former would be applied to activities such as price-fixing agreements, while the latter would be applied to activities such as agreements on standardization.

²³ See Iyori Hiroshi, *1 Mei no torihiki bunya ni okeru kyōsō no jisshitsuteki seigen no kaishaku* [Interpretation of Substantial Restraint in a Particular Field of Trade], in IMAMURA TAIKANKINEN RONBUNSHŪ: KŌHŌ TO KEIZAI HŌ NO SHOMONDAI II (1982) [hereinafter *1 Mei no torihiki*].

In *Standard Oil Co. v. United States*,²⁴ the U.S. Supreme Court held that under section 1 of the Sherman Act, an agreement should be regulated only when it unreasonably restricts trade, but that certain agreements are presumed to be unreasonable based on their nature and character. With respect to those restrictions to which the rule of reason is applicable, the Court has examined in separate opinions whether the purpose and effects of the restriction favor competition,²⁵ whether the party concerned has market power or a meaningful market share,²⁶ and whether the restriction of trade will result in a present or future benefit to the market or to competition.²⁷

On the contrary, applications of the “per se illegal” rule do not consider effects on the market or on competition. In *United States v. Socony-Vacuum Co.*,²⁸ the Court held that price-fixing agreements among competitors are illegal under any circumstances. It also determined that application of the per se illegal rule does not require analysis as to whether actual competition still exists in the market, whether prices become uniform because of cartel activities, whether the uniform price was created directly or indirectly, or whether the purpose of such restraint is to prevent destructive competition. Thus, regardless of the relative market power or market share of competitors, agreements on price are per se violations.

In the EU, Article 85 paragraph 1 of the Treaty of Rome prohibits all anticompetitive agreements or concerted activities which have an appreciable effect on the market.²⁹ The EU Commission has ruled that only agreements among small and medium size undertakings with a five percent or less market share are permissible.³⁰ On the other hand, agreements that contribute to restructuring of economic processes and that do not restrict effective competition are allowed under Article 85 paragraph 3. In this, Article 85 paragraph 3 corresponds to the “rule of reason” in the U.S. In Germany, article 1 of the Law Against Restraints of Competition (“GWB”) prohibits cartels and applies to agreements among competitors even if their total market share is five percent or less.³¹

²⁴ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

²⁵ *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

²⁶ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

²⁷ *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, (1977).

²⁸ 310 U.S. 150 (1940).

²⁹ Judgment of May 1969 (*Volk v. Vervaecke*), 1969 C.M.L.R. 273.

³⁰ Notice regarding de minimis rule in September of 1986.

³¹ Judgment of Oct. 27, 1966 (*Bockhorner Klinker Case*), Bundesgerichtshof [Supreme Court], WuW/E BGH 726, 730.

Prior to the 1953 amendments of the Japanese Antimonopoly Law, former article 4 paragraph 1 prohibited concerted actions. Former article 4 paragraph 2, however, provided that such a prohibition was not applicable to concerted actions with only a *de minimis* effect on competition in a particular field of trade. These provisions were almost the same as those in effect in the U.S. and the EU. In the period immediately following the passage of the 1953 amendments, article 3 was construed in a manner basically similar to former article 4 paragraph 2 when considering the effects on competition of concerted actions which substantially restrict competition in a particular field of trade.

Under the Japanese Antimonopoly Law, the same term, “substantially restricts competition in a particular field of trade,” which is used in the provision on the prohibition of unreasonable restraints of trade,³² also appears in: 1) the provisions prohibiting private monopolies;³³ 2) the restrictions against stockholding by companies;³⁴ 3) the restrictions against interlocking directorates;³⁵ 4) the provisions for regulation of mergers;³⁶ and 5) the restrictions on acquisitions of businesses.³⁷ In this respect Japanese law differs from both U.S. and European competition law. In the U.S., significantly different rules of interpretation (“the rule of reason” and the “*per se* illegal” rule) have been adopted, depending on the types of activities involved. In Japan, however, it seems that the term “substantially restricts competition in a particular field of trade,” is interpreted uniformly despite differences in the types of regulation. For example, in a case under article 16 where a lease of facilities was found to be equivalent to a merger, the Tokyo High Court held that “substantial restriction of competition” means “situations in which competition is lessened and a particular entrepreneur or a group of entrepreneurs can control the market, freely controlling to a certain extent conditions such as price, quality, quantity in its discretion.” The same interpretation was made in the case regarding exclusive supply of movies involving Toho and Shin Toho.³⁸ Also, this interpretation of “substantial restriction on competition” seems to be used in the application of article 3 to price-fixing agreements among competitors, a

³² Antimonopoly Law, *supra* note 2, arts. 3, 2 para. 6.

