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The Antimonopoly Law of Japan

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A Brief Historical Review

The Original Antimonopoly Law

Enacted in 1947, the Japanese Antitrust Law (known formally as the Antimonopoly Law and referred to as the AML[1]) has often been the focus of political controversy. At present, the AML is an important tool in the effort by Japan's government to open up the Japanese market and restructure the Japanese economy to make it more compatible with the economies of other major nations.

Before the end of World War II, there was limited understanding of the concepts of free enterprise and competition in Japan. With the end of the war came the Allied Occupation Forces, which introduced the Economic Democratization Policy of which the dissolution of *zaibatsu* combinations and the enactment of the AML were both part.

The original AML was quite stringent. Article 4 (which is now defunct) stipulated that cartels were illegal per se unless their effects were *de minimis*. Resale price maintenance was prohibited. Article 3 stipulated that any enterprise possessing disproportionately great economic power in relation to its competitors would be subject to remedial action, including dissolution.[2]

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1. For general information on the Japanese Antimonopoly Law, see Iyori and Uesugi (1994); Matsushita (1990); and Matsushita (1993).

2. On the dissolution of *zaibatsu* (large industrial combines), see Bisson (1954).

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The Fair Trade Commission of Japan (FTCJ) was created as the enforcement agency of the AML after the model of the United States Federal Trade Commission.

The 1953 Amendment and Subsequent Antitrust Relaxation

Starting around 1950, enforcement of the AML became somewhat more relaxed, for several reasons. For one, in June 1950 the Korean War broke out, causing US policy toward Japan to change quickly from encouragement of a strong antitrust policy to promotion of heavy industry as a means of erecting bulwarks against communist infiltration. Also, it had become evident by about 1950 that the AML in its original form was too ambitious for the Japanese economy, which had been shattered by World War II. Finally, it had also become apparent that there was no popular support for "free competition" and the AML as originally implemented.

In 1953, Japan enacted an amendment deleting Article 4, which had stipulated the per se illegality of cartels. Henceforth, cartels would be controlled under Article 2-6 and Article 3, which stipulated that cartels were unlawful if they restrained competition substantially and if their existence was contrary to the public interest. New provisions (Article 24-3 and Article 24-4) were introduced which authorized, respectively, depression cartels and rationalization cartels. Also, the 1953 amendment introduced an AML exemption covering the resale price maintenance of books and other items subject to copyright; commodities designated by the FTCJ also received an exemption. Another change under the 1953 amendment was the deletion of Article 8, which had provided that a large enterprise could be ordered to partition a portion of its facility, give away technology, or take such measures as appropriate to reduce its economic power if a large gap existed between this enterprise and its competitors in the market. This article was based on the premise that a large enterprise could be subject to an order of dissolution or divestiture without any wrongful conduct on its part as long as there was a large gap in economic power between it and its competitors. This provision was never used during its six-year existence.

The 1953 amendment strengthened one aspect of the AML: the control of unfair business practices. In its original form, the AML had prohibited "unfair methods of competition." The 1953 amendment replaced this phrase with "unfair business practices." It was an objective of the amendment to widen the scope of the law to address practices that were not "methods of competition" but rather were unfairly suppressive of the activities of other enterprises. Examples might include a powerful manufacturer imposing a harsh deal on a subcontractor in a relatively weak bargaining position, or a large retailer such as a department store exacting similarly one-sided terms from its suppliers.

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Supplemental legislation enacted in 1956, the Law to Prevent Unreasonable Delay in Payment to Subcontractors and Related Matters (hereafter referred to as the Subcontractors Law), defined prohibited conducts and remedies more specifically. This law remains an important piece of legislation today (*Shitauke Daikin Shiharai Chien Boshi Ho* [Law to Prevent Unreasonable Delay in Payment to Subcontractors and Related Matters], Law 120, 1956, as amended).

A number of exempting laws were enacted granting certain activities immunity from the AML. This legislation included the Export and Import Transactions Law, which permitted the formation of export and import associations; the Marine Transportation Law, which permitted the creation of shipping conferences; and the Medium and Small Business Organizations Law, which allowed trade associations composed of small enterprises to engage in restrictive activities.

Enforcement activity occurred under the AML from about 1950 to the mid-1960s. Only a handful of cases were decided by the FTCJ annually, even though several large mergers took place during those years. These included the merger of three heavy industrial companies to form Mitsubishi Heavy Industries (1963), the integration of Prince Motor Company into Nissan (1965), and the merger of the Yawata Steel Company and the Fuji Steel Company to form the Japan Steel Company (1969).[3]

Revitalization of the AML in the 1960s

A sharp increase in consumer prices in the early 1960s caused the AML to be regarded in a new light: as a weapon to combat high prices, which arguably were attributable to price cartels, resale price maintenance, and price rigidity caused by oligopolistic structures in the economy. More energetic enforcement of the AML in the 1960s was made evident by the increase in the number of cases in which the FTCJ proceeded against price-fixing cartels among enterprises and trade associations and found them to be unlawful (Matsushita 1990, 1-5).

Another important event in the 1960s was the liberalization of foreign trade and capital transactions. Until the middle of the 1960s, external trade and investment were strictly regulated through import quotas and restrictions on the introduction of foreign capital into Japan. Consequently, there was relatively little room for free competition. As liberalization progressed, the role of the AML increased in areas such as international patent licensing, and the need grew for enforcement of the AML. In response to this new situation, the FTCJ, for one, announced a new set of guidelines in 1968 governing how the trade commission would oversee restrictive provisions in international contracts between Japanese and foreign enterprises.

3. The best source on these developments is Koseitorihiki Iinkai (1967).

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The AML was further revitalized by the emphasis placed on consumer protection by Japan's increasingly affluent society in the 1960s. A supplement to the AML enacted in 1961 (the Law to Prohibit Unreasonable Premium and Representation and Related Matters, hereafter referred to as the Premium and Representation Law) prohibited excessive premium offerings and false and misleading representations; enforcement was entrusted to the FTCJ (*Futokeihinrui Oyobi Futohyoji Boshi Ho* [Law to Prohibit Unreasonable Premium and Representation and Related Matters], Law 134, 1962, as amended). This law continues to be an important piece of legislation.

The 1977 Amendment

The Oil Crisis of 1973 pushed prices sharply upward in Japan. Some oil companies took advantage of the inflation-induced panic by participating in price-fixing agreements. Public criticism was voiced against oil companies, as well as against enterprises whose hoarding practices contributed to higher commodities prices. The FTCJ seized this opportunity by organizing a task force to study the possibility of amending the AML. In a 1974 interim report, the task force recommended an amendment that would make the AML more effective at dealing with cartels and monopolies. The National Diet passed an amendment in 1977 incorporating many new provisions, the three most important of which were the administrative surcharge, structure control, and the price-reporting system.

Until introduction of the administrative surcharge, it had been impossible to forfeit from enterprises extra profits they had gained by means of unlawful price cartels or other cartels affecting price. The FTCJ could only issue orders prohibiting enterprises from continuing the cartels. This weak enforcement mechanism created a situation in which cartels were profitable. The administrative surcharge was implemented as a means of confiscating cartel participants' illegal extra profits and thereby discouraging cartel activity.

Article 2-7 of the AML as amended—the structure control provision—stated that when an enterprise occupied 50 percent or more of a particular market, or two enterprises occupied 75 percent or more, new entry into the market was difficult and undesirable economic outcomes resulted, such as excessively high price and profits or excessive expenditures on general expenses. Under the structure control provision, such enterprises were deemed to be in a monopolistic situation and the FTCJ could order them to be dissolved into smaller entities if other means of remedying the situation failed.

The price-reporting system was designed to deal with simultaneous price increases in oligopolistic markets, a common occurrence. Previously,

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if there had been collusion among a small number of enterprises to raise their prices, this activity could have been prohibited on the grounds that it constituted the activity of a cartel. However, there would often be no evidence of collusion. Under the provision for a price-reporting system, the FTCJ could now order enterprises that had raised their prices simultaneously in an oligopolistic market to report the reasons for such a price increase and provide supporting data. A summary of the data and their analysis by the FTCJ must be reported to the National Diet. Giving teeth to this provision was the prospect that the FTCJ, when invoking this provision, could require a great quantity of data to be submitted by the enterprises in question, including production costs and customers lists.

The Structural Impediments Initiative (SII)

One of the recent developments promoting revitalization of the AML has been the Structural Impediments Initiative (SII), a trade negotiation between the United States and Japanese governments. The SII was begun in 1989 and concluded in 1990; implementation occurred over the period 1990-93. The task force organized by both governments reported that "structural impediments" existed in the Japanese market preventing penetration by foreign enterprises and foreign goods. Structural impediments in the Japanese market consisted of, among others, *keiretsu* relationships among enterprises (closely interrelated business relationships among enterprises), mutual stockholdings of enterprises belonging to an individual group (such as the Mitsubishi and Mitsui groups), and interlocking directorates among enterprises. The task force recommended that the enforcement of the AML be expanded to cope with these impediments.

In response to the SII report, the Japanese government undertook to increase the enforcement of the AML in several respects. First, the rate of administrative surcharge was raised from 2 percent to 6 percent of the total sales of each participant in a cartel of the product in question (in sectors other than retail and wholesale business). Second, the FTCJ announced a set of guidelines entitled "The AML Guidelines on Distribution and Trade Practices." Third, the maximum criminal fine with regard to corporations was raised to ¥100 million. (Before the amendment, it had been ¥5 million.) Fourth, the FTCJ announced a program whereby it would assist private plaintiffs who brought civil suits for recovery of damages against defendants who violated the AML by providing data and documents so as to enable them to prove the amount of damages and the causal link between the unlawful conduct and the damage.

The number of FTCJ investigators was increased, and the commission established a special office designed to receive complaints from foreign

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parties claiming their efforts to penetrate the Japanese market had failed because of violations by Japanese enterprises of the AML.

Summary

The AML's enforcement has alternately weakened and strengthened as the result of economic and political pressures both domestic and foreign. On the whole, however, it seems fair to state that enforcement has been strengthened over the years.

A Summary of the Japanese Antimonopoly Law

An Overview

Although the Antimonopoly Law was originally modeled after United States antitrust laws, it has become clear over time that some of the enforcement methods inherited from these laws (such as damage suits and criminal penalties) are not effective in Japan. Therefore, other methods of enforcement, such as the administrative surcharge, have been introduced.

Generally, activities that come under the regulation of the AML are private monopolization (Article 2-5, Article 3), cartels (Article 2-6, Article 3), and unfair business practices (Article 2-9, Article 19).

Private monopolization is defined in Article 2-5 and is prohibited by Article 3 of the AML. Under those provisions, a private monopolization is an "exclusion" or "control" by a powerful enterprise of the business activities of other enterprise(s), thereby causing a substantial restraint of competition in a particular field of trade.

Articles 9 through 13 of the AML (see chapter 4) have been designed to control mergers and acquisitions. They are preventive measures in the sense that, since a private monopoly can be exercised only by an enterprise with a powerful position in a market, the control of mergers and acquisitions so that there will be no excessive concentration of corporate power in a market serves to head off private monopolization in its incipiency.

In Article 2-7, which was incorporated into the AML by its 1977 amendment, a "monopolistic situation" is defined. This provision is designed to deal with an oligopolistic market structure rather than a specific action by an enterprise. In a situation where an enterprise enjoys a large market share—enabling it to charge high prices and to earn high rates of profit—the prohibition of private monopolization is meaningless unless such a monopolistic position has been acquired by means of an

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exclusion or control by the enterprise of the business activities of other enterprises. As long as such a monopolistic position is the result of natural growth or superior technological or managerial skills, it does not amount to private monopolization even though competition in a market declines. Whether to extend antitrust control to "structure" is a policy matter. In the 1977 amendment, the National Diet decided to incorporate a provision into the AML designed to exert such a control. If a monopolistic situation exists, in order to restore competition the FTCJ can apply a dissolution measure to an enterprise.

