

# **THE PROSPECT OF ANTITRUST LAW AND POLICY IN THE TWENTY-FIRST CENTURY: IN REFERENCE TO THE JAPANESE ANTIMONOPOLY LAW AND JAPAN FAIR TRADE COMMISSION**

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## I. INTRODUCTION

The harmonization of competition law and policy has emerged recently as an important topic in international trade. This increasing interest stems from a generally accelerated worldwide liberalization of trade. With the recession of governmental trade barriers, private anticompetitive conduct has surfaced as a major trade barrier.

The importance of competition law and policy transcends international trade. Domestic and international competition significantly affect the economic performance of all countries, and thus competition policy should not be considered merely from the perspective of trade policy. Most major countries and regions have developed their own competition policies for their individual economic welfare rather than to safeguard trade. At present, the global harmonization of competition law is feasible only in the general prohibition against naked cartels.<sup>1</sup> Other competition law fields (including regulations against collaboration, exclusionary practices, vertical restraints, and mergers) have evolved constantly. Furthermore, as the importance of innovation has increased dramatically, many competition authorities now are seeing the need to develop policies directed toward research and development activities. Moreover, many countries also have engaged in deregulation and regulatory reform. Competition authorities therefore must define their roles in regulatory reform and coordinate competition law enforcement with sector-specific regulations. The world cannot harmonize such diverse areas of competition law and policy instantly. What we need today is not forced harmonization but rather a frank attitude to learn from other countries' experiences.

In this Article, I examine Japanese competition law and policy with a

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1. For information on competition harmonization at the World Trade Organization (WTO), see generally TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION (Roger Zach ed., 1999).

view toward increasing its effectiveness in establishing a pro-competitive Japanese economy. Japan's competition policy has profound international importance, as Japan possesses the third largest economy in the world (behind the United States and European Union). Moreover, Japan is unique in that its competition policy has enjoyed an upsurge in popularity recently, displacing the long-lasting supremacy of Japan's industrial policy. Analyzing current Japanese competition law and policy will shed light on the future course of competition policy worldwide. The Japanese experience holds particular relevance for those countries that recently have emerged from government-orchestrated development and are in the process of developing competition-oriented economies.

## II. THE INCREASING IMPORTANCE OF COMPETITION LAW AND POLICY IN JAPAN

Japan enacted its competition law, the Antimonopoly Law of 1947,<sup>2</sup> after its defeat in World War II, using U.S. antitrust law as a model. At the same time, Japan inaugurated the Japan Fair Trade Commission (JFTC) as the agency in charge of enforcing the Antimonopoly Law. After the end of the Allied Occupation, the Japanese Parliament revised the Antimonopoly Law twice (in 1949 and 1953), adding new clauses to differentiate it from U.S. law.<sup>3</sup>

While active initially, JFTCs enforcement of the Antimonopoly Law deteriorated under the shadow of the industrial policy promulgated by the Ministry of International Trade and Industry (MITI). However, beginning in the mid-1970s, the Antimonopoly Law began to show signs of life, and in 1977, Japan strengthened it with new provisions (primarily as a measure to combat the increased inflation caused by the oil crisis in the Middle East). Of particular importance was the introduction of a surcharge against illegal cartels. Adoption of the surcharge played a crucial role in making the JFTC's prohibition of cartels truly effective. Before 1977, the JFTC could not sanction condemned cartels. However, external pressure (primarily from the United States) influenced Japan to strengthen both the Antimonopoly Law and the JFTC. Most significant was the Structural Impediments Initiative

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2. Act Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade, Act No. 54 of 1947 [hereinafter Antimonopoly Law], reprinted in HIROSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN* app. A, at 387 (1994).

3. For details on the history of the Antimonopoly Law, see JOHN O. HALEY, *ANTITRUST IN GERMANY AND JAPAN* (2001); Mitsuo Matsushita, *The Antimonopoly Law of Japan*, in *GLOBAL COMPETITION POLICY* 151 (Edward M. Graham & J. David Richardson eds., 1997); IYORI & UESUGI, *supra* note 2, at 1-66.

(SII) negotiations between the United States and Japan to rectify the chronic trade imbalance between the two countries.<sup>4</sup> Under the framework of the SII, Japan significantly strengthened criminal sanctions for violations of the Antimonopoly Law and increased the number of JFTC personnel.

