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COMPETITION AND TRADE POLICY: ANTITRUST ENFORCEMENT: DO DIFFERENCES MATTER?

John O. Haley[†]

Abstract: This article deals with the question of differences in competition policy enforcement regimes in Japan, Europe and the United States. In answer to the question "Do differences matter?", the author concludes that they matter less than conventional wisdom suggests at least in terms of "fairness" and effectiveness. The article challenges the widely held views that Japan's competition rules are ineffectively enforced and that U.S. antitrust enforcement, especially treble damage actions, have had an unfair impact on foreign firms. The article concludes with recommendations for greater cooperation between trade regulation and antitrust enforcement authority in the United States and among competition policy enforcement authority internationally.

CONTENTS

- I. INTRODUCTION
 - II. ENFORCEMENT REGIMES: THE UNITED STATES, JAPAN, GERMANY,
AND THE EUROPEAN UNION
 - III. DOES ENFORCEMENT MATTER?
 - A. *Differences in Tolerance of Anticompetitive Conduct*
 - B. *Measuring Effective Enforcement*
 - C. *Costs*
 - IV. SOLUTIONS?
-
- I. INTRODUCTION

Perhaps for the first time in trade negotiations between any two nations, lax enforcement of competition policy became an issue during the course of bilateral United States-Japanese trade talks in the 1980s. The United States explicitly charged that inadequate sanctions and weak enforcement of Japan's postwar Antimonopoly Law¹ constituted a barrier to U.S. access to Japanese consumer and industrial markets, thus becoming

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¹ Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu [Law Concerning the Prohibition of Private Monopoly and the Maintenance of Fair Trade], Law No. 54 of 1947.

another factor contributing to the chronic imbalance in U.S.-Japanese bilateral trade in manufactured goods.² Therefore, proposals for strengthening Japanese competition law enforcement were high on the United States agenda for corrective Japanese action during the Structural Impediments Initiative ("SII") negotiations.³ The United States trade negotiators were not the first, however, to raise enforcement of competition policy as a trade issue. Beginning in the early 1970s, Japanese enterprises had increasingly complained that their U.S. competitors were using private treble damage actions under U.S. antitrust laws as an anticompetitive weapon to counter successful Japanese entry in U.S. markets.⁴

Although sparse and largely descriptive, scholarship on competition enforcement in the two countries provides some support for both American and Japanese views.⁵ Similar issues, however, have rarely if ever arisen in

² See, e.g., *United States-Japan Structural Impediments Initiative (SII), Hearing Before the Senate Subcommittee on International Trade, Committee on Finance, 101st Cong., 2nd Sess. (1990)*. The United States' position was bolstered by widespread belief that the prevalence of exclusionary business practices, presumably illegal under the Japanese Antimonopoly Act and reinforced by so-called *keiretsu* relationships, has severely restricted market access to foreign goods and services. Japanese markets are closed, the argument runs, as a result of illegal, anticompetitive barriers to entry not merely investment disincentives resulting from an extremely competitive industrial structure. Japanese competition policy therefore must have failed. This article of faith led inexorably to the conclusion that Japan's failure to enforce its existing competition rules more effectively was to blame. See, e.g., LAURA D'ANDREA TYSON, WHO'S BASHING WHOM? TRADE CONFLICT IN HIGH TECHNOLOGY INDUSTRIES 57, 100, 120, 122, 276, (1992). More effective enforcement of the law was thus included as one of several factors identified as a Japanese market impediment to foreign goods and services against which the United States pressed the Japanese government to take corrective action. For a critical examination of these premises, see generally JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? (Kozo Yamamura ed., 1990).

³ See U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE, JOINT REPORT OF THE U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE (Tokyo, June 28, 1990).

⁴ Federal District Judge Edward R. Becker voiced the complaints of Japanese defendants in many antitrust actions when describing the 15 year long antitrust and antidumping treble damage actions brought in 1971 by Zenith and National Union Electric against the Japanese electronics industry, as "an 'ersatz' antitrust case". *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 513 F. Supp. 1100, 1333 (E.D. Pa. 1981).

⁵ Scholarly commentary outside of Japan on the enforcement of the Japanese Antimonopoly and Fair Trade Law has been almost uniformly critical. See KOZO YAMAMURA, ECONOMIC POLICY IN POSTWAR JAPAN: GROWTH VERSUS ECONOMIC DEMOCRACY 54-86 (1967); DAN F. HENDERSON, FOREIGN ENTERPRISE IN JAPAN 149-54 (1973); WOLFGANG PAPE, GYŌSEI SHIDŌ UND DAS ANTI-MONOPOL-GESETZ IN JAPAN (Heymanns, 1980); John Owen Haley, *Antitrust in Japan: Problems of Enforcement*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 121-33 (Haley ed., 1978); J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604-45 (1985).

the context of U.S.-European or Japanese-European trade negotiations.⁶ Whether isolated to U.S.-Japanese trade conflicts or extended to multilateral trade relations, the fundamental question of whether, in general, competition law enforcement has any significant effect on trade remains unanswered. My purpose here, therefore, is to examine these issues and at least to set out the principal lines of inquiry and concerns. This analysis begins with the narrower question of whether differences in enforcement regimes among two or three markets matter and concludes with the more general issue of what measures related to enforcement seem most appropriate as a component of efforts toward international "harmonization" of national and regional competition policies.

Before determining whether differences in enforcement matter, three preliminary points should be stressed. First, the focus is enforcement itself, not the policy being enforced — that is, whether, irrespective of the policies being enforced, differences in the sanctions used, the processes involved, and the degree or level of enforcement attained are themselves consequential factors in either promoting or restricting trade. The questions asked are what differences in enforcement do exist, whether they matter, and, if so, what measures — national, bilateral, and multinational — would be both corrective and feasible.