Cartels, or Unreasonable Restraint of Trade

Cartels, described as "unreasonable restraint of trade," are defined in Article 2-6 of the AML. Under this definition, a cartel is an agreement (whether overt or tacit) or understanding between enterprises whereby they restrain competition mutually and cause substantial restraint of competition in a particular field of trade. Article 3 prohibits unreasonable restraint of trade. This article corresponds roughly to Section 1 of the Sherman Antitrust Act and Article 85-1 of the Treaty of Rome. Article 2-6 of the AML states that a cartel is unlawful when it is contrary to "the public interest." As will be discussed later, there are differing views on what constitutes the public interest.

Clauses (i) through (iii) of Article 8-1 of the AML prohibit trade associations from engaging in conduct that restrains competition or otherwise limits members' activities. Because trade associations play an important role in the Japanese economy and often engage in restrictive activities, Article 8 is an important provision in the prohibition of cartels. Exemptions for cartels are discussed in chapter 4.

Unfair Business Practices

Unfair business practices are defined in Article 2-9 and prohibited by Article 19. Article 2-9 states that unfair business practices are activities that impede fair competition; that come under any of the six following categories: unreasonable discrimination, transactions with unreasonable price, unreasonable inducement or coercion of customers of competitors, unreasonable control of business activities of other enterprises, abuse of dominant bargaining positions, and unreasonable interference in the matters of competitors; and that are designated by the FTCJ as falling within the framework of these six categories. The FTCJ has announced a set of designations enumerating the activities that fall under the rubric of unfair business practices.

Unfair business practices as defined above include a multitude of practices

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such as refusals to deal, boycotts, sales below costs, false advertisements, excessive premium offerings, exclusive dealings, and tie-in arrangements. As mentioned earlier, the Subcontractors Law and the Premium and Representation Law provide support to the provisions of the AML governing unfair business practices.

The Enforcement Agency and Its Procedures

The Fair Trade Commission of Japan

The FTCJ is the enforcement agency of the AML. The FTCJ is composed of a commission chairperson, four commissioners, and a secretariat. Altogether, the FTCJ employs more than 500 staff attorneys and other personnel. The chairperson is nominated by the prime minister with the consent of both houses of the National Diet; the fitness of the nominee must also be verified by the emperor. Commissioners are appointed by the prime minister with the consent of the National Diet.

The FTCJ wields administrative, quasi-legislative, and quasi-judicial powers. Its administrative purview includes licensing powers (for example, the power to approve depression cartels and fair-competition codes), the requirement that it receive and examine notifications (such as notifications of the establishment of trade associations and the signing of international contracts), the prerogative to consult with other ministries and give advice to industries, the authority to conduct economic research, and other powers.

The quasi-legislative powers are, in short, the rule-making powers, among which are the powers to designate and elucidate unfair business practices and to name the commodities for which resale price maintenance are allowed.

The quasi-judicial powers include the powers to initiate an investigation, to hold administrative hearings, and to make decisions concerning the legality of conduct. This last power includes the authority to levy an "elimination measure" (the equivalent of a cease-and-desist order of the US Federal Trade Commission). An administrative hearing is an adversarial process with the administrative hearing examiner or the commission presiding.

When the FTCJ deems that a violation exists, it can choose to issue a statement to the offending party that the conduct in question is a violation and recommending that the party discontinue it. If the party accepts the recommendation, the FTCJ does not proceed with a formal hearing process. The FTCJ's decision in such a case is called a *recommendation decision*. If an administrative hearing is initiated, the respondent can propose to the FTCJ that it will accept the allegations of facts and law as stated in the complaint by the FTCJ and that it will take neces-

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sary measures to stop the conduct complained of and restore competition. If the FTCJ deems this proposal to be appropriate, it issues a *consent decision*.

A decision of the FTCJ adverse to the respondent may be appealed to the Tokyo High Court and to the Supreme Court. However, the party who receives a recommendation decision or a consent decision cannot bring a suit against it in the Tokyo High Court since such decisions are based on the agreement between the respondent and the FTCJ. When reviewing a case in which a decision of the FTCJ is at issue, the Tokyo High Court is bound by the substantial-evidence rule.[4]

Elimination Measures and Administrative Surcharge

As explained above, the FTCJ issues a decision together with an elimination measure when it has found that an action is in violation of the AML. An elimination measure is a remedy to restore competition and may take various forms according to the nature of the violation in question. It can serve as a means of implementing any order necessary to restore competition. In price cartel cases, for example, the FTCJ usually issues an elimination measure commanding the parties in violation to cancel the cartel agreement and to make public that the cartel has ceased to exist.

As already discussed, the 1977 amendment introduced the administrative surcharge. The details of administrative surcharge are discussed in chapter 3.

Criminal Penalty

Article 89-1 of the AML provides that a person who has created a private monopolization or an unreasonable restraint of trade (cartel) is punishable by a fine not to exceed ¥5 million or by a prison term of not more than three years. The 1992 amendment created a criminal fine on corporations (Law No. 107, 1992 amending Article 95 (l)(i) of the Antimonopoly Law). Under this amendment, which took effect on 1 January 1993, the maximum fine on corporations is ¥100 million. Article 89-2 provides that when a trade association restrains competition substantially in a particular field of trade contrary to Article 8-1 of the AML, the same penalty as that for individuals applies.

4. Substantial-evidence rule is provided in Article 80 of AML. It states that the facts in a case determined by the FTCJ is binding on the court that exercises judicial review on the decision only if the facts are supported by substantial evidence. However, this article also states that the court is empowered to decide whether or not there is substantial evidence with regard to the facts found by the FTCJ.

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One feature of the system of criminal penalties under the AML is that an accusation by the FTCJ is the prerequisite for public prosecutors to bring an indictment (per Article 96).

Private Damage Action

Articles 25 and 26 of the AML permit a private plaintiff who suffers property damage resulting from a private monopolization, unreasonable restraint of trade, or unfair business practice to bring a suit in the Tokyo High Court for recovery of the damage. The prerequisite of an action under Articles 25 and 26 is that the FTCJ has acted against the conduct in question and a decision (of any kind) has been rendered and become finalized. If an FTCJ decision has been finalized with regard to a conduct and if a private plaintiff brings up a damage action on account of such an act, the defendant cannot claim that there has been no intention or negligence on his or her part. Therefore, the defendant's liability is a no-fault liability.

Article 709 of the Civil Code provides for tort claims generally. Under precedents, whenever there is a violation of the AML, a private plaintiff can bring a tort claim against the malefactor and seek the recovery of damages under Article 709 of the Civil Code; the plaintiff can do this regardless of whether or not there is an FTCJ decision on the action in question (Decision of the Supreme Court, 8 December 1989, *Minshu* [Supreme Court Civil Cases Reporter], 43[11], 1259 et seq. [1989]). Under the general rule of the Civil Code, however, the plaintiff must prove a tortious intent or negligence on the part of the defendant.

Whether a suit occurs under Articles 25 and 26 of the AML or under Article 709 of the Civil Code, the plaintiff in a suit must prove the amount of damage and the causal link between the damage sustained and the unlawful conduct in question. As is touched upon later, the rule regarding this proof is quite stringent, and it is quite difficult for a plaintiff to meet this requirement.

Salient Features of the Enforcement Process

Overview

In this chapter, I take up some aspects of the enforcement of the Antimonopoly Law (AML). The Japanese enforcement system is a mixture of diverse elements. As originally enacted in 1947, the enforcement methods of the AML were modeled after those in United States antitrust laws. There were three primary methods of enforcement. One was the elimination measure (cease-and-desist order) issued by the Fair Trade Commission of Japan. The second was criminal fines and imprisonment. The third

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was the private suit initiated by the private plaintiff to recover damages sustained by an unlawful conduct.

However, the criminal fines and imprisonment and the private damage suit have proved to be ineffective. In the early 1970s, the Oil Crisis occurred and prices soared. Oil cartels were discovered and a public outcry was raised against them. It was considered necessary to introduce a measure to forfeit profits gained by the participants of a cartel. Consequently, the administrative surcharge was introduced by the amendment of 1977. In the late 1980s, as a result of the Structural Impediments Initiative (SII), the Japanese government promised to strengthen the powers of the AML. As noted in the preceding chapter, the rate of administrative surcharge was raised, as was the maximum fine vis-à-vis corporations; guidelines on distribution and trade practices were formulated; and the FTCJ announced that it would launch a program whereby it would provide assistance to private plaintiffs who brought suits to recover damages by providing documents and data it had acquired in the process of investigation. Consequently, although the process of enforcement in Japan is primarily based on that in the United States, it has become somewhat different from that in the United States and also from that in the European Union (EU).

Administrative Surcharge

The administrative surcharge in Japan resembles the administrative fine in the European Union in that it is imposed by an administrative agency as an administrative measure rather than a criminal penalty. Yet it is different from the administrative fine in the European Union in that whereas the administrative surcharge is regarded as an administrative measure to collect the extra profits gained by the participants in a cartel during the period in which the cartel was effectively implemented, the administrative fine in the European Union is regarded as a "penalty," and the penalty may exceed the actual extra profits gained by participants in a cartel.

The administrative surcharge under the AML is imposed not on actual extra profits gained by an enterprise from participating in a cartel but on an estimated extra profit. This is because it is practically impossible for the FTCJ to calculate the actual amount of extra profit gained by cartel participants in each case.

Article 7-2 of the AML stipulates that a participant in a price cartel or a cartel that affects price (such as that for production quotas) shall pay 6 percent of the total value of sales of the product in question during the period in which the cartel was effectively implemented in the manufacturing industries. In wholesale industries, the rate is 1 percent; in retail industries, it is 2 percent. Before enactment of this amendment, the rate was one-half of 3 percent (=1.5 percent) of the total value (in

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manufacturing 4 percent, in retailing 2 percent, and in wholesale 1 percent) of sales of the product in question during the period when the cartel was in existence. When a cartel has lasted for more than three years, the administrative surcharge must be applied retroactively to the period beginning three years before the surcharge was imposed.

As part of the SII, the United States government insisted that the administrative surcharge be raised to 10 percent of total sales. In response, the FTCJ organized a task force to examine the issue. The task force concluded that to raise the administrative surcharge to 10 percent would be impossible because the administrative surcharge would then amount to not only a collection of extra profits but also a penalty. Because criminal penalties are also provided for in the AML, the imposition of an administrative penalty in excess of extra profits would be a de facto penalty and violate Article 39 of the Constitution, which prohibits double jeopardy.

Because, as stated earlier, the administrative surcharge is not a penalty but merely a collection of extra profits, the figure cited earlier—6 percent of total sales of the product of an enterprise that had participated in a manufacturing cartel—is not the maximum leviable administrative surcharge. The FTCJ must impose the administrative surcharge on cartel participants uniformly, calculated on the basis of the formulas provided above, although there are exceptions for small enterprises.

In the European Union, the maximum administrative fine is the greater of 1 million European Currency Units (ECUs) or 10 percent of the total value of worldwide sales in the preceding year of a party in violation. In the European Union, the administrative fine is based on the sales of a violating party in their entirety in the preceding year. In Japan, the administrative surcharge is a fixed rate whose amount is based on the sale of the product in question of a violating party for a period of three years or less, depending on the individual case.

See table 1 for the annual amount of administrative surcharges levied in Japan, in yen, for the years 1985-94.

The total levy for 1990 was unusually high because the Cement Cartel Case (In re Nihon Cement K. K. et al., Decision of the Fair Trade Commission, 25 January 1991, Shinketsushu, vol. 37 [1990-91] p. 59 et seq; In re Onoda Cement K. K. et al., Decision of the Fair Trade Commission, 25 January 1991, Shinketsushu, supra., p. 70 et seq.),[5] in which an unprecedentedly large administrative surcharge was imposed, was decided that year. Even if this year is excepted, however, the record shows a remarkable increase in the amount of surcharges imposed over the 10-year period.

However, it should be noted that the rate of surcharge is fixed by

5. Although these cases were formally decided by the FTCJ in early January 1991, the respondents had accepted the FTCJ measures at the end of 1990.