Table 1. Amounts of Surcharges<sup>5</sup>

Fiscal Year	Number of cases	Companies involved	Total amount of surcharges (ten thousand yen)
1989	6	54	80,349
1990	11	175	1,256,214
1991	10	101	197,169
1992	17	135	268,157
1993	21	406	355,321
1994	26	512	566,829
1995	24	741	644,640
1996	14	368	748,616
1997	16	369	283,289
1998	16	576	314,915
1999	20	335	545,891
2000	16	719	851,668

Currently, the Japanese government and business community generally recognize the importance of competition law and policy. When Japan renamed the MITI the Ministry of Economy, Trade and Industry (METI) in 2000, it established a department solely responsible for competition policy. The more than decade-long economic slump following the collapse of the bubble economy in 1989 induced these attitudinal changes. Japanese businesses and the government both realized that the structural weakness in Japan's economy lies in the industrial sectors secluded from competition (most notably the financial, construction, retail, and electricity sectors). In this regard, Michael Porter observed in an influential book: "Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry."<sup>6</sup> Japan's government and a large portion of its business community finally have come to share this view. To increase competition, the strengthening of competition policy (primarily active

4. For details on the SII, see IYORI & UESUGI, *supra* note 2, at 62-64.

5. Kosei Torihiki Inikai [Fair Trade Commission], Kosei Torihiki Inikai Nenji Hokoku Dokusenkinshi-ho Hakusho (Heisei 13 Nenpo) [Fair Trade Commission Annual Report] 118 (2001).

6. MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 662 (1990).

enforcement of the Antimonopoly Law combined with deregulation and regulatory reform in regulated sectors) is imperative.

The JFTC now faces a favorable environment for implementing competition policy. However, now that competition policy has become a major issue, the JFTC must compete with other governmental agencies (including METI and the Telecommunications Bureau of the Ministry of Public Management, Home Affairs, Posts and Telecommunications) to administer it. Therefore, the JFTC must upgrade the competence of its personnel and enforce the Antimonopoly Law more actively. Now that the Japanese political environment recognizes the importance of competition policy, the JFTC cannot defend its inactivity based on the lack of a political consensus. Furthermore, the JFTC must clarify what role it is going to play in deregulation and regulatory reform. In the ensuing sections, I examine the areas in which the JFTC could improve its competition policy and enforcement of the Antimonopoly Law. Focusing on the Japanese experience, I hope to elicit general lessons for twenty-first century antitrust.

### III. THE NEED TO CLARIFY STANDARDS FOR COLLABORATIVE ACTIVITIES

In today's economy, companies engage in various local and international alliances. Included within these alliances are efficient collaborations that should not be condemned as cartels. However, the question remains: How can a competition authority distinguish beneficial collaborations from anticompetitive cartels?

#### *A. The International Relevance of the Dichotomy Between "Per Se" Illegality and the "Rule of Reason"*

U.S. antitrust laws answer this question by distinguishing between collaborations (or horizontal agreements) deemed to be "per se" illegal, and those analyzed by the "rule of reason." Collaborations whose sole objective is to restrain competition are condemned as per se illegal, while the rule of reason controls examination of all other collaborations. Currently, the rule of reason analysis includes considerations of efficiency and market power.<sup>7</sup>

Other countries may adopt the U.S. approach of distinguishing between per se illegality and the rule of reason, as this demarcation appears to be the most sensible approach toward classifying collaborations. Nevertheless, one

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7. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> [hereinafter COLLABORATIONS GUIDELINES].

may criticize the current rule of reason analysis as being too complicated, as balancing considerations of market power and efficiency requires a detailed economic analysis. The Federal Trade Commission (FTC) and Department of Justice (DOJ) issued explanatory guidelines in 2000 to clarify the rule of reason approach as applied to collaborations.<sup>8</sup> However, the guidelines do not delineate clearly between illegal and legal collaborations, and appear more like a legal treatise than actual guidelines. Nevertheless, a detailed economic analysis for collaborations other than blatantly naked cartels should be utilized. The guidelines issued by the FTC and DOJ represent the best effort at a step-by-step explanation of the rule of reason.

The European Union takes a different approach. The European Commission treats virtually all collaborations as automatic infringements of Article 81 of the Treaty Establishing the European Community,<sup>9</sup> and then proceeds with exemption scrutiny under Article 81(3). This approach places too much weight on the exemption stage where the Commission incorporates industry policy-type considerations. Scholars have proposed to shift the Commission's Article 81 analysis toward the rule of reason approach. In addition, the Commission recently has been trying to incorporate a more economic approach into its assessment of horizontal agreements. In January 2001, the Commission published the Guidelines on the Applicability of Article 81 to Horizontal Cooperation Agreements<sup>10</sup>—a shift in focus that may be interpreted as an introduction of the rule of reason analysis into the application of Article 81 of the EC Treaty.

### *B. The Problem with the Antimonopoly Law's "Substantial Restraint of Competition" Standard*

The Antimonopoly Law stipulates that collaborations are illegal when they form a "substantial restraint of competition."<sup>11</sup> This terminology mirrors

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8. *See generally id.*

9. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997).

10. Guidelines on the Applicability of Article 81 to Horizontal Cooperation Agreements, 2001 O.J. (C 3) 2. *See also* Mark Griffiths & Sabina Nüesch, *Modernizing the Treatment of Horizontal Agreements—An Analysis of the Commission's Proposals*, 21 EUR. COMPETITION L. REV. 452, 458-61 (2000).