³³ *Id.* arts. 3, 2 para. 5.

³⁴ *Id.* art. 10.

³⁵ *Id.* art. 13.

³⁶ *Id.* art. 15.

³⁷ *Id.* art. 16.

³⁸ Judgment of Sept. 19, 1951 (Toho Motion Pictures Production Co. v. FTC), Tokyo Kōsai [High Court], 4 Kōminshū 497.

type of activity different from mergers, according to the conceptual interpretation rule.

Early decisions of the Japanese FTC regarding price-fixing agreements among competitors contain no reference to the market position of participants to the agreements until the mid-1950s, and the prohibition of “unreasonable restraints of trade” in article 3 was applied, in addition to article 6, to international vertical agreements between two parties. Considering this application of law, we may conclude that, in those days, the degree of effect on the competition considered to be sufficient to constitute a “substantial restriction of competition” under article 3 was almost the same as that required by former article 4. Some time after 1955, however, FTC decisions³⁹ regarding violations of article 3 included descriptions of the market position of the participants to the agreements. Such descriptions of market position continue to appear in Japanese FTC decisions to the present. It is not clear, however, whether these descriptions merely explain the circumstances of the violations or whether participant market position is a factor for determining that an activity constitutes a violation as an “unreasonable restraints of trade in a particular field of trade.”

In another application of the term, article 8 paragraph 1(1) prohibits trade associations from substantially restricting competition in a particular field of trade. However, in a decision of October of 1957 regarding a violation by the Home Electric Products' Stability Association,⁴⁰ the FTC applied article 8 paragraph 1(4), instead of 1(1), to agreements on the resale price maintenance of the home electric products among large manufacturers, wholesalers and retailers. Paragraph 1(4) restricts only the entrepreneurs that participate in the association, not the association as a whole which is restricted by paragraph 1(1). Moreover, paragraph 1(4) was also applied to price-fixing agreements among retailers that participated in the Osaka Kikkoman Association, which had a 31 percent share in the total soy sauce product market in the Osaka area.⁴¹ In light of such practice, it appears that, since 1955, the FTC has deemed horizontal price fixing

³⁹ Oil Products Bid Rigging Case, Judgment of Dec. 1, 1955 (Nihon Sekiyu K.K.), FTC [decision] no. 1, 1953, 7 Shinketsushū 70; *aff'd*, Judgment of Feb. 9, 1956 (Nihon Sekiyu K.K. v. Kōsei Torihiki I'inkai), Tokyo Kōsai [High Court], 7 Gyōshū 2849; Methanol Price Agreement Case, Judgment of Jan. 30, 1956.

⁴⁰ Judgment of Oct. 17, 1957 (In re Home Electric Products Stability Association), FTC [recommendation] no. 5, 9 Shinketsushū 10.

⁴¹ Osaka Kikkoman Association Case, Judgment of Aug. 10, 1968, FTC [decision].

agreements to constitute “unreasonable restraints of trade” when the participants have the power to control the market and such agreements significantly affect competition in the market.

In contrast, United States, European, and German competition laws provide that such horizontal price-fixing agreements are illegal in principle without examining the effects on the market. Only the Japanese Antimonopoly Law has been interpreted restrictively. The requirement that a restriction of competition be “substantial in a particular field of trade” can be interpreted differently depending on the type of activity.⁴² Horizontal price-fixing agreements can be viewed by their nature to contain the participants’ intention to eliminate price competition. Thus, such agreements themselves substantially affect the function of competition, and thereby constitute a “substantial restriction on competition.” Such an interpretation is appropriate to the purposes of the Antimonopoly Law. However, an interpretation which provides that agreements to eliminate price competition between two companies may be legal, while those among three or more companies are illegal, is vague and leads to confusion among firms when they consider compliance with the laws. Such an interpretation significantly diminishes the effectiveness of the Antimonopoly Law. On the other hand, such an interpretation is appropriate if the purpose of the law is to regulate mergers intended to rationalize business operations by examining their effects on markets and competition.