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Table 1 Sum levied as administrative surcharges under Japan's Antimonopoly Law, 1985-94 (in yen)

Year	Cases	Surcharge
1985	4	407,470,000
1986	4	275,540,000
1987	6	147,580,000
1988	3	418,990,000
1989	6	803,490,000
1990	11	12,562,140,000
1991	10	1,971,690,000
1992	17	2,681,570,000
1993	22	4,087,400,000
1994	26	5,668,290,000

Source: Annual report of the FTCJ.

law, which makes it easy for enterprises to calculate how much financial risk is involved in participating in a cartel. Enterprises may take this into consideration as a form of cost, and if projected profits exceed the estimated cost, there will be an incentive to enter into a cartel agreement.

Criminal Penalties

Clauses (i) and (ii) of Article 89-1 of the AML provide that violations of Article 3 (private monopolization or unreasonable restraint of trade) and of Article 8-1 (substantial restraint of competition by a trade association) are punishable by a term of imprisonment not to exceed three years or a fine not to exceed ¥5 million, or both. Article 95 provides that when the natural persons who constitute the representative and employees of a corporation commit punishable offenses covered in Article 89-1, clauses (i) and (ii), the corporation is subject to punishment as well as the natural persons.

The FTCJ has the exclusive power to bring a criminal accusation against individuals and corporations to the prosecutor general; unless the FTCJ has brought an accusation, the prosecutor general cannot bring an indictment.

Through the mid-1990s, the record of criminal prosecutions has been scanty. Typical has been the Oil Cartel (Production Adjustment) Case, decided by the Tokyo High Court in 1980 (Decision of the Tokyo High Court, 26 September 1980, *Hanrei Jiho* [Current Court Cases Reporter], 983, 22 et seq. [1980]). At issue was a program of the Petroleum Association of Japan that was encouraged by the Ministry of International Trade

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and Industry (MITI) to cut back the amount of oil refining it was doing. The Tokyo High Court held that, although the conduct of the defendants was unlawful, they were not guilty due to the lack of criminal intent. By contrast, in the Oil Cartel (Price-Fixing) Case, decided by the Supreme Court in 1984, a number of oil companies engaged in an agreement to raise prices of petroleum products. The Supreme Court held that most of the defendants were guilty (Decision of the Supreme Court, 24 February 1984, *Keishu* [Supreme Court Criminal Cases Reporter], 38[4], 1287 et seq. [1984]).

Recently, however, criminal enforcement has been stepped up in accordance with the promise made by the Japanese government under the SII. In 1991, the FTCJ brought an accusation against producers of wrap materials who had engaged in price-fixing activities. Indictments were issued, a criminal trial was held, and, in 1993, all the defendants were found guilty (Decision of the Tokyo High Court, 21 May 1993, *Hanrei Jiho* [Current Court Cases Reporter], 1474, 31 et seq. [1993]).

In 1992, the Public Prosecutor's Office indicted a number of individuals alleged to have engaged in bid rigging in the sale of peel-off seals to the Social Welfare Agency, an action in violation of a provision in the Criminal Code prohibiting rigging in public bids. In 1994, the Tokyo District Court handed down a decision in which the defendants were found guilty. Upon notice from the Public Prosecutor's Office, the FTCJ investigated the issue under the AML and issued a decision ordering the enterprises to discontinue the bid rigging. The FTCJ filed an accusation against the corporations with the Public Prosecutor's Office for a violation of criminal provisions of the AML. The Public Prosecutor's Office brought up an indictment and, in 1993, the Tokyo District Court held that the defendants were guilty (Decision of the Tokyo High Court, 14 December 1993, *Hanrei Taimuzu* [Court Decisions Times], 840, 81 et seq. [1994]; Antimonopoly law case, Decision of the Tokyo District Court, 7 March 1994, unreported [criminal law case]).

Although evaluation at this point would be premature, the criminal provisions of the AML may prove to be effective if the current enforcement policy continues. As noted above, in 1992 the AML was revised to increase the criminal penalty to be imposed on corporations. In Japanese criminal law doctrine, a corporation in and of itself is not subject to punishment apart from the criminal responsibility of the individuals belonging to it. Therefore, under Article 89 of the AML, a corporation could be punished only if individuals who were representatives or employees of the corporation had committed a violation of Article 89. Hence, under this doctrine, the maximum penalty a corporation could be assessed could not exceed the maximum for individuals (i.e., ¥5 million).

The maximum fine of ¥5 million was thought to be too small to deter corporate violations, although the social stigma attached to criminal prosecutions was considered to have a deterrent effect.

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As part of the effort to step up antitrust enforcement, the FTCJ considered increasing criminal penalties. To this end, it organized a task force, which recommended in a 1991 report that the traditional equivalence between a corporation's degree of criminal liability and that of the individuals associated with it should be ended. Specifically, the task force also recommended that the maximum criminal fine leviable on corporations should be raised to several hundred million yen. The Japanese cabinet decided to introduce an amendment to the AML that would raise the maximum criminal fine for corporations to ¥100 million. As mentioned, the bill was passed by the National Diet in 1992 and took effect in 1993.

In the United States, antitrust laws are enforced by means of criminal penalties as well as treble-damage lawsuits. In the European Union there is administrative penalty, but no criminal enforcement of the kind found in the United States. In Japan, there exist both criminal penalties and administrative surcharges.

When first implemented in the 1940s, the AML introduced criminal enforcement modeled after US antitrust laws. Over the years, however, this form of enforcement proved ineffective. As noted above, after the Oil Crisis of the 1970s, an attempt was made to introduce an administrative surcharge. One means of doing this would have been to introduce an "administrative fine" after the model of the European Union. However, an administrative fine assessed on the extra profit gained by the participants in unlawful activity would amount to a "fine," if not a criminal fine. This would be a violation of the principle of double jeopardy as incorporated in the Constitution.

Therefore, as introduced into the AML in the 1977 amendment, the administrative surcharge was characterized as merely a collection of extra profit. Although the amount collected may not exactly equal the extra profit gained by the parties to an unlawful activity and, therefore, may in fact have the same effect as a fine, in theory it is not regarded as a fine. For the above-stated constitutional reason, an administrative surcharge cannot be raised to a level greater than the amount of extra profit accrued as a result of illegal activity.

It seems that the dualism of the administrative surcharge and the criminal penalties is anomalous in the context of antitrust laws elsewhere in the world. This anomaly creates an obstacle to any attempt to raise the administrative surcharge above a certain level. However, the existence of the administrative surcharge makes it difficult to raise criminal penalties to corporations beyond the maximum fine of ¥100 million, although this amount probably is insufficient in view of the size and power of large corporations in contemporary Japan. In this sense, the counterposing of administrative fines and criminal penalties creates a sort of system of checks and balances that prevents the strengthening of one or the other.

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A remodeling of the penalty system under the AML seems necessary. One way of doing so would be to change the AML so that the FTCJ could either impose an administrative surcharge or bring up an accusation if there were a case in which a serious offense apparently was involved. Doing so would avert a double imposition of a criminal penalty and an administrative surcharge. Under such a new regime, the amount (or rate) of administrative surcharge could be raised to a level at which it would be an "administrative fine" in the sense understood in the European Union.

Private Damage Actions

Overview

Articles 25-1 and 25-2 of the AML provide that an enterprise guilty of private monopolization, unreasonable restraint of trade, or an unfair business practice shall be liable to make compensation for the damage sustained by a person and that the enterprise cannot escape from the liability by maintaining that there was no tortious intention or negligence on the part of the enterprise. Article 26-1 provides that a claim based on Article 25 cannot be entertained until and unless an FTCJ decision has been made final with regard to the violation in question. In short, these articles provide for a no-fault liability on the part of an enterprise that has committed a private monopolization, an unreasonable restraint of trade, or an unfair business practice, on the condition that an FTCJ decision has been rendered on the violation in question and has become finalized. Also, as noted above, Article 709 of the Civil Code, which provides for tort liability in general, is applicable when a person has sustained a damage as a result of conduct in violation of the AML.

In the past, private damage actions have been unusual. There may be a multitude of sociological explanations for this. However, as is noted later in this discussion, there is a trend toward more private enforcement today.

Indirect Purchaser and Proof of Linkage between Illegal Conduct and Damage

As the result of a 1987 Supreme Court decision, it is difficult for private plaintiffs who are indirect purchasers and who seek recovery of damages (e.g., consumers) to prove the linkage between illegal conduct on the part of the defendant and the damage sustained by the plaintiff.

In the relevant case, the Oil Cartel (Price-Fixing) Case, the defendants, oil refineries, fixed the price of petroleum products at the refinery level (Decision of the Supreme Court, 2 July 1987, *Minshu* [Supreme Court Civil Cases Reporter], 41[5], 785 et seq. [1987]). The refineries sold the

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product to wholesalers, who in turn sold it to retailers, who then sold it to consumers. Consumers brought claims against the refineries, stating that they had sustained damage as a result of price-fixing by the defendants at the refinery level that eventually translated into higher prices at the retail level.

The plaintiffs had to prove that (1) there was a price-fixing, (2) the retail price rose after the refineries' price had risen, and (3) events that occurred between the time of the price-fixing and the time when consumers purchased the product did not affect the price structure of the product. This last requirement would make it very difficult for the defendants to prove the linkage, and indeed, the Supreme Court decided that the plaintiffs had not proved the linkage between the unlawful price-fixing and the damage they as consumers had sustained.

Following the Oil Cartel Case, the FTCJ announced a program to assist private plaintiffs who bring claims against defendants for the recovery of damages. In short, the FTCJ proposed that it provide helpful economic and business data to plaintiffs and to civil courts handling cases that might help prove the existence of links between illegal conduct and damage and help courts determine the amount of such damages.

Recent Private Enforcement Cases

In 1993 and 1994, civil courts in Japan rendered important decisions in which the issue was a restriction imposed by manufacturers or their subsidiaries on dealers and customers. In those decisions, courts struck down restrictions imposed on dealers and customers by manufacturers on the grounds that they were contrary to provisions of the AML. In 1996, more such decisions were pending, and it was expected that even more would be handed down in the near future. Such decisions in private civil cases may lead to more private cases being filed in the future.

The Toshiba Elevator Case The Toshiba Elevator Company (The Toshiba Elevator Case; Decision of Osaka High Court, 30 July 1993), a wholly owned subsidiary of Toshiba engaged in the servicing of Toshiba-made elevators, refused to supply parts and components to independent companies that were also engaged in servicing elevators. There were problems with an elevator made by Toshiba and installed in a building whose owner had entered into a service contract with an independent contractor. The building owner asked Toshiba Elevator to supply parts and components so that the independent contractor could repair the elevator. Toshiba Elevator refused on the grounds of its policy of denying parts and components to anyone not in the business of servicing elevators. However, when an independent servicing company made a similar request, Toshiba Elevator refused to supply parts and components for the same reason.

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The owner of the building brought a suit against Toshiba Elevator, as did the servicing company, on the grounds that the refusal to supply parts and components constituted an illegal tie-in arrangement between elevator servicing (the "tying product") and parts and components (the "tied product") in a tortious violation of the AML. The two cases were consolidated into one, and the trial was held in the Osaka District Court. The court handed down a decision in 1990 holding that Toshiba Elevator was liable to indemnify the damage sustained by the plaintiffs.

The defendants appealed, arguing that the tie-in arrangement was necessary to maintain the safety of elevator operations. The Osaka High Court held that, although product safety was an important issue courts should take into account when considering the illegality of a tie-in contract, there was no need to take this into consideration in this case because the plaintiffs were sufficiently equipped to handle Toshiba-made elevators. The court granted the award of damage to the plaintiffs. There were no further appeals. The Toshiba Elevator case was the first in which the plaintiffs were successful in winning a damage award.

The Shiseido Case Shiseido (Fuijiki v. Shiseido, Decision of the Tokyo District Court, 5 September 1993, *Hanrei Jiho* [Current Cases Reporter], No. 1474, p. 26 et seq.), Japan's largest cosmetics company, required retailers to engage in "person-to-person sales." This meant that they had to give personal explanations of Shiseido products to customers who came to their shops. Retailers also could not engage in other forms of selling, such as catalogue sales, and the recommended retail price was set by Shiseido. The possible purpose of these restrictions was to ensure that the retail price of Shiseido products would be maintained at a certain level.