Of course policy does matter. The rules themselves are crucial in assessing how they are enforced. For example, if Japan, Europe or the United States did not have any competition law or one that allowed exercises of monopoly power by single firms (or as a result of the concerted efforts of several firms to exclude new entrants), the issue would be one of policy — its absence — not its enforcement. The initial assumption here is that as a matter of rules, Japan, Europe and the United States all prohibit such exclusionary exercises of monopoly power. To the extent that this premise is accurate, less effective enforcement in one market would prevent or deter new entrants in that market, thereby distorting inter-market trade in favor of established firms who would have greater access to all three markets than

⁶ Although in Germany considerable attention has been paid to the what some critics viewed as serious weakness of available sanctions under the German Law Against Restraints of Competition [Gesetz gegen Wettbewerbsbeschränkungen (GWB), BGBl. I 1081 (1957)], little if any attention has been paid to the enforcement of European competition rules by those concerned with U.S.-European trade relations. As mentioned below, this is notable, although not perhaps surprising, given the ostensibly more stringent sanctions available under Japanese law. See, e.g., John O. Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 WASH. L. REV. 471-508 (1983).

their existing or potential competitors. However, as I have argued elsewhere, at some level the presence of presumptively prohibited restraints on competition — notably horizontal price fixing and output restrictions — without effective restrictions on new entry should induce market entry. Thus, any failure to enforce such policies should encourage entry and further eliminate the violation without enforcement action.⁷ By the same token, more rigorous enforcement could deter new entry by enhancing rivalry among established firms. Consequently, under these circumstances, greater competition law enforcement could reduce, rather than promote, intermarket trade.

A second caveat is implicit in what has been said thus far. The primary concern here is less with what an economist might presumably consider an optimal regime of international trade than with market access and fair treatment of actual and potential competitors based in separate “home” markets. It does not necessarily follow, however counterintuitive it may be, that limiting access of potential competitors from other national

⁷ See John O. Haley, *Weak Law, Strong Competition, and Trade Barriers: Competitiveness as a Disincentive to Foreign Entry into Japanese Markets*, in JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 203-35 (Yamamura ed., 1990). Professor Tyson, who currently chairs the U.S. President's Council of Economic Advisors, implies that weak enforcement may have enabled Japanese firms “to cartelize the Japanese marketplace at the expense of foreign companies.” TYSON, *supra* note 2, at 100. She does not explain, however, why in the absence of identified barriers to entry horizontal restraints on competition did not induce rather than deter foreign firms from entering the Japanese market. Indeed, one of the few concrete examples cited by Tyson of an alleged violation of Japan's Antimonopoly and Fair Trade Law causing injury to a foreign firm was a complaint of *unfair* competition by Cray Research against its Japanese rivals for *price discounting*. *Id.* at 81. Although targeted price-cutting is a common tactic used by cartels to eliminate entrants, neither Tyson nor other critics cite any evidence of such practice having been directed against Cray or other foreign firms seeking to enter the Japanese market.

Instead of exclusionary practices that keep new entrants out, Tyson and other may have in mind the sort of predatory behavior that the Japanese electronics industry was alleged to have practiced in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.* — in other words, that lax competition law enforcement in Japan enabled Japanese firms to establish effective cartels in their home market, the profits from which were used to subsidize predatory entry in to the U.S. market. 475 U.S. 594 (1986). A variant of the same theme is that effective cartelization of Japanese markets enabled Japanese firms to reinvest their market gains and thereby achieve learning curves or other gains from the resulting economies of scale that made them internationally competitive. Evidence of Japanese cartels in the 1960s supports both arguments. The premise of potential public welfare gains that may result from restrictive practices of the second, however, challenges the fundamental argument in favor of competition policy. In any event, whatever the merits of these claims with respect to the 1950s and 1960s, there is little if any evidence of similar cartelization since the mid 1970s.

A potentially more fruitful line of inquiry is suggested in the discussion of exclusionary cost-raising tactics, especially in relation to supplier relations and exclusive dealing arrangements that are currently considered legal under most competition laws. See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209-93 (1986).

markets invariably distorts competition in either the restricted market or the global market taken as a whole. Were the established firms in the restricted market sufficiently competitive, more effective competition policy enforcement might not promote a more optimal level of overall competition. Yet, it would still favor established firms in the restricted market over their intermarket rivals and tend to create distortions in the patterns, if not the efficiency benefits, of intermarket trade.

Some might well also argue that such dichotomy between "foreign" and "home market" firms has become less and less meaningful in a global economy characterized by firm alliances. In terms of ownership, financing, and suppliers, the integration of major manufacturers in the international economy makes it difficult to distinguish between foreign and domestic firms in any meaningful way. In this context, trade statistics are profoundly misleading. Nevertheless, Japan's surpluses in its bilateral trade with the United States in manufactured goods (but not primary products or services) has had extraordinary political influence.

Perceptions count. Public and private belief in the United States and Japan, that their respective enforcement practices have had anticompetitive consequences, has tended to foster a climate in which protectionist pressures on both sides of the Pacific can only mount. It is widely believed that Japan's failure to enforce legal prohibitions against private restraints of competition has hindered foreign firm entry into national or regional consumer and industrial markets. As a result, public concern that U.S. manufacturers have been significantly disadvantaged has induced strong political pressures for effective countermeasures.⁸ One foreseeable result has been public support for the imposition of protectionist trade restrictions. The enactment of section 301 of the 1974 Trade Act and its threatened use to impose restrictions on Japanese access to the U.S. market is a prime example. In Japan, pressures to diversify and reduce trade with the United States, as well as to resist legitimate U.S. pressures to reform licensing requirements and other formal barriers to new entry, also tend to have greater public appeal.