6. “Contrary to the Public Interest”

The Sherman Act does not contain the term “contrary to the public interest,” found in the Japanese Antimonopoly Law’s definition of “unreasonable restraint of trade” for article 3.⁴³ There have been several interpretations of this term “contrary to the public interest.” If the phrase were to be interpreted broadly, in the same manner as “public welfare” in the Constitution, or if it were interpreted in relation to the nation’s economy as a whole, anticompetitive agreements would not be prohibited in principle. Instead, they would be regulated when they are shown to be harmful. Since its early days, however, the Japanese FTC has construed

⁴² See IMAMURA SHIGEKAZU, DOKUSEN KINSHI HÖ [ANTIMONOPOLY LAW] 62 (1978); TANSO AKINOTU, DOKKINHÖ JÖ NO ‘KYÖSÖ NO JISSHITSUTEKI SEIGEN’ NO I GI TO SONO SEIKAKU [MEANING AND CHARACTER OF ‘SUBSTANTIAL RESTRAINT OF COMPETITION’ OF THE ANTIMONOPOLY LAW] 541 (1980); Iyori, 1 *Mei no torihiki supra* note 23, at 190.

⁴³ See Antimonopoly Law, *supra* note 2, art. 2, para. 6.

“public interest” in light of the objectives of the Antimonopoly Law. These objectives include the maintenance of fair and free competition.⁴⁴ Moreover, the Japanese FTC has deemed anticompetitive agreements to be prohibited in principle and has applied article 3 to all anticompetitive agreements. Most scholars support this interpretation in principle. On the other hand, industrial circles and industrial ministries oppose it.

In a 1984 criminal case involving an oil products price cartel, the Supreme Court of Japan held that in principle, subject to some reservations, the term “contrary to the public interest” means violation of the economic order for free competition that is the primary interest protected by the Antimonopoly Law.⁴⁵ Because the Japanese FTC’s enforcement of article 3 will continue according to its traditional interpretation, further discussion of this issue is unnecessary. Substantially, this interpretation is not significantly different from that applied to U.S. law.

D. *Keiretsu*

Under U.S. antitrust laws, trade agreements within production *keiretsu*, as exemplified by continuing trade agreements between automobile manufacturers and automobile parts manufacturers, have been treated as “non-price restrictive agreements” (*hikakaku seigen kyōtei*). At least since the 1977 *Sylvania* decision, U.S. courts have applied a “rule of reason” test to such agreements rather than finding them “per se illegal” (*tōzen ihō no gensoku*). Thus, where trading within *keiretsu* is concerned, it is necessary to examine present and future benefits and harms to competition and the market in order to ascertain whether the harms outweigh the benefits. Furthermore, because trading within *keiretsu* varies from industry to industry, and within the same industry from business to business, and because the harms and benefits differ among various *keiretsu*, it is necessary for courts to judge them on a case-by-case basis.

Under Japan’s Antimonopoly Law, the evaluation of trading within *keiretsu* is about the same as under U.S. antitrust laws. In the July 1991 Guidelines Relating to Distribution and Trading Practices, the FTC adopted a fairly strict stance with respect to trading within *keiretsu*:

⁴⁴ Plywood Bidding Agreement Case, *supra* note 10; Soy Sauce Price Agreement Case, *supra* note 10.

⁴⁵ Oil Product Price Agreement Case, Judgment of Feb. 24, 1984 (Idemitsu Kōsan K.K. v. Kuni), Saikōsai [Supreme Court], 235 Saibanshū 1.

Where an enterprise (*jigyōsha*), in order to ensure continuation of an existing trading relationship, agrees with a trading partner to respect and give precedence to an existing trading relationship, or in concert with another enterprise engages in an act excluding competitors, the competition for acquisition of customers is restricted, market entry of new competitors is hindered, and competition in the market is restricted. Furthermore, where an enterprise makes trading with a trading partner conditional upon the trading partner not dealing with the enterprise's competitors, or pressures its trading partners not to deal with its competitors, it exerts a harmful influence on competition in the market, such as hindering market entry.⁴⁶