After a retailer violated the contract by offering Shiseido products by catalogue, the cosmetics manufacturer disputed the retailer's action and then terminated the contract. The retailer then brought an action against Shiseido alleging that, since this was a long-term contract, Shiseido had no right to terminate it unilaterally. The Tokyo District Court decided that the termination of contract was wrong and ordered Shiseido to resume the supply of its products to the retailer under the terms of the contract. The court based its decision on the finding that Shiseido's retail-price policy had an effect contrary to "the spirit of the Antimonopoly Law." Shiseido appealed to the Tokyo High Court. On 14 September 1994, the Tokyo High Court reversed the decision of the district court, holding that there was no evidence to show that the requirement imposed by Shiseido that retailers had to engage in face-to-face sales activities was intended to maintain the retail price of Shiseido products at the retail level (see Shiseido v. Fujiki, Decision of Tokyo High Court, 14 September 1994. For details, see Matsushita, "Shiseido Jiken Kossoshin Hanketsu" [The Appeals Court Decision in the Shiseido

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Case], Kokusai Shogyo [The Magazine for Cosmetic, Toiletry, & Drug Industries], December 1994, p. 40 et seq.).

Although it is not clear if the court held that the conduct of Shiseido was contrary to the AML, antitrust issues undoubtedly provided a backdrop for the decision.

The Kao Cosmetics Sales Company Case Kao Cosmetics (Decision of the Tokyo District Court, 18 July 1994. This case was not reported by court case reporters.), a sales subsidiary of the Kao Soap Company, one of Japan's large manufacturers of soap, cosmetics, toiletries, and related items, entered into an agreement with a retailer. The retailer engaged in catalogue sales in which it solicited orders by sending advertisements to business offices by fax and sold the products to customers at a price 10 percent to 20 percent lower than the retail price suggested by the manufacturer. The retailer also sold Kao products to discount shops, which were considered unauthorized retailers.

Kao terminated the agreement on the grounds that the retailer did not observe provisions in the agreement requiring the retailer to sell products by means of "counseling sales." The issue in this case was similar to the "face-to-face sales" matter raised in the Shiseido Case.

The retailer brought a claim against Kao alleging that the termination amounted to an abuse of rights. The Tokyo District Court held that the termination of the agreement was intended to exclude low-price sales by the plaintiff. The court pointed out, among other things, that the plaintiff was singled out for termination by reason of low-price sales and sales to discount shops. The court noted that, although there were some other retailers that engaged in catalogue sales, these retailers did not lower prices and were not subjected to termination of the agreement.

The court held that Kao's termination violated Item 13 of the General Designation of Unfair Business Practices announced by the FTCJ, which prohibits resale price maintenance. For this reason, Kao's action amounted to an abuse of rights. Therefore, Kao was ordered to deliver products to the plaintiff as ordered.

Kao appealed to the Tokyo High Court. Although in the Shiseido case the court used somewhat ambiguous expressions referring to conduct contrary to the "spirit" of the AML, in the Kao Case the court clearly stated that the AML had been violated, although the facts of both cases seemed essentially the same.

Informal Regulation

Although informal regulation of antitrust laws is not unique to Japan, it is probably much more common there than in the United States, the EU states, and other countries. The FTCJ has established several prior-

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consultation systems in which enterprises receive advice from FTCJ officials prior to the initiation of business plans. For example, under the AML Guidelines on Activities of Trade Associations, a trade association that obtains a go-ahead in prior consultation with the FTCJ when it intends to initiate a business program is protected from legal action by the trade commission as long as the program operates as described to the commission. If a contemplated plan seems likely to involve a violation of the AML, the FTCJ points this out to the party and suggests that it restructure the plan to conform to the law.

Besides the prior-consultation system, there are informal consultation procedures that enable enterprises and trade associations to obtain the views of the FTCJ on proposed business programs. The 1991 FTCJ Guidelines on Distribution and Trade Practices established procedures for these informal consultations. Informal consultation is also used in the enforcement of Article 6 (control of international contracts) and Article 15 (control of mergers and acquisitions) of the AML, and in the enforcement of the Subcontractors Law. Such informal enforcement is considered as important in Japan as formal actions such as elimination measures, administrative surcharges, criminal indictments, and private damage actions.

Between 1987 and 1993, the number of instances in which trade associations consulted with the FTCJ about the lawfulness of proposed activities ranged from 440 to 960. The total was 540 in 1987, 440 in 1988, 600 in 1989, 845 in 1990, 960 in 1991, 808 in 1992, and 725 in 1993.

In 1991, the FTCJ found 36 percent of the proposed programs in clear violation of trade practices law; 17 percent in possible violation, with further analysis needed; and 47 percent in full conformance with the law. In 1992, 34 percent of programs as proposed were in violation of the law, 25 percent were in possible violation, and 41 percent were in conformance. The proportions for 1993 were 26 percent, 25 percent, and 49 percent respectively.

Cartels and Trade Associations

Overview

In the Antimonopoly Law, a cartel is referred to as "unreasonable restraint of trade." Article 2-6 of the AML defines an unreasonable restraint of trade as an agreement, understanding, or communication of wills among enterprises to restrain competition that indeed substantially restrains competition in a market and that is contrary to the public interest. Unreasonable restraints of trade are prohibited under Article 3 of the AML.

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Trade associations often engage in restrictive activities such as establishing a standard price to be charged by the member enterprises or the maximum quantity of a product to be produced by the member enterprises. Clauses (i), (ii), and (iii) of Article 8-1 are the special provisions controlling activities of trade associations, among which clause (i) is the most important. This passage prohibits a trade association from engaging in an activity that restrains competition substantially in a market.

There are a number of laws exempting cartels from the application of the AML. To understand the legal aspects of cartels in Japan, it is essential to examine those exempting laws as well as the provisions of the AML that prohibit cartels.

Legal issues with regard to the prohibition of cartels in the AML are not fundamentally different from those that arise in the antitrust laws of other countries. They include, among others, proof of cartel, the roles of circumstantial evidence and conscious parallelism, and permissible scope of remedy. Because the rules that have emerged in the AML with regard to such issues are not so different from those developed in other countries, such as the United States and the member states of the European Union, I refrain here from analyzing those legal principles in details and concentrate, rather, on issues that seem uniquely Japanese.

Cartels and the Public Interest

Like most antitrust laws elsewhere in the world, the AML in principle prohibits cartels. FTCJ has taken the position that business arrangements that can be identified as cartels under the requirements of Article 2-6 are unlawful unless put outside the purview of the AML by an exempting law. Some controversy exists with regard to the meaning of the term "public interest" incorporated in Article 2-6.

Article 2-6 requires that a cartel be "contrary to the public interest" in order to be held unlawful. There are three major schools of thought on the interpretation of the term *public interest*.[6]

The prevailing doctrine of interpretation—that is, the view held by the FTCJ and the majority of commentators—is that the "public interest" as described in Article 2-6 means nothing more than "free competition." Consequently, per this view, "contrary to the public interest" is synonymous with substantial restraint of competition. This view holds that consistency with the public interest is not a separate and independent requirement in the AML.

6. See, for details, Matsushita (1993).

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Under the prevailing doctrine, the FTCJ or a plaintiff who challenges a cartel need not prove that the cartel in question is "contrary to the public interest" as long as the cartel substantially restrains competition. This interpretation reflects the view that competition is fundamentally important to the economy and may be regarded as an orthodox position on this subject. However, in practice it is difficult to maintain this position in every case. There may be, for example, a situation in which an agreement among enterprises that are selling a product is necessary to create a countervailing power when they are selling the product to a legally sanctioned monopoly enterprise. There might also be a situation in which an agreement among enterprises engaged in production of, say, chemical compounds, is necessary to guarantee that no chemical substance that would damage the environment is produced.

A countervailing perspective on the concept of the public interest is represented within the business community by the Keidanren (Federation of Economic Organizations), that is, that upholding the public interest is not necessarily the same as upholding free competition, and that consequently the term *contrary to the public interest* is not necessarily synonymous with substantial restraint of competition. Under this interpretation, the public interest means a variety of factors such as the interests of consumers and the growth and stability of the national economy. If one accepts this interpretation, a cartel is not necessarily unlawful even if it restrains competition as long as it is useful in meeting other meaningful economic objectives.

A problem with the Keidanren's interpretation of the content of public interest is that this theory is so vague and general that it can hardly provide criteria for judging whether an agreement among enterprises is contrary to the public interest. Such an interpretation creates the prospect of blanket immunity for all agreements among enterprises that restrain competition because some excuse could always be easily found.

The third theory of the public interest was enunciated by the Supreme Court when it decided the Oil Cartel (Price-Fixing) Case in 1984 (Decision of the Supreme Court, 24 February 1984, *Keishu* [Supreme Court Criminal Cases Reporter], 38[4], 1287 et seq. [1984]). Under this interpretation, the term "public interest" in Article 2-6 of the AML means free competition in principle, but there are exceptional situations in which an agreement that substantially restrains competition is necessary to meet a valid objective. In such situations, courts should weigh the benefit of maintaining competition and the benefit of permitting such an agreement; when the benefit of allowing such an agreement outweighs that of maintaining competition, such an agreement is not contrary to the public interest and consequently not unlawful.

The interpretation adopted by the Supreme Court constitutes a middle-of-the-road approach and, if interpreted and implemented properly, seems

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to be the most balanced interpretation. However, the Supreme Court did not elaborate the details of the meaning of *public interest*. Therefore, it is left to courts, the FTCJ, and commentators to determine the exact meaning of such exceptional circumstances. Generally, however, examples include an agreement among enterprises to avoid hazards to the public, such as an agreement to stop producing an industrial substance that is known to pollute the environment; an agreement to maintain public order and good morale, such as an agreement to restrain publication of obscene literature; and other agreements designed to accomplish additional objectives considered socially valid.

One might argue that such social objectives should be achieved through legislation and should not be left to the concerted efforts of private enterprises. Indeed, legislation is often introduced to provide for such situations. However, there may be a situation in which there is no such legislation or in which such legislation is being considered but has not yet passed despite the immediate need to address the problem. Under such a circumstance, an agreement among enterprises that are designed to achieve a socially acceptable objective may be held as not contrary to the public interest.

Cartels and Administrative Guidance

One of the issues with regard to the prohibition of cartels is the question of whether a cartel initiated under the administrative guidance of a government agency should be immune from the application of the AML. This issue has arisen in the past as a result of the discrepancy between the competition policy enforced by the FTCJ and the industrial policy exercised by the Ministry of International Trade and Industry (MITI). Although the AML prohibits agreements among enterprises or activities by trade associations that restrict competition, the MITI has used agreements and activities of trade associations as a means of implementing industrial policy.

In concrete terms, the MITI has issued "administrative guidance" to enterprises to form trade associations and engage in restrictive activities or to enter into an agreement to restrict competition among themselves. As a result, there have been instances in which activities of enterprises initiated by the MITI have been challenged by the FTCJ as unlawful cartels (examples are given in the following pages).

Recently, the industrial policy of the MITI has changed so that the ministry no longer emphasizes restrictive activities by trade associations or agreements among enterprises that restrict competition as instruments of policy implementation. However, a potential problem lies in the area of control of financial markets by the Ministry of Finance. For example, a uniformity of interest rates exists among banks. If the Ministry of Finance gives guidance to banks to ensure uniformity of interest rates,

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there results a conflict between the policies of the finance ministry and the AML.

It is worth examining some of the cases in which restrictive activities of enterprises initiated under the administrative guidance of the MITI were at issue and seeing what legal rules have emerged from them, given that some of the rules formulated in this process have a universal applicability. One such case is the Chemical Fiber Production Cutback Case (FTCJ Decision, 16 August 1953, *Shinketsushu* [FTCJ Decisions Reporter], 5, 17 et seq. [1954]), decided by the FTCJ in 1953, in which a production cutback program was implemented by a trade association in the chemical fiber industry based on MITI administrative guidance. In the period following the outbreak in 1950 of the Korean War, the Japanese economy was in recession and the chemical fiber industry in particular was suffering from slackening demand.