The political dimensions of the problems explored here lead to the third caveat. Institutional factors preclude reliance on economic analysis as

⁸ See, e.g., Thomas L. Friedman, *No Rest on Trade: Washington's View*, N.Y. TIMES, Oct. 3, 1994, at D1; James Gerstenzang & David Holley, *U.S. Reimposes Law to Allow Trade Sanctions on Japan*, L.A. TIMES, Mar. 4, 1994, at A1.

the principal determinant of either competition or trade policy. The influence of economic analysis in U.S. competition policy is substantial, but it should be emphasized, this is because U.S. competition policy is largely of judicial making. Unlike competition rules, U.S. trade policy has historically been a highly discretionary prerogative of the executive branch. Until the mid-1970s, legislative controls were quite limited. Even today, legislatively mandated rules remain subject to a significant degree of executive discretion. Moreover, the legislative controls that do exist tend largely to be political rather than legal in that they take the form of reports to Congress instead of legislated rules. The legal restrictions of executive discretion have been limited to carefully worded legislative mandates. Neither Congress nor the President have allowed the courts to develop trade law in the manner of competition policy. The opportunities for judicial review and intervention remain even more restricted. The end result is that, in comparison with competition policies, economic analysis tends to be substantially less influential than immediate political concerns. Thus, U.S. courts have not been able to impose on U.S. trade rules the constraints of economic analysis incorporated in their construction of U.S. competition rules. Equally important, they have not yet considered the interrelationships between the two.

Against this background, the aims of this article are twofold. The first is to evaluate the justifications for more stringent international trade rules based on alleged lack of reciprocity or competitive advantage resulting from differences in the enforcement of competition rules. The second is to explore the implications for competition law enforcement in proposals for international harmonization of national and regional competition policies, as well as the use of competition law as a principal instrument of trade policy.

What, then, are the differences in the enforcement of competition rules in the United States, Europe, and Japan? And what effect, if any, do these differences have on trade?

II. ENFORCEMENT REGIMES: THE UNITED STATES, JAPAN, GERMANY, AND THE EUROPEAN UNION

The United States exhausts the list of sanctions and procedures for the enforcement of competition law — administrative fines, criminal sanctions, and private damage actions. In no country is the potential for

coercive state intervention as great or the range of applicable sanctions as broad. From the commencement of an administrative investigation or private damage action, both the scope and compulsive force of civil discovery are unrivaled. And the costs of defense in any enforcement action are unsurpassed. The complexity of enforcement of competition policy in the United States is compounded by the division of jurisdiction between two public enforcement authorities, the Federal Trade Commission ("FTC") and the Justice Department, acting through its Antitrust Division. The Antitrust Division of the Department has concurrent jurisdiction with the FTC for most competition rule violations and exclusive jurisdiction over all criminal penalties. The additional availability and incentives for private damage actions ensure that enforcement of competition law in the U.S. is more widespread and potentially harsher than in any other jurisdiction.

Japan follows the United States in the variety of sanctions and potential enforcement powers. Japan's Antimonopoly Law provides for: 1) administrative fines, including, since 1977, a special surcharge on illegal cartel profits (*kachōkin*); 2) damage actions, which can be brought under either the general tort provisions of the Civil Code or the special provision of the Antimonopoly Act itself; 3) criminal penalties; and 4) administrative authority to restructure monopolistic firms.

The Japanese FTC is the exclusive enforcement agency. It is, however, one of only two national administrative units subject to direct cabinet oversight without cabinet representation, the other being the Imperial Household Agency. The directors of such diverse and arguably less significant agencies as the National Public Safety Commission and the Defense Agency are accorded the status of a minister of state.⁹ As a result, the FTC has less influence as an agency at the cabinet level on economic policy. Yet it is still subject to political influence by both legislators, party leaders and the economic ministries, in particular the Ministry of Finance.

In Germany, the principal sanctions for violations of competition rules are administrative fines. The German Law Against Restraints of Competition¹⁰ does provide for damage actions but not criminal sanctions. And like Japan, a single administrative agency, the Federal Cartel Office

⁹ Other such agencies include the Management and Coordination Agency, the Hokkaido Development Agency, the Economic Planning Agency, the Science and Technology Agency, the Environment Agency, and the National Land Agency.

¹⁰ See Gesetz gegen Wettbewerbsbeschränkungen (GWB) [German Law Against Restraints of Competition] BGBl. I 1081 (1957)

(*Bundeskartellamt*) has exclusive jurisdiction at the national level for public enforcement, but state (Land) authorities also share responsibility for local violations. As a quasi-independent agency organized within the Economic Ministry, the Federal Cartel Office reflects a compromise between the independent agency of the Japanese variety, influenced by the U.S. FTC model and the approach exemplified by the Antitrust Division of the Justice Department, under which competition policy enforcement is entrusted to a politically accountable department of the executive (cabinet).

The European Commission relies exclusively on administrative fines for enforcement of competition policy under regulations issued pursuant to Articles 85 and 86 of the Treaty of Rome.¹¹ For the enforcement of investigatory orders, the fines are fixed at 100 to 5,000 European Currency Units ("ECU") (currently from about US\$130 to US\$7,500), but for substantive violations, they may be imposed in amounts equaling up to ten percent of the offending enterprise's previous year's turnover.¹² Private damage actions are not available under European Union ("EU") law, but violations of EU competition law are recognized as delicts (torts) under the national private law of at least some member states. Very few of such private damage actions, however, have been brought.¹³

Responsibility for enforcement of European competition policy is delegated to a Commission-level directorate, the Directorate-General for Competition ("DGIV"). The head of the DGIV has an official status in the European Union that is similar to that of a minister in Japan and Germany or department secretary in the United States.