Agreements which give precedence to existing relationships are treated as violations of article 3 of the Antimonopoly Law,⁴⁷ while agreements which make trading conditional upon not dealing with competitors are treated as an unfair trade practice in violation of article 19.⁴⁸ Furthermore, reciprocal dealing between a business and its trading partners is to be considered an unfair trade practice under article 19. Also, the Law to Prevent Late Payments to Subcontractors (*shitauke daikin shiharai chiento bōshi hō*), which supplements the Antimonopoly Law, covers the problem of abuse of superior position in continuing trading agreements.⁴⁹

These provisions have had the effect of improving the *keiretsu* situation (as seen in the distribution system of automobile parts), but two problems should be noted in continuing trade agreements within *keiretsu*. These problems arise from the role of what is essentially a Japanese custom. Continuing trade agreements generally have set terms of one to three years, and although they commonly contain provisions allowing for automatic renewal, they can be terminated at the end of the term. If, at the expiration of the term, the parties were able to freely and reasonably make a decision about whether to continue with the same trading partners, there would be no *keiretsu* problem. But in fact, given the Japanese sense of duty and humaneness with sympathy to the weak (*giri ninjō*) and the custom of

⁴⁶ FTC, GUIDELINES RELATING TO DISTRIBUTION AND TRADING PRACTICES pt. 1-1 (1991).

⁴⁷ *Id.* pts. 1-1, 2.

⁴⁸ *Id.* pt. 1-4.

⁴⁹ *Id.* pt. 1-6.

giving precedence to existing relationships, it is difficult to terminate a continuing trade agreement upon its expiration. Furthermore, if one party tries to terminate an ongoing trade agreement that has continued over many years and the other party objects, a court may decide that the attempted termination is invalid unless there are significant circumstances favoring termination. Moreover, even if there is a violation of the terms of the contract, a court may find that an attempted termination is invalid, and decide in favor of maintaining the existing order.⁵⁰ Because the sense of duty and humaneness is strong in Japan, in order to break up *keiretsu*, businesses must be allowed a free and rational choice of trading partners at the expiration of continuing trade agreements.

Furthermore, Japanese trade associations are well established in various industrial fields. These associations are backed by government ministries.⁵¹ Associations have been formed of *keiretsu* members, particularly supplier-manufacturer *keiretsu* such as Nissan Supplier's Association.

Under U.S. law, freedom and equality are basically respected. Discrimination in trade is not allowed. Although there were strong protests from some, the Robinson-Patman Act prohibiting price discrimination features treble-damage actions as its central enforcement mechanism. Under the current regime, discriminatory prices cannot be set. On paper, Japan's Antimonopoly Law is essentially patterned after U.S. antitrust laws. From the beginning, there have been provisions restricting discriminatory pricing. These provisions, however, have never been enforced. The Guidelines published by the FTC in July 1991 state that aggregated rebates (*ruishin-teki-na ribeeto*), in one sense, can promote price formation based on the true state of the market, but where the percentage of rebate is significantly high, it can function to cause the products of the company offering the rebate to be treated more favorably than the products of other companies." Thus, so long as the percentage is not remarkably high,

⁵⁰ In *Fujiki v. Shiseido Sales* (Sept. 27, 1993), in which Shiseido terminated a contract because of breach of a termination clause by Fujiki, the Tokyo District Court held: 1) that the one-year contract between the plaintiff and the defendant had continued for a long term of 28 years by virtue of an automatic renewal clause, 2) that it was thus reasonable that the plaintiff expected the contract to be continued in the future, and 3) that this expectation should be protected. The court further held that, as the agency contract in issue was a so-called 'continuous supplying contract', even if there were a unilateral termination clause, the contract would not be terminated unilaterally, unless there was an extraordinarily changed condition or grave disloyal conduct by another party. This decision, however, was overruled by the Tokyo High Court on Sept. 14, 1994.

⁵¹ Cf. FTC, REPORT ON TRADE ASSOCIATION (Spring 1993).

aggregated rebates to promote sales are reasonable. Furthermore, there are no provisions regulating discriminatory pricing by large-scale businesses. Such discriminatory pricing practices have the effect of excluding competition (*haita-teki-na kōka o motsu*), make the market non-opaque and complicated, and restrict free competition. Article 1 of the GATT, the charter of free trade, sets out the most-favored nation principle and adopts the principle of nondiscrimination. Considering that free trade and nondiscriminatory treatment are really two sides of the same coin, and that the concepts of "duty and humaneness" (*giri ninjō*), along with respect for the existing order in Japan, are at the bottom of a variety of unfair trade practices including *keiretsu*, it is necessary to thoroughly implement the principle of nondiscrimination and to eliminate ambiguities in order to abolish unfair trading practices.