The MITI issued a directive to the Chemical Fiber Association that its members should come up with a program to cut back production. In response, the association formulated a plan in which it determined the total amount of chemical fiber to be produced each year and allocated production quotas to its members. The FTCJ regarded this scheme as an unlawful restraint of competition, and an administrative proceeding was initiated to determine whether the production cutback scheme was contrary to the AML.

The Chemical Fiber Association brought a defense that the scheme was based on the administrative guidance of the government and should be immune from the application of the AML for that reason. The FTCJ rejected this defense, holding that the association's scheme was unlawful even though it was based on administrative guidance. The rationale given by the FTCJ was that government agencies other than the FTCJ had no power to interpret and apply the AML and to allow exemption from the application of the AML. Attempting to justify conduct on the sole basis that the conduct was based on administrative guidance was tantamount to granting administrative guidance the same weight as legislation, the trade commission said. The FTCJ further asserted that the unreasonableness of the Chemical Fiber Association's justification of its actions was obvious.

In the late 1990s, the FTCJ's decision in the Chemical Fiber Association Case continues to represent the position of the FTCJ with regard to the relationship between the AML and administrative guidance.

Issues related to those raised in the Chemical Fiber Association Case were addressed in the Oil Cartel (Production Cutback Case Decision of the Tokyo High Court, 26 September 1980, *Hanrei Jiho* [Current Court Cases Reporter], 983, 22 et seq. [1980]) and decided by the Tokyo High Court in 1980. Involved in this case was a program of the Petroleum Association, whose members included every oil refinery in Japan, to restrain production of petroleum products. The association established a

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plan to limit the maximum amount of production and allocated production quotas to its members. (Legislation already existed—the Petroleum Business Law—that authorized the MITI to announce and carry out the restraint of production of petroleum products as the ministry deemed necessary.) Because the objective of the law coincided with the Petroleum Association's plan to reduce production, the MITI granted tacit consent to the plan and allowed it to be put in place as part of the implementation of the Petroleum Business Law. However, there was no provision in the Petroleum Business Law exempting such a plan from the AML. Consequently, the FTCJ challenged the Petroleum Association program and recommended to the prosecutor general that the association and the individuals involved in the formulation of the scheme be indicted.

The defendants asserted that this program was based on administrative guidance from the MITI and thus should be immune from the application of the AML. The Tokyo High Court held that, in this particular instance, the defendants could not rely on administrative guidance for justification because the conduct in question was not initiated by administrative guidance but rather by private motivation, and that the MITI only stepped in later to utilize an already existing program.

The court responded in the form of a dictum that an activity initiated by an administrative guidance that would be held unlawful were it not for the administrative guidance could be held as *lawful* if the conduct had been commissioned by a government agency or represented an implementation of the policy of the government. Although the scope of exemption based on administrative guidance may be very narrow, the decision of the Tokyo High Court nonetheless allowed an interpretation that administrative guidance could be grounds for exonerating a conduct that would otherwise be considered unlawful.

On 30 June 1994, the FTCJ announced a set of guidelines on administrative guidance. These replaced a memorandum published by the FTCJ on the same subject on 16 March 1981, shortly after the decision of the Tokyo High Court in the Oil Cartel (Production Cutback) Case.

Today, deregulation of economy is a major policy of the Japanese government. Deregulation involves reducing the powers of ministries, including the power of certain ministries to exempt cartels from the AML. Ministries have traditionally used administrative guidance to retain control of industries under their supervision even after the laws that authorized them to exempt some activities of industries from the AML have expired. Cartels have been exempted as a result of such administrative guidance. The FTCJ announced the new set of guidelines to counteract similar possible moves by ministries in the future.

Basically, the FTCJ guidelines promulgated in June 1994 dictate that activities of enterprises and trade associations initiated on the basis of administrative guidance are considered illegal as long as they meet the requirement for illegality found in the AML. The guidelines enumerate,

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as examples of administrative guidance that tends to generate unlawful activities on the part of enterprises and trade associations, that which relates to: (1) enterprises' movement into and out of particular markets, (2) product price levels, (3) quantity of product produced and utilization of production facilities, and (4) sales methods, quality standards, advertising, representation, and related matters.

It is worth noting that the guidelines mention as a problem area "administrative guidance in which a guidance is given [to enterprises or trade associations] by indicating concrete figures of production, sales, import, the rate of production, the amount of purchase of raw materials, and related matters." It is further stated that "such an administrative guidance tends to cause enterprises and trade associations jointly to decide quantity of production and other terms." In light of the above, if a ministry endeavors to achieve a certain level of imports of a foreign product by issuing administrative guidance indicating the target amount or market share of the product, and enterprises and trade associations subsequently take joint action to achieve this goal, then there is a risk of violating the AML.

Exempted Cartels

Although covered elsewhere, exempted cartels are sufficiently important to warrant a few comments here.[7] Cartels authorized under law include, among other things, depression cartels, rationalization cartels, export/import cartels, medium- and small-enterprise cartels, shipping conferences, international aviation cartels, and insurance industry cartels.

Although the number of authorized cartels has been reduced dramatically over the past quarter century, there are still many such cartels. Widespread cartelization consequently creates opportunities for enterprises to discuss issues among themselves and generate a sense of exclusivity among participants. These consequences are further evidence of the need to reduce the number of authorized cartels.

It is reported that efficiency is lacking in the areas where cartelization is permitted under law and consumer prices are generally high. The Temporary Administrative Reform Promotion Council announced in 1988 that "the AML is the most universal rule of competition in market and exemptions from it should be limited to its minimum necessity. The number of exemption laws are more than 40 at present. It is necessary to review the need for maintaining the existing exemptions from the competition policy viewpoint" (Matsushita 1996).

The Temporary Administrative Reform Promotion Council released

7. Exempted cartels are discussed in greater detail by Suzumura in chapter 14.

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its third report in 1992, in which it proposed that, in light of the fact that the Japanese economy enjoyed a high level of international competitiveness, it was necessary to introduce openness to the Japanese market and reform Japan's economic structure so that it would be more compatible with the economies of other major trading nations. To promote this compatibility, the council proposed that the Japanese government reconsider the total legal system with regard to exemptions of cartels, with a view to abolishing some of them. The council concluded its report by recommending that the Japanese government initiate an extensive program to reduce the number of exemption laws and cartels. It urged that, with regard to the review of exempting laws, the FTCJ and the ministries in charge engage in consultation, and that the Japanese government reach a conclusion by the end of 1995.

Reducing the number of authorized cartels or, if possible, effecting these cartels' abolition, is an important objective in light of the trend in this direction among the major trading nations. It is clear that the existence of a large number of exempting laws and cartels impedes a successful harmonization project.

Summary and Conclusion

Although there are some differences between the antitrust laws of major jurisdictions such as the United States, the European Union, Canada, Germany, the United Kingdom, France, Japan, South Korea, Australia, and New Zealand, one element is common to those countries regarding the prohibition of cartels: In every country in which antitrust legislation exists, the cartel is regarded basically as a form of business activity that should be prohibited or at least limited as much as possible. There are some differences among nations with regard to exceptions and justifications for exonerating cartels of one kind or another. However, in every country, including Japan, the number of such exceptions is being reduced. The differences in this area of antitrust law are not nearly as great as those in other areas, such as the regulation of mergers and acquisitions and nonprice vertical restraints. Therefore, one can anticipate that on the subject of cartel prohibition, nations can agree on basic principles with a view to achieving a greater harmonization or approximation of laws.

An important obstacle to harmonization is the existence of exempted cartels. I attempt no detailed discussion of this issue here because it is discussed in another paper. I will only note that there are still many laws in Japan authorizing cartels for various reasons. It is also worth noting that export cartels are permitted not only in Japan but in almost every country in the world. For the sake of harmonization, this situation must also be addressed.

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Monopolies and Mergers

An Overview

Article 2-5 of the Antimonopoly Law defines private monopolization, and Article 3 prohibits enterprises from engaging in private monopolization. Under Article 2-5, a private monopolization is an "exclusion" or "control" by a powerful enterprise exerted over the business activities of other enterprises whose effect is to restrain competition in a particular market. These AML provisions are designed to address situations in which a powerful enterprise excludes competitors and dominates a market.

Article 2-7 defines "monopolistic situations." Per Article 2-7, the enterprise or enterprises are regarded as being in a monopolistic situation if (1) an enterprise occupies 50 percent or more of a market, or two enterprises occupy 75 percent or more of a market, (2) new entry into the market is difficult, and (3) the price and profit rates of these enterprises are excessively high. The FTCJ can order an enterprise in a monopolistic situation to accept measures to restore competition, including a deconcentration order, which would split up the enterprise. Article 2-7 was incorporated into the AML by the 1977 amendment and is designed to deal with a situation in which an enterprise has acquired a monopolistic situation through natural growth or any other means that is not unlawful as such under the AML.

Articles 9 through 18 (Chapter 4 of the AML) deal with mergers and acquisitions. Among others, they address matters such as the prohibition of holding companies (Article 9), companies' acquisition of each other's stocks (Article 10), and the control of mergers (Article 15). Provisions in Chapter 4 are regarded as "preventive measures" in relation to the prohibition of private monopolization. Whereas a monopolization is only possible when an enterprise has a substantial market power, such a market power is often acquired through mergers and acquisitions. For the purpose of preventing a monopolization, it is useful to provide for the control of mergers and acquisitions.

Private Monopolization

Although few cases are decided under Article 2-5 and Article 3 of the AML, one worth noting is the Noda Soy Sauce Case, which involved decisions by the FTCJ, the Tokyo High Court, and the Supreme Court (Decision of the Tokyo High Court, 15 December 1957, *Kosai Mishu* [High Court Civil Cases Reporter], 10[10], 743 et seq. [1957]). Noda Soy Sauce Company (Kikkoman) had about 34 percent of soy sauce sales in the Tokyo area. The company's "KIKKOMAN" trademark was the most prestigious trademark for soy sauce; indeed, it was almost synonymous with

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soy sauce. In the soy sauce industry, there were three grades in terms of quality. They were, from highest to lowest, "Supreme," "Superior," and "Best."

Kikkoman undoubtedly belonged in the Supreme class. Products of three other companies, Yamasa, Higeta, and Marukin, were also regarded as belonging in this class. However, these three brands enjoyed less stable market positions than Kikkoman. Grades generally paralleled prices, with the higher-priced products regarded as being of a higher grade. Because of this price-quality relationship, the other three companies had to price their products at the same level as the Kikkoman product to keep them from being perceived as inferior and consequently being consigned to a lower grade.

Kikkoman pressured its distributors and retailers to raise the prices they charged for Kikkoman products (i.e., to engage in resale price maintenance). In a few days, the other three companies followed suit, raising their prices to match that of the Kikkoman product.

The FTCJ proceeded against Kikkoman, holding that Kikkoman monopolized the soy sauce market by controlling the activities of the other three companies. The gist of this decision was that Kikkoman indirectly controlled the other three companies' price decisions by raising its own price by way of resale price maintenance.

The trade commission's decision was upheld by the Tokyo High Court. The court reasoned in much the same way as the FTCJ, holding that the term "control" in Article 2-5 encompassed indirect control. This means that a control could include a situation in which a powerful enterprise engaged in a unilateral conduct such as requiring its distributors and retailers to raise prices, as long as this conduct had the effect of causing other enterprises to take similar actions. Some commentators argue that this is too wide an interpretation because the term *control* should be interpreted to mean a direct action or pressure by one party on the other parties that causes the latter to engage in an action parallel to that of the former. However, others argue that to deal with the oligopolistic structure of industries, it is necessary to adopt a wide interpretation of the term *control* and support the interpretation of the FTCJ and the Tokyo High Court.[8] This case comes close to being an instance of a "structure control" as contrasted with a "conduct control."