No administrative enforcement authority under any of these regimes is fully independent of political influence over at least the broad directions of competition policy enforcement. In the United States, the separation of legislative and executive powers under the American presidential system, combined with two separate administrative enforcement agencies, arguably ensures greater legislative and executive influence over enforcement policies than is the case with either the Japanese or European experience. In contrast, the influence of other policy-making and implementing

¹¹ See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 85-86.

¹² See Council Regulation No. 17, art. 15(2), 1959-1962 O.J. SPEC. ED. 87. Whether the fine is measured in terms of the turnover for the particular products involved in the violation or of the enterprise's overall business is not clarified in Regulation No. 17.

¹³ See cases cited in BARRY E. HAWK, 2 UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTI-TRUST: A COMPARATIVE GUIDE 42 n.146 (1993 ed.).

bureaucracies in Japan and Europe appear to be significantly greater. As a result, it is considerably more difficult to coordinate competition and trade policy in the United States or to assure coherence in economic policies.

The role of judiciary also differs considerably among the three systems. The United States is the most distinctive. As noted previously, in contrast to Japanese, German and European practice, as well as United States experience in the area of international trade law, U.S. competition rules have been developed largely by judicial decision rather than either legislative enactment or administrative regulation. Moreover, courts in the United States, unlike those in Japan or continental Europe (including the European Union), also participate actively in the enforcement of competition as well as other regulatory rules as a partner in public law enforcement with executive agencies. In Japan and Europe, fines are imposed by the responsible administrative enforcement agency subject to *de novo* judicial review, whereas, in the United States, they are imposed in civil judicial proceedings initiated by the agency. More subtle differences restrain judicial authority in Japan and Europe in both criminal cases and private damage actions. Although ostensibly similar, here too U.S. courts play a role more akin to an independent enforcement authority than in either Japan or Europe. In Japanese, European, and more general civil law practice influenced by separation of powers principles, judicial and administrative courts tend predominately to have a more exclusively reviewing role. Without the contempt powers of their common law counterparts, judges in civil law jurisdictions rarely if ever are called upon by administrative authorities to enforce administrative orders and decisions. In civil damage (Japan and Germany) and criminal actions (Japan only), administrative decisions and interpretations of the statute, albeit not determinative, tend to be treated with considerable deference.

The prevalence of private damage actions coupled with greater judicial independence, at least with respect to federal judges, combine to reduce relative coherence in competition and trade policies even further in the United States. Unlike Europe or Japan, without legislative changes, judicial definition of competition policy and its enforcement through private damage actions are not subject to executive control.

Differences in appellate practice — notably the European and Japanese presumption of *de novo* review of facts on first appeal in civil and criminal cases — also affect administrative proceedings. The general lack

of *de novo* review helps to explain why administrative procedures in the United States are considerably more “judicialized” than in Europe or Japan. As a consequence, from a Japanese or European perspective, they seem extraordinarily complex and costly. On the other hand, from a U.S. viewpoint, administrative proceedings in both Japan and Europe seem quite informal. Recently U.S. practice has begun to influence both, especially with respect to hearings. Japanese FTC enforcement proceedings have been governed from the early 1950s by detailed procedural requirements to ensure accuracy and fairness. And a recent Tokyo High Court decision invalidated an FTC decision on the grounds that one of the five members of the Commission who decided the case had been chief of the Investigations Bureau at the time the Commission staff initiated the preliminary investigations years earlier.¹⁴ European and German enforcement procedures are considerably less constrained by procedural requirements. For example, the European Commission has only recently begun to use hearing examiners and still does not practice as complete a separation of investigatory, prosecutorial, and decision-making functions as required in the United States or Japan.¹⁵

Effective government action to enforce legal rules requires that public enforcement authorities have access to information to determine compliance. The investigatory powers of U.S. enforcement authorities are considerably broader and more coercive than any of their counterparts in Japan or Europe. The combination of reporting requirements, extensive discovery powers, and the availability of judicial contempt sanctions for their enforcement enables significantly greater access to evidence in both public and private law enforcement actions in the United States, with, it should be added, equally greater costs for both prosecution and defense. Unable to compel full disclosure as effectively as their U.S. counterparts, both Japanese and European competition law authorities are forced to rely on surprise site searches as the principal means of gathering evidence of violations. The costs and personnel required, however, preclude frequent resort to these means. As a result, it appears that evidentiary problems alone reduce considerably the effectiveness of enforcement.

¹⁴ Judgment of Feb. 25, 1994 (Toshiba Chem. K.K. v. Fair Trade Comm'n), Tokyo Kōsai [Tokyo High Court].

¹⁵ For a comparison of the “transparency” of U.S. and European administrative enforcement proceedings, see observations by Ivo Van Bael et al., in *PROCEDURE AND ENFORCEMENT IN E.C. AND U.S. COMPETITION LAW* 192-214 (Piet Jan Slot & Alison McDonnell eds., 1993).

In terms of enforcement personnel, Japan is relatively strong. With 484 staff employees, of whom about 200 are assigned as investigators, the Japanese FTC staff is somewhat larger than either the German Cartel Office or the Division IV staff and on a per capita basis has nearly as many enforcement personnel as the United States. The Antitrust Division of the Justice Department currently employs 638 persons, and the FTC has a staff of 330, mostly attorneys with a few economists, whose primary responsibility is antitrust law enforcement.¹⁶ In the case of criminal actions, however, Japan is severely limited by a dearth of procurators — only 2100 to handle nationwide all criminal prosecutions and civil litigation in which the state of Japan is a party.