E. Measures Taken Against Violations of Antitrust Laws

1. Administrative Cease and Desist Orders (haijo sochi) and Surcharges (kachokin seido)

Although the procedures differ under both U.S. and Japanese law, all antitrust law violations are subject to cease and desist orders.⁵² But these administrative measures are insufficient to combat violations of the Antimonopoly Law such as price cartels. Such operations are conducted in secret, and they cease as soon as they are detected.

In order to eliminate the incentives for cartel formation, Japan introduced a surcharge system (*kachōkin seido*) in the 1977 revision of the Antimonopoly Law.⁵³ Under this system, the government collects excessive profits from price cartels. The amount of the surcharge is determined by multiplying the total sales of the product which was the object of the price cartel over the period the cartel was in effect by a specified ratio.⁵⁴ This levy on excess profits is not a fine and is unique to Japan. It cannot be found in U.S. law, and the German version, the *Geldbusse*, is actually a form of administrative fine.⁵⁵ Nevertheless, the

⁵² Sherman Act, *supra* note 3, art. 4; Clayton Act, *supra* note 4, art. 15; Federal Trade Commission Act, ch. 311, art. 5(a)(2), 38 Stat. 717 (1914) (codified at 15 U.S.C. § 41 (1988)); Antimonopoly Law, *supra* note 2, art. 7.

⁵³ Antimonopoly Law, *supra* note 2, art. 7-2.

⁵⁴ *Id.*

⁵⁵ The German Cartel Law Article 37B (Mehrerlösabschöpfung). *Cf.* art. 38 (*Geldbusse*).

surcharge has been criticized as being ineffective against elusive price cartels. By its nature, the surcharge merely deprives the cartel of its profit and does not provide an effective punitive sanction upon discovery of such cartels. It has been suggested that it will be necessary to adopt additional sanctions, including harsh penal provisions, to achieve a preventative effect.

2. *Criminal Penalties*

In both the U.S. and Japan, the law has long provided for criminal penalties, applicable both to natural and juristic persons, for price cartels and other violations of antitrust law.⁵⁶ In Japan, criminal investigations are initiated after an accusation (*kokuhatsu*) by the Fair Trade Commission.⁵⁷ In the U.S., antitrust criminal proceedings became common in the 1960s, and in recent years, approximately seventy to eighty criminal cases a year have been prosecuted for clearly illegal acts such as price cartels.

In Japan, until the early 1970s, the thought with respect to violations of the Antimonopoly Law was that eliminating the illegal act was sufficient. Therefore, violations were handled by administrative cease and desist orders. But as price cartels sprouted up during the oil shocks of the 1970s, a general need was perceived to strengthen the preventative power of the Antimonopoly Law. Thus, in 1974 several oil companies were criminally charged with forming a price cartel. Following the introduction of the surcharge system in 1977, however, no criminal charges were initiated for a long time. Japan's lackluster enforcement of its Antimonopoly Law was criticized in the U.S.-Japan Structural Impediments Initiative talks. As a result, in June 1990, the Fair Trade Commission announced its intention to aggressively pursue cases of bad-faith violations of the Antimonopoly Law such as formation of price cartels. The chief public prosecutor (*kenji socho*) also made clear his intention to aggressively pursue violations of the Antimonopoly Law. Following this, in 1992, the upper-limit for fines assessed on corporate offenders was increased from five million yen to one hundred million yen. Also, by 1993, two criminal charges had been filed for Antimonopoly Law violations.⁵⁸

⁵⁶ Clayton Act, *supra* note 4, art. 4; Antimonopoly Law, *supra* note 2, art. 89.

⁵⁷ Antimonopoly Law, *supra* note 2, art. 96.

⁵⁸ Accusation against Stretch Film Price Agreement (Dec. 1992); Accusation against Special Seal Bid Rigging (Spring 1993).