Structure Control

The 1977 amendment introduced the concept of the structure control. Article 2-7 stipulates that if (1) an enterprise occupies 50 percent or more of the market or two companies occupy 75 percent or above, (2) new entry into the market is difficult, (3) the price of the enterprise(s) in

8. On this issue, see Matsushita (1986, 78-87).

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question is excessively high, and (4) the profit rate of the enterprise is also excessively high, then the enterprise is regarded as in a monopolistic situation and is subject to dissolution if other means to restore competition fail.

As examined above, the prohibition of private monopolization is designed to control a "wrongful conduct" by a powerful enterprise. However, there may be a situation in which an enterprise acquires a predominant position through lawful practices. For example, an enterprise may achieve a market share of 90 percent through a process of "natural growth," in which competing enterprises have lost their ground because of a comparative lack of managerial skills and resources over a long period. Also, an enterprise may dominate the market thanks to a technological invention. In the above situations, there is no "wrongful conduct" on the part of the party that has come to dominate a market; therefore, the actions of such enterprises do not constitute monopolization under Article 2-5. Yet competition in a market may be eliminated by the dominance of such an enterprise.

Article 2-7 was enacted to fill the gap. It is a structure control as opposed to a control over conducts. Although enacted in 1977, it had not been invoked by the end of 1995. If it ever is invoked, it will be as the ultimate measure for dealing with oligopolies. However, invocation of Article 2-7 seems unlikely. This is because, among other reasons, the procedures to invoke this provision are quite stringent, exceptions exist that exempt enterprises in a monopolistic situation from dissolution orders, and the government ministries overseeing enterprises that might face dissolution would be likely to oppose such an action.

However, the existence of Article 2-7 works to deter abusive conduct on the part of enterprises in monopolistic situations. As explained earlier, an enterprise is subject to dissolution if it has a market share of 50 percent or more, new entry is difficult, and the price and the profit are excessively high. Therefore, if an enterprise with a large market share acts as the price leader in the industry, raises price first, and gains a high rate of profit, then that enterprise may be held as being in a monopolistic situation, a finding that could lead to dissolution of the enterprise.

The FTCJ names industries in which market shares of leading enterprises have reached the market share requirement warned of in Article 2-7; such a designation is regarded by named industries as a sign that they are stepping onto a slippery slope. Enterprises with large market shares take into consideration the existence of Article 2-7 of the AML and refrain from acting as the price leader in the industry in question. Such behavior does not necessarily promote competition. If an enterprise with a large market share refrains from raising its price, its lesser competitors may have difficulty raising their prices when they wish. If they are not as efficient as the enterprise in a monopolistic situation, they may be eliminated from the market. This may lead to an even more concentrated

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market. In this way, the structure control provided for in Article 2-7 may produce a paradoxical result. However, this provision operates as a de facto means of price regulation by the government.

Mergers and Acquisitions

As stated earlier in this chapter, Chapter 4 of the AML (Articles 9 through 18) is devoted to the control of mergers and acquisitions.

Article 9 prohibits the establishment of holding companies. A "holding company" is defined as a company whose main business is to hold stocks of other companies and control them. Article 9 prohibits holding companies regardless of whether they have any anticompetitive effects such as "substantial restraint of competition."

The reason for the prohibition of holding companies can be found in the history of the AML. In 1947, when the AML was enacted, there was a program for the dissolution of *zaibatsu* (large industrial combines that dominated the Japanese economy before and during the World War II), and many *zaibatsu* were controlled by holding companies.[9] When the AML was enacted in 1947, its framers felt that a holding company could easily be used as a tool for the domination of an industry, and thus that it would be necessary to prohibit such arrangements outright.

The absolute ban on holding companies has been criticized by the business community on the grounds that a holding company is a useful tool for business purposes such as reorganization and consolidation of enterprises, that this absolute prohibition is incompatible with other provisions in the AML that control business activities when they do have an anticompetitive effect, and that a holding company is not necessarily anticompetitive in nature.

It is my view that the absolute prohibition of holding companies under Article 9 should be reconsidered with a view to amending it to require proof of anticompetitive effect. The same applies to Article 9-2, which sets the limit on ownership of stocks by large business companies, and Article 11, which prohibits the holding of stocks by financial companies (banks and securities companies) in excess of 5 percent of the outstanding stocks of the acquired company. (For insurance companies, this limit is 10 percent).

Article 10 prohibits the acquisition and holding of one company's stocks by another company when competition in a particular market is likely to be substantially restrained as the result of that acquisition or holding. Article 15 prohibits a merger between companies when the merger is likely to restrain competition substantially in a particular market.

Article 15-2 provides for prior notification of mergers. Under this

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9. For more information, see Bisson (1954).

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article, in effecting a merger the participating companies must notify the FTCJ of the proposed merger plan at least 30 days before its execution. The FTCJ must conduct an examination of this proposed merger within the 30-day period. If it finds that there is sufficient evidence for a possible violation of Article 15-1, it takes an appropriate legal action to cause the companies to revoke the merger plan. Once the 30 days have passed, the FTCJ cannot initiate a legal action. If the companies effect the merger either without notifying the trade commission or before the end of the 30-day waiting period, the FTCJ can bring an action asking the court to declare the merger null and void.

Article 15-1 stipulates that companies shall not effect a merger if, as the result of the merger, competition in a particular market is likely to be restrained substantially. The term *merger* is not defined in the AML. However, it is interpreted in the sense defined in the Commercial Code. This interpretation excludes a de facto consolidation of enterprises by a means other than two companies establishing a third company, transferring its businesses to the third company, and subsequently dissolving themselves.

In view of the fact that a wider economic concept of "enterprise" is applied to merger control by the antitrust laws of major countries (see the use of terms such as "concentration" in the European Union and "mergers and acquisitions" in the United States), it is worth reviewing this narrow concept of mergers in the AML in order to widen the scope of it.

The FTCJ announced a set of merger guidelines in 1980. In order to respond to criticisms that they were too general, the FTCJ announced new guidelines on 18 August 1994 (referred to as the FTCJ Merger Guidelines). Under this set of guidelines, mergers are classified into (1) horizontal mergers, (2) vertical mergers, and (3) conglomerate mergers, and FTCJ's enforcement policies are laid out with regard to each of these categories. I will touch on only the most salient features of the guidelines.

If the value of assets of merging companies is ¥10 billion or less, the FTCJ conducts only a cursory review of whether the filing of the proposed merger satisfies the formal requirements, such as provision of the necessary information. This practice provides a "safe harbor" for mergers of small enterprises because it means that there will be no substantive investigation into the lawfulness of a merger if it is below this threshold.

Under the FTCJ Merger Guidelines, the trade commission conducts a close scrutiny of a proposed merger under the following conditions:

1. If one or both of the parties to a merger (1) occupy 25 percent or more of a market, (2) rank at the top in terms of market share, holding 15 percent or more of market share, or (3) rank at the top in terms of market share, with the market share of one or both parties

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at least one-quarter more than that of the second-ranking or third-ranking company

2. If, in the market in which one of the parties to a merger operates, one or both of the parties rank within the top three in terms of market share, and the total market share of the three top-ranking companies is 50 percent or more
3. If the number of competitors in the market in which one of the parties to a merger operates is seven or fewer
4. If the total value of the assets of one of the parties is ¥100 billion or more, and the total value of assets of the other is ¥10 billion or more

If a merger between companies falls into any of the above categories, it is closely examined by the FTCJ. However, this does not mean that the merger is held unlawful or is presumed to be unlawful. Rather, a number of factors are taken into consideration in the FTCJ's examination.

In horizontal mergers, factors such as the conditions of competition in the relevant market, the conditions in the related markets, the total business ability and resources of the merging companies, the nature of the relevant market, and the environment in which the new entity will operate are considered.

As to efficiency, the FTCJ Merger Guidelines state that increased efficiency is considered a factor only if the merger in question is expected to promote increased competition.

The FTCJ Merger Guidelines state that, with regard to a vertical merger, factors such as degree of market foreclosure and increase of entry barrier will be considered. With regard to a conglomerate merger, factors such as the existence of potential competition among the parties to a merger, the degree to which the position of the parties to a merger will be improved by the merger, and the increase of entry barrier are considered.

The FTCJ Guidelines show some improvements over the previous guidelines in terms of predictability. It is clearly stated, for example, that the market share figure of 25 percent is not a rigid requirement and that other factors are weighed. Likewise, the requirement that market competitors must number at least seven if scrutiny is to be averted is also not rigidly observed by the FTCJ.

The US Department of Justice announced merger guidelines in 1992. These establish three categories in terms of market concentration measured by the HHI (Herfindahl-Hirschmann Index), in which likelihood of action by the Department of Justice is indicated according to the principle that as one moves up to a category of higher concentration ratio, there is more likelihood of action. Relative to the US guidelines, the FTCJ guidelines lack predictability and allow the FTCJ a wider discretion in deciding which factor will be given weight in a given case.

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Vertical Restraints

Overview

The Japanese distribution system has long been a focal point of trade issues between Japan and its major trade partners. The United States and the European Union have claimed that the distribution system in Japan is "too long," "too complex," and "exclusive," and that it has prevented foreign enterprises from penetrating the Japanese market.[10] In fact, exclusivity in the distribution system was one of the major issues negotiated under the Structural Impediments Initiative (SII). In response to the request of the United States, the Federal Trade Commission of Japan announced "Guidelines on Distribution and Trade Practices" in 1991 (hereafter referred to as the FTCJ Distribution Guidelines),[11] in which the FTCJ articulated its enforcement policies toward restrictive business practices in distribution. An account of the FTCJ Distribution Guidelines is provided later in this chapter.

Antitrust issues in distribution in large part concern vertical restraints. Generally they involve restraints exercised by a powerful manufacturer over its distributors and dealers such as a resale price maintenance, a vertical territorial allocation of business, an exclusive-dealing arrangement, a tie-in clause, and related matters. Also, sometimes a powerful distributor (for example, a large trading company or a large-scale retail store) will exercise control over manufacturers by means such as requiring manufacturers to give them a sole distributorship.

Some of the practices mentioned above have the effect of excluding outsider parties. For example, an exclusive-dealing arrangement and a tie-in clause exclude outside parties from supplying goods, and a sole distributorship excludes competing goods from the distribution channel. Although a resale price maintenance and a vertical territorial allocation do not exclude outside parties as such, the close relationships they create may have the de facto effect of hindering penetration by outside parties.

Although the term *keiretsu* is both general and vague, it is often used to mean a vertical arrangement between a manufacturer and its distributors (i.e., a distribution *keiretsu*), or such an arrangement between a manufacturer and the producers of parts and components (production *keiretsu*), or between a bank and borrowers (financial *keiretsu*). Although

10. For similar claims, see Goldfarb (1995).

11. For a summary of these guidelines, see "The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices," *FTC/Japan View*, September 1991, 11 et seq. A full translation of these guidelines is published by the Executive Office of the FTCJ (1991).

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a *keiretsu* is not necessarily a vertical relationship (it can be a horizontal or conglomerate *keiretsu* or a mixture of the two types), a vertical relationship is undoubtedly an important feature of it.

Because antitrust issues in distribution are enormously complex, I deal here only with selected issues that seem important in light of trade issues. In the following pages, I examine case law development in areas such as resale price maintenance, territorial and customer restrictions, exclusive-dealing arrangements, and tie-in clauses. I then analyze the contents of the FTCJ Distribution Guidelines. The chapter concludes with some remarks on the effectiveness of the Antimonopoly Law in relation to vertical *keiretsu* issues.

Resale Price Maintenance

A resale price maintenance arrangement whereby a manufacturer causes wholesalers and/or retailers to maintain wholesale or retail prices at a certain level is generally regarded as unlawful unless exempted from the application of the AML under that law's Article 24-2. Resale price maintenance comes under Article 2-9 of the AML and Article 12 of the FTCJ Designation of Unfair Business Practices. Under Article 12 of the FTCJ designation, if a seller of a commodity imposes a condition on a purchaser that the purchaser must maintain a price level as dictated by the seller when the commodity is resold by the purchaser, this imposition constitutes resale price maintenance and is thus unlawful unless there is a good reason for the action. Good reasons are considered by the FTCJ to exist only under very limited circumstances, such as when a manufacturer mandates the price that its subsidiary or distributor will charge to customers.