Once a violation is determined to exist, differences seem to diminish. Until the late 1970s, Japanese penalties for violations of the Antimonopoly and Fair Trade Law were without question considerably weaker than those available under U.S., German, or European Union law. The addition of an illegal profits surcharge in 1977, modeled after the German *mehrerlös*, parallels the basic penalty under Regulation No. 17. Although the method for calculating the fine was amended in 1991 to increase the maximum and broaden its application, the Japanese surcharge remains narrower in definition and application. Nevertheless, in 1992, the Japanese FTC levied a surcharge in 10 cases against 103 enterprises, ranging from ¥220,000 (approximately US\$2,200) to ¥235 million (approximately US\$2.3 million) for a total of ¥1.99 billion (US\$19.9 million).¹⁷ In comparison, in 1993 Antitrust Division enforcement actions resulted in fines amounting to US\$40.4 million against 64 corporations and US\$1.86 million against individuals.¹⁸ Although on average the Japanese fines appear to be less than half of the U.S. counterparts, without information on the size of the firms involved, it is difficult to assess their actual impact. In any event, however, as amended and currently applied, the Japanese surcharge cannot be considered negligible. By almost any measure the United States far

¹⁶ PERSONNEL OFFICE, FTC, 1993 ANNUAL REP. (Feb. 24, 1994) (citing personnel statistics from FTC and Dep't of Justice).

¹⁷ KŌSEI TORIHIKI I'INKAI [FAIR TRADE COMMISSION], NENJI HŌKOU [ANNUAL REPORT] 72-74 (1993).

¹⁸ Antitrust Division, Dep't of Justice, Workload Statistics 1984-1993, 8 (internal memo).

outdistances Europe and Japan in terms of the number and variety of enforcement actions¹⁹ as well as the severity of the penalties imposed.

III. DOES ENFORCEMENT MATTER?

Whether differences in the means and levels of enforcement matter depends upon the answers to two other questions. First, we need to know what policies are pursued or, more narrowly, what anticompetitive conduct is prevalent but tolerated. In addition, an equally fundamental but seldom asked question is the extent to which it is appropriate to equate lax enforcement with such tolerance. Neither question is easily answered. Of greater certainty is the issue of costs and the effect of anticompetitive cost-imposing practices.

A. *Differences in Tolerance of Anticompetitive Conduct*

Violations of competition rules have an axiomatic effect on international trade. As exercises of monopoly power reduce the volume of goods and services produced within any market there will be a reduction of trade in these goods and services. However, to the extent that this reduction produces increased trade in substitute goods and services, no overall reduction in trade may occur. Nonetheless, anticompetitive conduct will have distorted trade patterns. Conversely, to the extent that competition law is effective in fostering greater competition by eliminating trade distorting exercises of monopoly power, the more effective the enforcement of competition rules proscribing such conduct, and hence the smaller such distortions should become. Therefore, as a matter of policy, the primary issue becomes the desirability or undesirability of particular distortions. Obviously, the answers given are not always the same. Different regimes will have different priorities. For example, in order to promote the flow of goods and services across national borders within the European Union, Article 85 of the Treaty of Rome is construed to deny holders of national patent rights the right recognized by both the United States and Japan to prevent parallel importation.

¹⁹ See W. Wallace Kirkpatrick, *Antitrust to the Supreme Court: The Expediting Act*, 37 GEO. WASH. L. REV. 746-87 (1969); W. Wallace Kirkpatrick, *Antitrust Enforcement in the Seventies*, 30 CATH. U. L. REV. 431-81 (1981).

As a trade issue — or more accurately as a *national* trade issue — the focus here is less the effect of these distortions on trade than on traders themselves. The principal concern, as explained above, is how such distortions affect traders and the fairness of regimes in relation to treatment of firms in separate home markets. It should be emphasized that the commonly used standards, *reciprocity* and *national treatment*, for measuring fairness can be satisfied without concern for an effective competition policy. Neither reciprocity nor national treatment requires competition or an expansion of international trade. For example, were all national regimes to allow substantial restraints of competition that barred foreign entrants equally — unquestioned reciprocity — the consequences would include a significant reduction of international trade, but would not necessarily be unfair in terms of giving particular advantage or disadvantage to firms from one regime or another.

Similarly, a national treatment standard of fairness may be met even were only one national regime to allow established firms — domestic and foreign — to establish barriers that prevented new entry. Because such a policy would not advantage established domestic firms over established foreign firms, the requirements of national treatment would be satisfied despite the trade distortions and adverse political responses that might result.

For example, assume that rival firms A, E and J in Country J are treated equally in that all are subject to the same restrictions and controls governing competition and potentially anticompetitive conduct, and that they also bear the same potential costs for legal services related to the enforcement of these controls. Assume, in addition, that similar equality in treatment and costs among firms A, E, and J pertain in countries A and E, although there are significant differences in regulation and costs between countries A, E, and J, but which are borne equally by competing firms in each market. Hence, all other factors being equal, all three firms would be subject to the same regulation and costs. The playing fields would be equal; differences in enforcement become a wash. They would not advantage or disadvantage any firm — although to the extent anticompetitive conduct is permitted, there may be significant distortions of trade — with resulting potential losses or more accurately foregone benefits.

Were both reciprocity and national treatment to pertain, it is difficult to conceive of any inter-firm disadvantage or advantage. However, national treatment without reciprocity may of course disadvantage firms established

in one market but not in others. For example, if, as a result of national differences in the effectiveness of anticompetitive restrictions on new entry, firm A were forced to compete with firms J and E in country A but unable to enter the markets and compete with firm J in country J or firm E in country E, it would not be able to achieve the same economies of scale of either firm J or firm E.

Nevertheless, national differences in the costs of enforcement alone can create a home market advantage or disadvantage. Assume that the principal market of each firm A, E, and J is its home market. Substantially lower, or higher, costs related to the enforcement of competition rules in any one of these countries would advantage, or disadvantage, the home market firm. For example, assume firm A has significantly higher costs related to the enforcement of competition rules in its dominant market than firms J or E and firm J has substantially lower enforcement expenses in its dominant market than firms A or E. Unless offset by other costs, firm J will enjoy a competitive advantage over firms A and E, and firm A will suffer a competitive disadvantage in relation to firms J and E.