3. *Suits for Damages*

Under both U.S. and Japanese law, those who suffer injury resulting from violations of antitrust laws can file suit for damages. In the U.S., plaintiffs can demand treble damages,⁵⁹ and can file class-action suits. Furthermore, under the 1976 revision of the Clayton Act, a state's attorney general can file suit for damages on behalf of the citizens of the state, under their *parens patriae* authority.⁶⁰ Where there has been a final decision by the court that an act is in violation of the antitrust laws, such decision serves as *prima facie* evidence of a violation.⁶¹ Furthermore, where there is a likelihood that a private person may be damaged by an act in violation of antitrust laws, he or she may file suit to enjoin the act.⁶²

In Japan, a person who has suffered damage due to a violation of the Antimonopoly Law may file suit under article 709 of the Civil Code's general provision governing torts (*fuho koi*). Additionally, one may file suit where there has been a final decision (*kakutei shinketsu*) by the Fair Trade Commission with respect to an act in violation of the Antimonopoly Law. Under article 25 of the Antimonopoly Law, a person can file a suit for damages without having to prove negligence (*mukashitsu songai baisho seikyō shoshō*). Suits for damages which result from violations of the Antimonopoly Law, however, have been extremely rare. Between 1947 and April of 1990, only seven cases were brought under article 25 of the Antimonopoly Law, and only nine cases were filed under article 709 of the Civil Code, bringing the total to sixteen cases. Moreover, none of the plaintiffs won their suit. They lost in twelve, settled in two, and withdrew in one. In May 1991, to assist plaintiffs, and to eliminate violations of the Antimonopoly Law, the Japanese FTC announced its intention to make evidentiary materials available to courts, where necessary, in suits for damages caused by violations of the Antimonopoly Law. However, Japan does not have a discovery system like the U.S., and as the court in an adversarial system must remain neutral, it continues to be very difficult for plaintiffs to prove violations of the Antimonopoly Law and the resulting damages.

⁵⁹ Clayton Act, *supra* note 4, art. 4.

⁶⁰ *Id.* arts. 3, 4(c).

⁶¹ *Id.* art. 5.

⁶² *Id.* art. 16.

F. *Organizations that Enforce Antitrust Laws*

Another factor influencing antitrust enforcement in Japan is the number of agencies and personnel allocated to the effort. In the U.S., two public agency organizations enforce federal antitrust laws: the Justice Department's Antitrust Division and the Federal Trade Commission. The Justice Department's Antitrust Division has a staff of approximately 600 persons, which is significantly greater than either the criminal or civil divisions of the Department. Most of the staff members are involved in handling violations of antitrust laws. Where necessary, the Justice Department can also employ federal prosecutors from the Federal Bureau of Investigation. The Federal Trade Commission has approximately 1000 staff members. In addition, the attorney generals of the states and other self-governing territories may file suit to enjoin violations of federal antitrust laws.⁶³ The Antitrust Division of the Justice Department can initiate grand jury investigations in the case of suspected criminal violations, and in civil investigations, has the right to conduct compulsory searches (*kyōsei chōsa ken*). The Federal Trade Commission also has the right to conduct compulsory searches. Interference with compulsory searches or failure to comply with searches is punishable by strict criminal penalties, which are frequently employed. In addition to federal antitrust laws, states have and enforce their own antitrust laws.

In the EU, the Directorate for Competition (*kyōsō sōkyoku*), the organ of the EU Commission (*EU i'inkai*) responsible for competition law, employs approximately 400 staff members. Where violations of antitrust laws are suspected, the EU Commission may conduct compulsory searches on its own initiative.⁶⁴ Those who fail to cooperate in an investigation are subject to administrative fines. Furthermore, each of the fifteen member states of the EU has governmental agencies responsible for the enforcement of competition law. The EU may order these agencies to investigate suspected violations⁶⁵. In Germany, for example, the Federal Cartel Office (*Renpō karuteru tyo*), has more than 300 staff members, and when necessary, they may obtain the cooperation of the police. Additionally, each German state has its own cartel bureau.

⁶³ *Id.* art. 16.

⁶⁴ Council Regulation No. 17, art 11(14)-(16), 1959-1962 O.J. SPEC. ED. 87.

⁶⁵ *Id.* art. 13.