In practically all cases in which the FTCJ and the courts, including the Supreme Court, have dealt with resale price maintenance, such an arrangement has been found unlawful. One example, which was heard by the Supreme Court, is the Wakodo Case (Decision of the Supreme Court, 11 July 1975, *Minshu* [Supreme Court Civil Cases Reporter], 26[6], 888 et seq. [1975]), in which the sole distributor of powdered milk imposed an elaborate scheme under which retailers had to register themselves with the sole distributor and to pledge that they would abide by the retail price level as directed by the sole distributor. This scheme was held unlawful by the FTCJ and upon appeal came up to the Supreme Court. The Supreme Court supported the FTCJ decision, stating that a resale price maintenance was unlawful as long as it stifled competition among distributors and retailers with regard to the terms of resale of the product supplied by the manufacturer. This has meant that a resale price maintenance is unlawful as long as it stifles "intrabrand price competition" among distributors and retailers of the commodity in question. This doctrine has the broad effect of making resale price maintenance

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generally unlawful because the very nature of a resale price maintenance is to eliminate intrabrand competition among distributors and retailers.

In the Wakodo Case, the respondent argued that a resale price maintenance was useful for rationalization of the distribution system. The Supreme Court rejected this argument, stating that the lawfulness of a resale price maintenance must be reviewed only from the viewpoint of maintenance of fair competition, and that the mere fact that a resale price maintenance served the purpose of rationalizing the distribution system did not justify it.

In March 1993, the FTCJ challenged a disguised resale price maintenance scheme exercised by sales subsidiaries of Toshiba, Hitachi, Sanyo, and Matsushita. These television manufacturers announced their "suggested retail price" as well as a "reference price." The reference price was lower than the suggested retail price and closer to the market price. The sales subsidiaries instructed the large-scale retail discounters not to advertise the TV sets below the reference price. The FTCJ held that this amounted to an "attachment of unreasonable condition on other party to a transaction" and was thus unlawful (FTCJ Decision, 8 March 1993, *Shinketsushu* [FTCJ Decisions Reporter], 39, 236 et seq. [1994]). In this case, the four television manufacturers took parallel actions in imposing conditions on discounters with regard to advertised price. If there were communications of intentions among the sales subsidiaries, this would be a case of horizontal cartel rather than of vertical restraint.

Viewed narrowly, the case of the four television manufacturers was not one of resale price maintenance because the sales subsidiaries imposed restrictions on "advertisement" rather than on pricing itself. However, the intention of the sales subsidiaries was to keep the retail price from falling below the reference price; therefore, this case can be classified as one of de facto resale price maintenance.

Article 24-2 exempts books and other articles that are subject to copyright (such as music recordings) from the AML. Also exempted are certain commodities expressly designated by the FTCJ. Many commodities have been exempted from the AML. Recently, however, the number of commodities so exempted has been greatly reduced. At present, pharmaceuticals and cosmetics are the sole commodities designated by the FTCJ for exemption from the AML.

Vertical Territorial Restraint

Article 13 of the FTCJ Designation of Unfair Business Practices states that to attach an unreasonably restrictive condition to a transaction is unlawful. "Unreasonable attachment of restrictive condition" is a broad concept and applies to various types of products. Vertical territorial re-

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straint belongs in this category. In this area, precedents have not fully developed yet. The only well-known case is that of Fuji X-Ray (FTCJ Decision, 11 May 1981, *Shinketsushu* [FTCJ Decisions Reporter], 28, 10 et seq. [1982]). A subsidiary of the Fuji Film Company, the Fuji X-Ray Company held about 70 percent of the market for X-ray equipment in Japan and allocated exclusive territories to its distributors. The FTCJ proceeded against this arrangement and held it to be unlawful.

Some rules are included in the FTCJ Distribution Guidelines; they are analyzed later in this chapter.

Exclusive-Dealing Arrangements

Article 11 of the FTCJ Designation of Unfair Business Practices stipulates that to attach a condition to a transaction that the other party to the transaction cannot deal with the producers of competing products is unlawful if such a condition is considered unreasonable. Exclusive-dealing arrangements are included in this category. An exclusive-dealing arrangement whereby, for example, a manufacturer requires that distributors and dealers not handle competing products is held unlawful if it is exercised by a powerful enterprise. There are several cases in which it was found that an exclusive-dealing arrangement was unlawful. A representative case is that of Muto Kogyo (FTCJ Decision, 22 November 1974, *Shinketsushu* [FTCJ Decisions Reporter], 21, 148 et seq. [1975]), in which a manufacturer of drafting instruments holding a 70 percent market share required distributors not to sell competing products. The FTCJ proceeded against this arrangement and held it to be unlawful. The FTCJ Distribution Guidelines set out rules on this subject, which I discuss later in this chapter.

Tie-In Clause

Article 10 of the FTCJ Designation of Unfair Business Practices provides that a tie-in arrangement is unlawful if the freedom of choice of the party on whom a tie-in clause is imposed is unreasonably restricted. Comparatively few cases have involved tie-ins. These include the Textbook Case (1964) and the Farmers' Cooperative Case (1976) (FTCJ Decision, 22 November 1974, *Shinketsushu* [FTCJ Decisions Reporter], 21, 148 et seq. [1975]). The most recent case is the Draque Case (1991) (FTCJ Decision, 28 February 1992, *Shinketsushu* [FTCJ Decisions Reporter], 38, 41 et seq. [1992]), in which a distributor of game software programs tied the sale of such products that it had difficulty selling (i.e., the tied product) with the sale of a very popular game software program called "Dragon Quest" or "Draque" (i.e., the tying product). The FTCJ initiated

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an administrative hearing procedure, and this tie-in arrangement was held to be unlawful.

As noted earlier, the Osaka High Court handed down a decision in the Toshiba Elevator Case in which the court granted a damage award to plaintiffs seeking the recovery of damage sustained by a refusal to sell by a service company (a company wholly owned by Toshiba).

The FTCJ Distribution Guidelines

As mentioned earlier, the FTCJ announced its Guidelines on Distribution and Trade Practices in 1991 ("The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices," *FTC/Japan View*, September 1991, 11 et seq.).[12] This action was an outcome of the Structural Impediments Initiative. Under the SII, the United States government demanded that the Japanese government increase enforcement of the AML in relation to restrictive trade practices and *keiretsu* relationships to improve market access.

The guidelines are divided into three parts. Part 1 contains provisions dealing with restrictive practices in relation to the distribution of capital goods, raw materials, parts, and components. Part 2 deals with restrictive practices in the distribution of consumer goods. Part 3 deals with restrictive business practices in import trade and related matters such as the exclusionary activities of sole import distributors.

Part 1 is entitled the "Guidelines on Continuous and Exclusive Transactions among Enterprises." It includes provisions prohibiting collusive activities of enterprises that restrict purchases from and sales to outside parties of a commodity—in other words, a cartel. There are also provisions on boycotts. In those provisions, a boycott is described as an unreasonable restraint of trade if it curbs competition substantially. Even if it is not an unreasonable restraint of trade, it is held as an unfair business practice. In both cases, a boycott is considered unlawful in principle. However, a refusal to deal exercised by a single enterprise is held as an unfair business practice when it is used as a means of enforcing a term that is unlawful. For example, a refusal to deal is unlawful if it is used to enforce a resale price maintenance.

There are several rules on exclusive-dealing arrangements in Part 1. Under those rules, an exclusive-dealing arrangement constitutes an unfair business practice if it is exercised by a "powerful enterprise" and business opportunities of competing enterprises are unduly reduced. If the market share of an enterprise is 10 percent or more, or if the enterprise ranks in terms of market share within the top three in its field, then that enterprise is subject to scrutiny as a "powerful enterprise."

12. See also Federal Trade Commission of Japan (1991).

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However, this market share does not automatically establish an entity as a powerful enterprise. The FTCJ also takes into consideration such factors as the conditions of the market in general, the position of the enterprise in the market, the number of competitors and their positions, and the possible impacts of the arrangement on these competitors.

Part 1 also deals with reciprocal dealings in which one party (for example, a buyer) deals with the other (for example, a seller) on the condition that the latter purchase a commodity from the former. If, for example, a powerful department store conditions its purchase of a commodity from a subcontractor on the purchase by the subcontractor of a commodity that the department store sells, this arrangement may constitute an unlawful reciprocal-dealing arrangement. Of course, a reciprocal-dealing arrangement is not held as unlawful per se. However, if there is coercion, intimidation, or undue pressure to buy or sell, as the case may be, the reciprocal dealing is held to be an unreasonable arrangement.

Also dealt with in Part 1 are such actions as offering a customer a price below that offered to competitors for the purpose of excluding competitors from a particular transaction, and an acquisition of stocks of a party to a transaction for the purpose of excluding competitors from transactions with that party.

Part 2 of the Distribution Guidelines, entitled "Antimonopoly Guidelines on Transactions in Distribution Sectors," deals with restrictive practices in the distribution of commodities. It includes provisions on vertical price restrictions (resale price maintenance) and vertical nonprice restrictions.

With regard to resale price maintenance, Part 2 enunciates the general principle that this practice is unlawful. Although an indication of suggested price or a recommended price is lawful as such, if a manufacturer takes steps to make it a de facto binding obligation, it is held as unlawful. Various examples of unlawful resale price maintenance are provided in the Guidelines on Distribution and Trade Practices.

Part 2 addresses exclusive-dealing arrangements and vertical territorial arrangements. Under the provisions of Part 2, an exclusive-dealing arrangement is not unlawful as such. However, if it is undertaken by a "powerful enterprise" (as referred to earlier), and a new entrant and the existing competitors experience difficulty finding alternative distribution channels, then the exclusive-dealing arrangement is unlawful.

Four categories are mentioned in Part 2 with regard to vertical territorial arrangements. One is the setting up of an "area of primary responsibility" in which sales territories are allocated by a manufacturer to distributors and dealers as their primary areas of responsibility without the imposition of a strict restraint on activities outside the allocated territory. The second category concerns restrictions on the siting of sales establishments. In such instances, a manufacturer designates a location for a sales establishment to distributors and dealers and obligates them

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to refrain from establishing their shops and stores at sites other than the designated location. The third category concerns the practice of strict territorial allocation, in which a manufacturer allocates sales territories to dealers and distributors and obligates them not to sell in territories other than those allocated by the manufacturer. The fourth category involves restrictions on sales to customers outside the allocated territory, in which a manufacturer prohibits distributors and dealers from selling the commodity of the manufacturer to customers who order that commodity from outside the territories allocated by the manufacturer.

Among the four categories of vertical territorial arrangements, the setting up of an area of primary responsibility and the placement of restrictions on the location of sales establishments are both lawful in principle. However, a strict territorial restriction is unlawful if it is used by a powerful enterprise and the price of the commodity involved tends to be artificially maintained. Likewise, a restriction imposed by a manufacturer on distributors and dealers requiring that they not sell the manufacturer's commodity to customers who order it from outside the territories allocated by the manufacturer is held unlawful if the price of the commodity tends to be artificially maintained.

Another category mentioned in Part 2 is customer restriction. Generally this involves a restriction imposed by a manufacturer on distributors requiring that they sell the commodity of the manufacturer only to designated customers. Although a customer restriction is not unlawful as such, it is held unlawful if it has the effect of artificially maintaining the price of the commodity.

Rebates given by a manufacturer to distributors and dealers are also discussed in Part 2. A rebate is not unlawful in itself. However, it is unlawful if it is used to achieve restrictions that are unlawful, such as a resale price maintenance, an unreasonable exclusive-dealing arrangement, a strict territorial arrangement, or an unreasonable customer restriction.

Part 2 also enunciates some rules on unreasonable interference by manufacturers in the managerial matters of distributors and dealers and abuse of dominant position by large retailers.

Part 3 of the Guidelines on Distribution and Trade Practices is entitled the "Guidelines of the Antimonopoly Law with regard to Sole Sales Agencies." Part 3 includes rules on the activities of a sole sales agency of a commodity, including rules on parallel importation of genuine goods. Because the rules articulated in Part 3 are essentially not different from those announced in Parts 1 and 2, detailed discussion is omitted here.