Although barriers to entry and therefore competition policies that curtail such barriers do matter, enforcement of such competition rules itself becomes an issue only if 1) competition policy prohibits exclusionary practices²⁰ and those rules are not adequately enforced, or 2) there are substantial differences in the costs resulting from enforcement of competition rules to competing or potentially competing firms.

B. Measuring Effective Enforcement

Taken for granted in most, if not all, discussions of enforcement of competition policy is an equation of active enforcement and its effectiveness. The greater the variety and severity of penalties and the number of enforcement actions, the more effective competition policy appears. The error of the equation is apparent. The United States leads the industrial world in the number of criminal prosecutions and severity of penalties. Few would argue from our crime statistics that we have a more effective criminal justice system, i.e., one that achieves a lower level of criminal activity. We know that this is not true because we have a reasonably accurate measure of

²⁰ Without effective exclusionary practices or other barriers to entry, cartels within a national economy are quite difficult to maintain. See *supra* note 7.

crime and criminal activity. Unlike common crimes, however, we do not have any objective count of proscribed anticompetitive behavior. Because no accurate measure of illegal conduct apart from the number of enforcement actions itself is available, we tend necessarily to use enforcement statistics as the measure of effectiveness. We thus equate the number of cases and the severity of the penalties with effectiveness and conversely lax enforcement with tolerance. We need to be reminded of what we do not know. In fact, there does not exist to my knowledge any credible evidence on the relative effectiveness of any competition policy enforcement regime. We simply do not know and cannot say that there is more or less illegal behavior in any country compared to any other. In other words, no empirical data are available to correct profound differences in perceptions within any of these countries regarding the extent of anticompetitive conduct in the others.

Without such measures, we are equally unable to assess accurately the effectiveness in eliminating or deterring proscribed anticompetitive conduct of one enforcement regime over another. Profound differences in social control exist, for example, between the United States and Japan. The Japanese have been far more successful in preventing and controlling crime without resort to formal state controls.²¹ The observation by Hiroshi Iyori²² on the deterrent effects of reputation, particularly denial of Imperial honors (*kunsho*), in preventing anticompetitive conduct in Japan should thus be highlighted. Low crime rates also produce less enforcement activity. The possibility that Japan's industrial structure in fact produces less anticompetitive behavior than in the United States and Europe must not be dismissed.²³ Nor, to my knowledge, have any foreign entrants yet tested the effectiveness of existing competition rules in Japan. Few, if any, formal complaints have been filed with the Japanese FTC by foreign firms against Japanese firms for illegal exclusionary practices. Such complaints — along

²¹ See, e.g., JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

²² Hiroshi Iyori, *Antitrust and Industrial Policy in Japan: Competition and Cooperation*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: JAPANESE AND AMERICAN PERSPECTIVES* 56-82, 61 (Saxonhouse & Yamamura eds., 1986).

²³ For greater detail on U.S. misperceptions regarding competition in Japan, see JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 146-47 (1991); John O. Haley, *Japanese Antitrust Enforcement: Implications for United States Trade*, 18 N. KY. L. REV. 335-66 (1991); John O. Haley, *Weak Law, Strong Competition, and Trade Barriers: Competitiveness as a Disincentive to Foreign Entry into Japanese Markets*, in *JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE?* 203-35 (Yamamura ed., 1990).

with criticism of Japan's enforcement regime — tend to be made to U.S. trade negotiators not Japanese enforcement authorities.

C. Costs

In recent years, there has been considerable dispute over the appropriateness of the United States' mix of sanctions and various features of its enforcement process. With respect to sanctions, the use of private damage actions, especially the availability of trebled damages, has been widely criticized.²⁴ Predatory litigation, it is argued,²⁵ has been used to invite or enforce competitor collusion,²⁶ to raise competitor's costs,²⁷ or otherwise to deter entry or eliminate rivals.²⁸ As summarized by economists William Breit and Kenneth Elzinga, two of the most prominent early critics of treble damage actions as an antitrust penalty, a consensus has emerged — at least among one community of scholars:

The prevailing consensus [of the new learning on private damage actions] is that the current statutory construction needs changing, though proposals for reform are somewhat diverse. They range from complete reliance on public enforcement to recommendations that would effectively lower the damage multiple, raise the requirements for eligibility to recover damages, and preclude private actions in specified circumstances. Secondary reforms would reward attorneys' fees to either prevailing party.²⁹

²⁴ See, e.g., PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (Lawrence J. White ed., 1988); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551-603 (1991); Gary Myers, *Litigation as a Predatory Practice*, 80 KY. L. REV. 565-630 (1991-92).

²⁵ Myers, *supra* note 21, at 585-96.

²⁶ See, e.g., *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982); James D. Hurwitz, *Abuse of Government Process, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 75 (1985).

²⁷ See, e.g., *Alexander v. Nat'l Farmers Org.*, 687 F. 2d 1173 (8th Cir. 1982); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

²⁸ See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

²⁹ William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 443 (1985).

Little in the criticism of predatory litigation and private damage actions has special bearing on international trade. The "perverse effects" that Breit and Elzinga note apply generally throughout the United States and do not have a particularized effect either on international trade overall or, it appears, on foreign firms doing business in the United States. Although, to my knowledge, no empirical study of U.S. antitrust damage actions has attempted to compare the number of private actions brought against foreign as opposed to domestic competitors, the collected data does not show a greater proportion of damage actions involving foreign defendants.³⁰ Whatever the effects of competitor damage suits, they do not appear to impose greater costs or barriers to entry than faced by their U.S. rivals.