11. Section 2(6) of the Antimonopoly Law defines unreasonable restraints of trade as any business activities

by which any entrepreneur, by contract, agreement or any other concerted actions . . . with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing . . . a *substantial restraint of competition* in any particular field of trade."

Antimonopoly Law § 2(6) (emphasis added).

that used for mergers<sup>12</sup> and monopolization.<sup>13</sup> “Substantial restraint of competition,” through an accumulation of cases, has come to refer to the formation of market power.

From the standpoint of current knowledge, this standard for collaborations seems illogical, as the Antimonopoly Law requires the JFTC to prove the formation of market power before declaring any collaboration illegal. Market power analysis requires detailed economic scrutiny, which sacrifices the JFTC’s resources and causes an insufficient condemnation of naked cartels.

This is one example where the detailed and inflexible phrases of the Antimonopoly Law, enacted over fifty-five years ago, have obstructed the rational development of legal reasoning. The simple and abstract wording of Sherman Act Sections 1 and 2 lends itself more to the cumulative improvement of legal standards. Now that the political and business environments generally favor competition policy, the JFTC should proceed with an overall revision of the Antimonopoly Law in order to rationalize its governance.

With regard to clearly anticompetitive cartels, the JFTC has come to adopt a “per se illegal” approach, thus truncating the market power analysis for naked cartels. Moreover, for distribution-related conduct, the JFTC published the Guidelines Concerning Distribution Systems and Business Practices in 1991 in response to trade conflicts with the United States.<sup>14</sup> In these guidelines, the JFTC stated that pernicious collaborations such as price cartels and bid rigging arrangements are “illegal in principle.”<sup>15</sup> The JFTC should explicitly adopt the “illegal in principle” standard for all naked cartels. To illustrate this point clearly, the JFTC should abolish Section 2(6) of the Antimonopoly Law.

With regard to collaborations that are not clearly anticompetitive, the JFTC has not yet adopted a rule of reason analysis comparable to that of the United States. Instead, the JFTC has followed Section 2(6)’s standard concerning a “substantial restraint of competition.”<sup>16</sup> Under this standard, the JFTC does not condemn collaborations that are not clearly anticompetitive as

12. “No company in Japan shall effect a merger...[w]here the effect...*may be substantially to restrain competition* in any particular field of trade.” *Id.* § 15 (emphasis added).

13. “No entrepreneur shall effect private monopolization or an unreasonable restraint of fair trade.” *Id.* § 3.

14. Japan Fair Trade Comm’n, Guidelines Concerning Distribution Systems and Business Practices (July 11, 1991), available at <http://www.jftc.go.jp/e-page/guideli/distributionGL.pdf> [hereinafter Distribution Guidelines].

15. *Id.* at 2.

16. See *supra* note 11.

being illegal until they are found to form market power. This seems too simplified an approach, as the JFTC does not balance considerations of efficiency and competition restraint. Inefficient collaborations should be illegal even if their level of market power is ambiguous. At the same time, the JFTC should tolerate highly efficient collaborations even when they temporarily form market power. Such a sophisticated balancing approach is most appropriate in innovation and technology related markets.<sup>17</sup>

*C. The Increasing Irrelevance of Special Treatment for Trade Associations*

The Antimonopoly Law contains a special provision regarding “trade associations.” Section 8 details what constitutes illegal conduct by trade associations. In addition, to supplement Section 8, the JFTC published the Guidelines Concerning the Activities of Trade Associations<sup>18</sup> and issued comfort letters to predict interpretation. The JFTC devotes considerably greater resources to regulate the conduct of trade associations relative to most other countries.

The primary benefit of Section 8 is that it prohibits certain practices by trade associations even when they do not constitute a “substantial restraint of competition.” This special provision for trade associations possesses historical relevance, as Japanese trade associations traditionally have played a central role in anticompetitive business conduct. However, this special treatment for trade associations also produces inconsistent standards among diverse forms of collaborations and joint ventures. Section 2(1) of the Antimonopoly Law stipulates certain conditions for associations to be treated as “trade associations” for the purposes of Section 8. Other associations, consortia, joint ventures, or collaborations fall outside Section 8’s ambit. In today’s economy, particularly in technology markets, companies create diverse forms of associations and collaborations. To achieve consistent and equal treatment for all collaborations, the JFTC should repeal Section 8 and simultaneously rationalize the general standard of illegality for collaborations in the aforementioned ways.

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17. *See infra* Part VII.

18. Japan Fair Trade Comm’n, Guidelines Concerning the Activities of Trade Associations (1995), available at <http://www.jftc.go.jp/dokusen/3/tagl/index.htm>.