Effectiveness of the Antimonopoly Law Relative to Vertical *Keiretsu* Issues

One of the focal points of trade disputes between Japan and its major trade partners, especially the United States, is the issue of production

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and distribution *keiretsu*. Trade negotiators in the United States and the European Union have argued that *keiretsu* systems in production and distribution make up an important part of the trade barriers preventing the entry of foreign enterprises and commodities into the Japanese market. Of primary concern are vertical *keiretsu* systems. There are various arguments over the vices and virtues of such *keiretsu* systems. A comprehensive analysis of *keiretsu* issues is made by Sheard in chapter 16. A few comments are provided here with regard to the effectiveness of the application of the AML vis-à-vis vertical *keiretsu*.

Increased enforcement of the AML will have a substantial impact on corporate behavior. In fact, there is evidence indicating that some manufacturers have changed their distribution agreements with their distributors and dealers and eliminated restrictive provisions from these agreement so as to make them conform to the norms of the AML. This trend undoubtedly will enhance the openness of the Japanese market in general. Although the ways in which manufacturers changed their distribution systems in response to an increased enforcement of the Antimonopoly Law belong to trade secrets and are not disclosed, it is evident that such changes have occurred. Some companies have announced antimonopoly compliance programs in which they stated their basic objective was observance of Antimonopoly Law rules. For an example, see the recently announced Antimonopoly compliance manual by Shiseido Company (1996).

It should be noted that there is a limit to the effectiveness of the application of the AML to *keiretsu* systems. First, there is often intensive interbrand competition between *keiretsu* systems (for example, competition between Toyota *keiretsu* and Nissan *keiretsu*), including price competition. As long as there is strong interbrand competition, including price competition, between *keiretsu* systems, such systems generally are considered lawful under the AML. This is true if one accepts rules announced in the Guidelines on Distribution and Trade Practices as stated above and rules enunciated in US Supreme Court cases such as the Sylvania Case and the Business Electronics Case (*Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 US 36 [1977]; *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 US 719 [1988]). Yet each system may be a closed system. If such a system is to be challenged, it should not be by a means based on a traditional antitrust concept.

Second, *keiretsu* systems are not necessarily arrangements in which contractual agreements are involved. Sometimes a *keiretsu* system is a de facto relationship among enterprises. For example, in automobile distribution, dealers that sell automobiles of a manufacturer may remain loyal to the manufacturer and refrain from selling competing products simply because they expect, among other things, that it is the policy of the manufacturer to protect dealers, that the manufacturer would guarantee that the businesses of dealers continue, and that financial

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assistance would be forthcoming from the manufacturer if they faced business difficulties.

There is a widespread view among manufacturers that if a dealer under their particular *keiretsu* goes bankrupt, the reputation of the manufacturer will be hurt. Also, if bankruptcy hits a dealer under the sponsorship of a manufacturer, it may affect the morale of all the dealers under this sponsorship. This may, in turn, drive the manufacturer to adopt the policy of providing some kind of measure to ensure that dealers will be protected if they get into serious financial trouble.

In the above-mentioned situations, the relationship between enterprises is more sociological than contractual. Challenges to such sociological entities under the AML would be difficult. Despite this limitation, an increase in the purview of the AML over distribution would be worthwhile because it would contribute to more openness in the market structure.

Abuse of Dominant Position

Overview

Control of abuse of dominant position, which is provided for under the Antimonopoly Law, is given an interpretation that is perhaps unique to Japan. In the European Union, Article 86 of the Treaty of Rome provides for the prohibition of abuse of dominant position. This prohibition is aimed at controlling abusive conduct by an enterprise that is dominant in a market and therefore has the power to control the market. However, the AML concerns itself with dominant position at the *transaction level*. Therefore, a small enterprise with little influence in a market may be in a dominant position in relation to the other party to a transaction if the other party is smaller still (Decision of the Supreme Court, 20 June 1977, *Minshu*, [Supreme Court Civil Cases Reporter], 31[4], 449 et seq. [1978]).

The AML's approach to dominant position is aimed at protecting small enterprises such as subcontractors that supply parts and components to manufacturers, as well as suppliers of commodities to supermarkets and department stores, from abusive conduct on the part of manufacturers and large-scale stores. It is in this sense that it can be said that this control is designed to protect small enterprises. Therefore, the control of abuse of dominant position in the AML is structured differently and for a different purpose than in the European Union.

In Japanese business society, there are many vertical, horizontal, or conglomerate systems in which participants are "captive members." Mobility between different systems is not high. For example, it is not easy for a dealer of one automobile manufacturer to shift to another manufacturer. Although this situation appears to be changing, this lack of

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mobility between different business systems is expected to persist for some time.

Defining Dominant Position

Article 14 of the Federal Trade Commission of Japan Designation of Unfair Business Practices prohibits an abuse of a dominant position by an enterprise. Article 14 states that if an enterprise engages in a transaction with another party and uses its dominant position to impose unreasonable conditions that appear contrary to commercial customs, then an abuse of dominant position has occurred.

A dominant position is not the same as market domination. It suffices to say that dominant position exists if an enterprise is dominant in a particular transaction and is able to impose conditions on the other party that would be impossible if there were equality of bargaining power. In the Miyagawa Case (Decision of the Supreme Court, 20 June 1977, *Minshu*, [Supreme Court Civil Cases Reporter], 31[4], 449 et seq. [1978]), a financial institution (a cooperative established under the Medium and Small Enterprises Cooperatives Law) loaned money to an enterprise on the condition that the borrower deposit a certain amount of money in the institution. The enterprise that had borrowed money could not pay it back, and the financial institution seized a property that had been offered by the borrower as security. The borrowing enterprise argued that it was an abuse of dominant position under the AML on the part of the financial institution to condition the loan on the deposit by the borrower. The enterprise further argued that the loan agreement was null and void because it had had to borrow the amount required for the deposit and consequently had to pay interest on two loans.

The Supreme Court handed down a decision in which it stated that the financial institution's requirement that the borrower deposit money constituted an abuse of dominant position. It added, however, that the loan agreement could not be declared null and void just because the agreement was contrary to the AML. The Supreme Court also stated that the interest charged by the institution was excessive in light of the Antiusury Law (Risoku Seigen Ho [Antiusury Law], Law 107, 1954), and that the amount of interest in excess of the limit established under this law would be regarded as payment of the principal.

The financial institution in this case was a relatively small one without a dominant position in any market. However, in the particular transaction involved in the case, the borrower was even smaller and, in relation to the borrower, the financial institution had a stronger bargaining power. Therefore, the decision established a rule that a dominant position under Article 14 need not be in a market but was sufficient as long as a party was dominant in a particular transaction.

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Defining Abuse

Article 14 of the FTCJ Designation of Unfair Business Practices enumerates five categories of conducts as abuses on the part of a dominant enterprise: (1) requiring the other party to a continuous transaction to purchase a commodity or a service from the dominant enterprise that is different from that involved in the transaction; (2) requiring the other party to a continuous transaction to offer to the dominant enterprise money, services, or any other economic benefit; (3) setting terms of a transaction or changing them to the disadvantage of the other party; (4) causing disadvantage to the other party with respect to the terms of a transaction or the implementation of it in a manner other than those above mentioned; and (5) requiring the other party to a transaction (when it is a company) to observe a prior direction by the dominant enterprise or to obtain the approval of the dominant party when the other party appoints members to its board of directors. This definition is illustrative rather than exhaustive; other activities may come under Article 14. Also, this definition is necessarily general. It is not clear, for example, whether an abuse requires any "coercion" or "oppression." In the Mitsukoshi Case (FTCJ Decision, 17 June 1982, *Shinketsushu* [FTCJ Decisions Reporter], 29, 31 et seq. [1982]), a large department store, Mitsukoshi, sold luxury items to suppliers and asked them to contribute money to Mitsukoshi for the purposes of remodeling sales space and financing festivals sponsored by Mitsukoshi. The FTCJ proceeded against these practices on the grounds that they constituted an abuse of dominant position on the part of Mitsukoshi in regard to its suppliers of goods.

Mitsukoshi argued that it had only asked suppliers to purchase items and contribute money on a voluntary basis, with no coercion or oppression. The FTCJ argued that suppliers of goods had no choice but to comply with such requests owing to the bargaining power held by Mitsukoshi, because the arrangements between them and Mitsukoshi could be ended if they did not comply. The case was terminated at the request of Mitsukoshi for a consent decision.

The Mitsukoshi Case had the potential to establish the meaning of abuse by a dominant enterprise. However, because Mitsukoshi requested a consent decision and the FTCJ disposed of the case without certifying any facts, no legal interpretation on this issue is shown in the decision. It seems, however, that some elements of coercion or oppression are necessary to constitute an abuse; otherwise, the coverage of Article 14 would be too wide and too intrusive upon freedom of business action.

Abuse of Dominant Position and Its Impact on Foreign Trade

Although an abuse of dominant position as exercised by Japanese enterprises and controlled by Article 14 is not aimed at preventing imports

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generally, it may have some impact on imports. For example, there is a widely practiced business custom, which might be described as "return of goods," in which large-scale Japanese retailers such as supermarkets and department stores return unsold goods to suppliers. If this is done excessively, it may constitute an abuse of dominant position under Article 14 on the part of the party returning the goods, such as a supermarket or department store. It has been pointed out that this business custom tends to discourage imports because retailers have difficulty returning goods to foreign exporters when they cannot sell them out and therefore are less willing to handle imported goods.[13]

Supermarkets in Japan often require suppliers to supply goods in small quantity and with great frequency. They require this in order to meet the purchasing demands of customers quickly without holding a large stock of goods. Although there is no evident business reason for this practice, it is said to affect imported products adversely because foreign exporters generally cannot meet such requirements as quickly as Japanese suppliers can. Also, this practice may be an abuse of dominant position under some circumstances.[14]

Abuse of Dominant Position and Competition Policy

Some observers hold that the control of abusive conduct on the part of a dominant enterprise in a particular transaction does not belong to the realm of competition policy but to other areas of law such as the law of torts, and that it makes more sense to require that the wrongdoer be at least a "powerful enterprise" as defined in the FTCJ Distribution Guidelines. There are several interpretations given to this part of the AML that attempt to place this type of regulation in the proper place in the context of the AML. However, none of these interpretations appear satisfactory.

In the context of harmonizing competition laws internationally, the segments of the AML concerned with abuse of dominant position may present a difference between the AML and the competition laws of other countries and thus become the focus of review.

Conclusion

The Antimonopoly Law was originally modeled after United States antitrust laws. It retains some features characteristic of US antitrust law such as criminal enforcement. However, over a period of close to 50

13. For a discussion of the issue, see Sanekata (1994).

14. See Sanekata (1994).

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years, other features have evolved. The 1953 amendment introduced control of an abuse of dominant position, interpreting this concept in a way probably unique to Japan. The 1977 amendment introduced the administrative surcharge system, which is akin to the European system of administrative fine, yet with significant differences. Further distinguishing Japanese antitrust has been the emergence of an informal enforcement system.

Although the AML is different from US antitrust laws and from competition rules in the European Union, it shares principles with competition laws of other countries in areas such as the prohibition of cartels. Also, to some extent the AML resembles US antitrust laws, as well as competition rules of the European Union, in that it controls excessive concentration of corporate powers created through mergers and acquisitions.

The many causes of trade imbalances between Japan and other countries include saving rates, investment trends, budget deficits, and Japan's embattled but still-present lifetime employment system, as well as microeconomic factors such as the restrictive practices of Japanese enterprises. Indeed, it may be that the restrictive business practices of Japanese enterprises constitute a comparatively small part of the large problem of trade imbalance, and that an increase in enforcement of the AML will have, at least in the short run, little effect on the trade imbalance between Japan and its major trading partners.

Nevertheless, the AML can play an important role in creating a market in Japan that is more conducive to open competition by eliminating restrictive business practices and creating more favorable conditions for business enterprises to compete with each other. This will contribute to the establishment of an international trading system in which differences in competitive conditions for enterprises among the major trading nations can be reduced to a tolerable level.

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