However, applied to trade regulation cases, the same argument leads to a very different result. The defense of an administrative action under U.S. trade law is costly. John H. Jackson estimates that a decade ago the private costs per annum of U.S. import regulation amounted to 97 million dollars.³¹ Nearly all of these costs were borne by foreign firms. Domestic competitor petitioners need not incur the litigation costs borne by plaintiffs in a private antitrust action. That cost is borne by the respondent firms and the investigating agencies. As noted by Spencer Weber Waller:

[Foreign respondents] must respond to extensive information requests by the International Trade Administration of the Department of Commerce in conducting its investigation. These costs may result in a heavier burden when spread over the respondents' sales in the United States. Foreign firms will normally have a smaller body of sales in the United States compared to the domestic producers, either because the foreign producers are smaller firms or because U.S. exports represent only a fraction of their total sales. Thus, even where each side incurs similar legal costs, the foreign firms may have to absorb a higher burden per dollar of United States sales.³²

³⁰ See John O. Haley, *United States Antitrust Beyond the Borders: The Japanese Experience*, in AUSTL. INDUS. DEV. ASS'N BULL., Nov. 1980, at 7-15.

³¹ John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1587 (1984).

³² SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 13.02 (1992).

It makes little sense, therefore, for a U.S. competitor to use the private anti-trust action as a cost-imposing tactic to the extent that a similar aim can be achieved for less by resort to a trade action. United States trade procedures are thus akin to the Japanese distribution system as a potentially effective cost-raising barrier to entry.

On its face, Japan's Antimonopoly and Fair Trade Law is second only to the United States in the variety of sanctions and means of enforcement. The statute provides for administrative fines, criminal sanctions, and private damage actions. The investigatory powers of the administrative enforcement agency, the Japanese Fair Trade Commission ("JFTC") are phrased in the broadest terms. However, all law enforcement in Japan is subject to significant limitations. Some of these limitations are shared by all civil law systems — Germany and the European Union included. There is no contempt, limited discovery, strict legislative control over criminal sanctions (especially incarceration), and stringent requirements for proof. More particular restraints on law enforcement exist in Japan. Many relate to problems of institutional capacity: a chronic lack of judges, lawyers, and prosecutors.

The untold story of law enforcement is the cost of defense imposed on the innocent or, at least, those not proven guilty. In the United States, less than ten percent of all private damage actions ever go to trial, and over fifty percent are settled without court action.³³ In the case of public enforcement actions, in civil actions less than one in ten cases investigated end with a judicially confirmed violation in either a civil or criminal action or both.³⁴ The analysis by Kauper and Snyder of the Georgetown Private Antitrust Litigation Project sample of 1,938 antitrust damage actions (1,935 of which were filed between the years 1973 and 1983), revealed that more than a quarter of all private damage actions are dismissed.³⁵ Of the cases litigated (less than ten percent), plaintiffs won less than a third.³⁶ Moreover, over one-third of the actions were filed by competitors.³⁷ In other words, a substantial number of presumptively innocent parties are forced to bear the

³³ Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163, 1185, 1188 tbl. 5.

³⁴ See *id.* at 1176 tbl. 1.

³⁵ *Id.* at 1188 tbl. 5, 1189.

³⁶ *Id.* at 1205.

³⁷ *Id.* at 1184.

costs of defending legal actions brought in large number by their competitors.

The pattern for Japan is somewhat similar. Nearly a third of all cases investigated by the Japanese FTC end with a warning. Less than ten percent result in a formal decision.³⁸ However, few private damage cases have been brought. To the extent that the costs of responding to civil discovery and other investigatory proceedings are significantly higher in the United States than Japan, the costs imposed on innocent respondents are correspondingly lower. In any event, foreign firms do not appear to suffer disproportionately in either system. At worst, the costs are a wash in that they are borne equally by home market and foreign firms.

The argument that, with respect to foreign entrants, differences in the costs of enforcement of competition rules may be a wash does not apply to trade policy enforcement actions. By definition, trade policies are directed at foreign not domestic entrants. Thus, the costs of defending enforcement actions brought under a country's trade rules are borne exclusively by foreign entrants. Again, assuming that the costs of law enforcement in the United States are significantly higher than for Europe or Japan, U.S. firms are able to impose greater costs on their actual or potential foreign competitors than can be imposed on them.

Nonetheless, it appears that the litigation costs borne by established firms in the United States are considerably higher than those borne in the home markets of any rivals in Japan and Europe. The U.S. legal system can thus be compared to the Japanese distribution system. Both are extraordinarily inefficient and impose significant costs on all firms in the marketplace whether established or newly entering. Both, therefore, raise the costs of doing business and thereby constitute a barrier to entry. Neither, however, appears to advantage home market firms at the expense of their foreign competitors. Indeed, as a cost of doing business in the home market, they have the opposite effect.

In conclusion, it appears that neither U.S. nor Japanese complaints against the other regarding the pernicious effects of competition policy enforcement appear to have much merit. Lax competition policy enforcement in Japan cannot be demonstrated to have hurt U.S. firms or greatly benefited Japanese firms since the mid 1970s once most formal barriers to foreign participation had been removed. Nor, however, has

³⁸ Iyori, *supra* note 19, at 76 n.36.

private antitrust enforcement in the United States significantly disadvantaged Japanese and other foreign firms entering the U.S. market. Related concerns over the abuse of U.S. international trade procedures by home market firms against foreign rivals have much more merit.