In Japan, the Japanese FTC is the only organ responsible for enforcement of the Antimonopoly Law. The FTC employs approximately 500 staff members, but only about 200 are directly involved in the investigation of violations. Under the National Public Servant Law (*kokka komuin hō*), the status of the Secretary-General of the FTC is one step (*ichidankai*) lower than that of Vice Minister (*jikan*) of the various Ministries. Therefore, the power of the FTC to influence and restrain industry behavior through administrative guidance is weaker than that of the ministries which govern industry. Only after the FTC has filed criminal charges (*keiji kokuhatsu*) will the Prosecutor's Office initiate a criminal investigation. The Prosecutor's Office has no special division for the Antimonopoly violations. While the FTC does have the authority to conduct compulsory investigations,⁶⁶ and while obstruction of investigation is a crime, there have been no prosecutions for obstruction of FTC investigations (*chōsa bōgaizai*). Local governments have no enforcement authority under the Antimonopoly Law. In sum, the enforcement regime in Japan is clearly weak when compared to that of the U.S. and the EU.⁶⁷

G. *Issues Related to Antitrust Laws*

Market entry is an issue closely related to antitrust law, and several issues related to market entry can be included within the broad meaning of competition policy. Hence, a brief comparison of the U.S. and Japan with respect to some of these issues is in order here. Yet, in the future, a more detailed and precise comparison of these and similar points will be necessary.

1. *Government Regulation and Industrial Policy*

It is clear that government regulation and industrial policy have the effect of directly, or indirectly, restricting competition. There is a significant difference between government regulations and the industrial policies of the United States and Japan. I think this difference is partly attributable to differences in the social, economic, and historical backgrounds of the two countries, and to differences in the business-

⁶⁶ Antimonopoly Law, *supra* note 2, arts. 46, 94.

⁶⁷ Cf. Hotta Tsutomu, *Zenekon oshoku ni kosureba konzetsu dekiru* [Scandals in General Construction Field can be Terminated by this Means], CHŪŌ KŌRON (Jan., 1994).

government relationship. These differences influence the competitive environment and the ease of market entry. Thus, from the viewpoint of market access, it is necessary to level out (*heijunka*) certain differences in government regulations and industrial policy in the same manner as antitrust laws. Some of these issues have already been the topic of discussion between the U.S. and Japan.

2. *Law and Information Relating to its Application and Enforcement*

In the U.S., the federal government files more than one hundred antitrust violation cases per year. In addition, more than six hundred private suits are filed annually. Because a large number of decisions are handed down each year, there is an abundance of specific information about the application and interpretation of antitrust laws. There is a well-developed legal information industry, and it is easy to obtain explanations of the application and interpretation of antitrust laws. In short, the status of the law is clear (*tōmeisei ga takai*).

In the EU, decisions of the EU Commission in antitrust law cases contain detailed findings of fact and application of laws. Furthermore, the European Court decides more than ten cases per year. In turn, these decisions include in depth discussions of EU Commission decisions. As in the U.S., there is a wealth of well-organized legal information. In both the U.S. and the EU, fairly specific opinion letters are published answering hypothetical questions about antitrust laws. In addition, there is a mutual exchange of legal information relating to antitrust laws between the EU and the U.S. Thus, there is practically no information gap between the two regimes.

In Japan, the FTC has begun to issue about thirty decisions a year involving violations of the Antimonopoly Law, but most have been recommendation decisions (*kankoku shinketsu*) issued with the consent of the respondent. These contain only a brief summary of the facts constituting the violation and the applicable statutes. Although one may be able to understand what provision will apply in what situations (*hōritsu no unyō jōkyō*), one cannot understand from them the interpretation of the law as applied to specific facts. Furthermore, since 1947, there have been fewer than thirty Tokyo High Court cases involving review of FTC decisions, fewer than thirty suits for damages stemming from Antimonopoly Law violations, and only six cases involving criminal violations of the

Antimonopoly Law. As a result, there is a dearth of legal information about the Antimonopoly Law, and what information is available is not very clear. This analysis probably holds true not only for the Antimonopoly Law, but also for other regulatory laws administered by government ministries in Japan. In part, this state of affairs may be attributable to the relationship in Japan between the government bureaucracy and the people. It is not clear to what extent the recently enacted Administrative Procedure Law (*Gyōsei tetsuzuki hō*) will improve this situation, but it is possible that the lack of legal information relating to the application and interpretation of the Antimonopoly Law will become a source of friction between Japan and other countries. To a certain extent, this point is being discussed in the Structural Impediments Initiative.