IV. SOLUTIONS?

Full harmonization of enforcement would be the optimal response in attempting to reduce trade distorting advantages or disadvantages to competing firms from national differences in the enforcement of competition rules. One proposal to this end is uniformity in sanctions. For example, the International Antitrust Code Working Group, sponsored by the Munich Max Planck Institute, includes provisions for common sanctions in their Draft Code.³⁹ They propose that all national competition law provide for injunctive relief, fines, disgorgement of profits, damages, and publication of judgments.⁴⁰ However, the Draft Code would allow differences between national regimes with respect to imprisonment, multiple damages, punitive damages, and suspension or termination of business.⁴¹ Such proposals do not, however, address the critical problems — differences in the effectiveness and costs of enforcement irrespective of similarities in sanctions. The variety of sanctions that are available is less significant than their use and effect.

Elimination of national differences in the fundamental processes of law enforcement, ranging from attorney fee arrangements to the jury system, is simply not feasible. However, greater awareness of differences in the efficiencies of law enforcement regimes and sensitivity by judges and administrative law enforcement authorities to their anticompetitive effects is possible. For this purpose, greater coordination and cooperation among public law enforcement authorities in the United States, Europe and Japan are welcome. Such cooperation might well be extended to greater use of various means of intervention by public authorities in private enforcement actions where their anticompetitive purpose and effect are in question. The

³⁹ See DRAFT INTERNATIONAL ANTITRUST CODE (Final Munich Version 1993).

⁴⁰ *Id.* art. 15, §§ 1-7.

⁴¹ *Id.* art. 15, § 1.

role of the United States *amicus* brief in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*⁴² comes to mind.

A similar role could be played in trade regulation actions. In the United States, the only effective institutional forum within which conflicts between competition and trade policies can be effectively addressed is the Department of Justice. The role of the Department in trade regulation remains less significant, although it has grown in recent years. Questions concerning the legality of U.S. actions are now more routinely aired with the Department and its voice is influential. Unfortunately, the record of Justice Department's responses does not bode well for a more vigorous application of competition policy concerns in the context of trade regulation. Executive branch domestic and international policy concerns have priority. The Department has appeared to have been more likely to justify, rather than challenge, anticompetitive trade policy positions.⁴³

The presence of the head of Directorate-General IV as a full member of the European Commission ensures that there is at least a voice for competition policy at the highest administrative level. Such a reform seems especially appropriate for Japan. Elevating the chair of the Fair Trade Commission to cabinet status would create a similar scheme. In the United States, such result could be achieved were the antitrust division of the Justice Department included formally within the circle of public agencies — notably, the Office of the United States Trade Representative, the Commerce Department, and the International Trade Commission — actively concerned with trade policies. The Division should at least be authorized to play a watchdog role with respect to the probable effects of trade restrictions on competition, including the right to evaluate competitor petitions at the time of filing and to intervene in proceedings.

To the extent that the costs of law enforcement, generally, and competition rules, in particular, impose relatively greater burdens on firms based in the United States or with their principal markets in the United States, efforts should continue to be made to improve the efficiencies in U.S. enforcement procedures. Needless to say, Japanese and European resistance can be anticipated to any attempts to equalize such costs by

⁴² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁴³ See, e.g., WALLER, *supra* note 29, § 14.07. In Waller's words, "the Antitrust Division has become an adjunct to United States trade policy, counseling and advising the other branches and departments of the United States government on how to implement trade restraints that cannot be challenged on competition grounds." *Id.* at 14-25.

seeking to impose similar burdens through reforms designed to introduce American-style enforcement measures, such as treble damage actions.

Arrangements for cooperation among the enforcement authorities have become increasingly prevalent. They include formal agreements, such as the 1991 European Community-United States Antitrust Cooperation Agreement,⁴⁴ as well as informal arrangements, as between the United Department of Justice and the Japanese Ministry of Justice, with respect to the 1994 criminal antitrust investigation in the facsimile paper industry.⁴⁵ However, in a recent interview the Chairman of the Japanese FTC, Masami Kogayu, raised doubts about the ability of the Japanese FTC to enter any formal agreement alluding to obstacles presented by "existing Japanese domestic laws."⁴⁶ Such agreements, nevertheless, provide a useful mechanism to ensure greater uniformity in enforcement as well as to ameliorate conflicts. They thus represent the minimum level of coordination and convergence. As facilitating legislation, the newly enacted International Antitrust Enforcement Assistance Act⁴⁷ is a welcome step.

A more ambitious approach would be to include agreement on consultation within the framework of the World Trade Organization. Perhaps a Council on Restrictive Practices and the application of the dispute resolution mechanisms of the General Agreement on Tariffs and Trade could be used to adjust conflicts that arise in both unilateral enforcement of competition law as well as the anticompetitive manipulation of trade regulation proceedings. This approach, however, would require agreement on standards defining inappropriate proceedings.

In conclusion, no proposal fully resolves the problems and conflicts of enforcement without major reforms to reduce the fundamental differences that distinguish the U.S. legal system from those of its trading

⁴⁴ For an evaluation of the EC-U.S. agreement, see Joseph P. Griffin, *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business*, 24 *LAW & POL'Y INT'L BUS.* 1051-65 (1993).

⁴⁵ The Japanese Ministry of Justice attempted a spot search of Japanese thermal facsimile paper manufacturers in response to U.S. Justice Department requests in connection with a criminal investigation of the firms' activities in the U.S. and Canada. The search was challenged but upheld as legal in an action filed in the Tokyo District Court. In a related Canadian enforcement action, three firms pleaded guilty to criminal violation of the Canadian Competition Act. *Canada v. Kanzaki Specialty Papers, Inc.*, 56 C.P.R. 3d. 467 (Fed. Ct. Trial Div., 1994).

⁴⁶ *Antitrust Links with U.S. Shunned*, *NIKKEI WKLY*, Nov. 7, 1994, at 2.

⁴⁷ International Antitrust Enforcement Assistance Act of 1994, Pub. L. 103-438, 108 Stat. 4597 (codified as amended in scattered sections of 15 U.S.C.).

partners. The best alternatives are those that provide mechanisms to reduce and ameliorate conflicts.