3. *On the Legal System's Treatment of Suits for Damages*

With regard to the issue of the legal system's treatment of private suits, it is important to consider both substantive and procedural laws. In the U.S. it is easy to sue, and there are many suits. In Japan, it is difficult to sue, and there are few suits. During the Structural Impediments Initiative discussions, both the small number of suits for damages related to violations of the Antimonopoly Law and the difficulty of pursuing suits were highlighted in connection with the issue of the enforcement of the Antimonopoly Law. Also, the high cost to plaintiffs of filing suits⁶⁸ and the difficulties faced by plaintiff in procuring evidentiary materials were pointed out. Some of these issues have been partly resolved. However, with respect to the method of obtaining evidence, it will be necessary to investigate the possibility of introducing some kind of discovery system. The system of civil suits must be improved, not only as a means for strengthening the enforcement of laws and for increasing the amount of legal information available, but also as an important means for ensuring rights.⁶⁹

⁶⁸ The cost of filing a court suit in Japan was calculated at 0.5 percent of the requested damages. In the Yokosuka Navy Base Construction Bid Rigging Damage Case, the U.S. Government requested 5 billion yen in damages. It found the cost of filing to be unreasonable and requested the Japanese Government to revise the calculation. As a result, the cost was reduced by more than half.

⁶⁹ With respect to this issue, the U.S. delegation commented:

We welcome that the JFTC has taken administrative steps designed to facilitate private damage claims, but these actions will not be sufficient in themselves to achieve the GOJ undertaking to establish an effective antimonopoly remedy damage system. Broader initiatives are needed. We

III. CONCLUSION

Japan's Antimonopoly Law was modeled on U.S. antitrust laws, and is basically similar to them. However, because of differences in the cultural, social, economic, and legal backgrounds of the two countries, it is clear that the Antimonopoly Law of today has become considerably different from U.S. antitrust laws. These differences have led to differing competitive environments (*kyōsō jōken*). This, in turn, has surfaced as a structural problem in U.S.-Japan trade relations, particularly with respect to the opening of markets.⁷⁰ These types of problems do not exist only between the U.S. and Japan. It is possible that systematic harmonization of competitive environments (*kyōsō jōken no seidō-teki-na heijunka*) among countries will develop into an issue in the post-Uruguay-round era.

For Japan, market access is an important problem, and thus Japan should strictly enforce its Antimonopoly Law against price cartels and collusive bidding. Because price cartels and collusive bidding are acts conducted in secret, it is necessary to adopt stringent sanctions and apply the laws strictly in order to achieve a general preventative effect. In order to effectively eliminate violations of the Antimonopoly Law, price cartels must be treated as being clearly in violation of the law. This illegal status will cause business persons to reassess their lax attitude toward price cartels and make it easier for them to strictly comply with the Antimonopoly Law in their companies' best interests. While the FTC has already made clear in its 1991 Guidelines that vertical restraints of trade could be included within "unreasonable restraints of competition," it remains necessary to demonstrate that this interpretation will actually be applied. It is necessary to recognize that clarifying the interpretation and application of the law will greatly increase its effectiveness. From this standpoint, it is important for FTC decisions to be specific and detailed in their application of the statutes

appreciate that the Ministry of Justice has committed to complete a study on the possible reduction in the filing fees for private damage actions as soon as possible. It has not yet decided to take action to reduce these fees. Nor has the Ministry of Justice agreed to study other obstacles to an effective private remedy system. Without legislative changes, including such measures as providing plaintiffs with effective means to obtain evidence needed to pursue their claims, shifting the burden of proving damages and causation, multiple damages, some form of class actions and reduced filing fees, barriers to successful pursuit of private damage remedies will continue to prevent victims of AMA violations from obtaining compensation.

SII Follow-up Report, May 1991.

⁷⁰ See C. FRED BERGSTEN, RECONCILIATED DIFFERENCES? UNITED STATES JAPAN ECONOMIC CONFLICT (1993).

to each case. It is also necessary for the FTC to investigate and report on *keiretsu*. Furthermore, it is critical that the FTC be expanded and its powers strengthened, and for local governments to become involved in enforcement. In addition to improved application and enforcement of the Antimonopoly Law, it is necessary for the government to relax restrictive regulations, to clarify industrial policy, and to limit and clarify administrative guidance. As for administrative guidance, the future application of the Administrative Procedure Law will be important. From a more basic and long-term perspective, it will be necessary for government ministries to make available more and better information relating to the interpretation and application of laws, to make suits challenging administrative dispositions easier, and to adopt measures promoting private suits where appropriate.