#### *D. Lessons for Twenty-First Century Antitrust*

Demarcation of “per se” illegality and the rule of reason doctrine may be adopted worldwide. Each country should modify its standard according to its individual legal system. In Japan, the JFTC has modified per se illegality to become the “illegal in principle” standard. The countries in the Organisation for Economic Co-operation and Development (OECD) already nearly share a consensus for treating naked cartels as per se illegal—a consensus that may extend to member countries of the WTO at the next Round.

Governments should evaluate business collaborations that are not clearly anticompetitive through a balanced consideration of efficiency and competition restraint. To achieve this, competition authorities should utilize a specific economic analysis. Thus far, the U.S. Antitrust Guidelines for Collaborations Among Competitors represents the best effort at systematically conducting a balancing analysis.<sup>19</sup> It would benefit other countries’ competition authorities to study the U.S. guidelines closely when developing their own guidelines.

Governments should draft competition statutes using general and flexible language to enable competition authorities and courts to adapt and improve legal standards if necessary. The overly detailed and outmoded phrases of Japan’s Antimonopoly Law hinder the amelioration of JFTC and judicial application. Competition authorities and parliaments should not hesitate to revise competition laws when the language within becomes outdated.

### IV. THE NEED TO CLARIFY STANDARDS FOR VERTICAL ARRANGEMENTS

#### *A. Vertical Arrangements As Trade Barriers*

Foreign manufacturers and trade officials (particularly those in the United States and European Union) have criticized Japanese manufacturers for their exclusionary arrangements with retailers, wholesalers, and parts manufacturers. Foreign officials called these arrangements *keiretsu*, as if they were exclusively Japanese phenomena. However, companies worldwide use such arrangements, which collectively should be generalized as vertical arrangements.

The JFTC applies the Antimonopoly Law impartially to foreign and domestic companies with regard to their vertical arrangements, a point sustained by a WTO panel in the Kodak-Fuji case.<sup>20</sup> The panel noted that

19. See generally COLLABORATIONS GUIDELINES, *supra* note 7.

20. See Report of the Panel, Japan—Measures Affecting Consumer Photographic Film and

Japan applied its laws and rules impartially to foreign and domestic companies, thereby fulfilling its “National Treatment” obligation under Article III of the General Agreement on Tariffs and Trade (GATT).<sup>21</sup> At the same time, the panel rejected application of the WTO’s non-violation nullification clause<sup>22</sup> to importing nations’ provisions that apply equally to foreign and domestic companies. The panel decision is noteworthy in indicating that business practices forming market barriers do not necessarily deserve instant condemnation. Many business practices with exclusionary effects possess legitimate business reasons. Thus, competition authorities rather than trade officials should analyze these practices using a rule of reason analysis.

Competition laws in major countries generally have failed to establish clear standards toward vertical arrangements. Their standards are still in the evolutionary stage. Nonetheless, the Antimonopoly Law standards toward vertical arrangements remain murkier than those of the United States and European Union. This lack of clarity emanates from the all-embracing phrasing of the Antimonopoly Law’s “unfair trade practices” clause,<sup>23</sup> the coverage of which extends beyond vertical arrangements. The JFTC should clarify standards for “unfair trade practices” to rationalize enforcement of the Antimonopoly Law rather than based on trade considerations.

*B. “Unfair Trade Practices” vs. “Unfair Methods of Competition”*

An important characteristic of the JFTC’s enforcement of the Antimonopoly Law is its frequent use of the “unfair trade practices” clause. The phrase “unfair trade practices” originates from the language of the Federal Trade Commission Act.<sup>24</sup> In the United States, the judicially established supremacy of the Sherman Act has made it difficult to condemn purportedly unfair business practices under the Federal Trade Commission Act if the practices do not violate the Sherman Act. This development harmonized U.S. antitrust law, as demarcation of business practices by their anticompetitive characteristics became clearer. Namely, Section 1 of the Sherman Act deals with collaborative conduct while Section 2 deals with unitary exclusionary conduct, although some inconsistency still remains. In contrast, the Antimonopoly Law contains clauses that do not possess such a

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Paper, WTO Doc. WT/DS44/R (Mar. 31, 1998) [hereinafter Report of the Panel].

21. *See id.* Part. X.F. *See also* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. III, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

22. Report of the Panel, *supra* note 20, Part X.E. *See also* GATT art. XXIII ¶ 1(b).

23. *See* Antimonopoly Law § 2(9).

24. *See* 15 U.S.C. § 45 (1994).

clear demarcation of roles, which has caused incoherent and inconsistent application.

### *C. Overlapping Application to Unitary Exclusionary Conduct*

The Antimonopoly Law defines an “unfair trade practice” as “any act . . . which tends to impede fair competition and which is designated by the Fair Trade Commission . . .”<sup>25</sup> Unfair trade practices transcend the boundaries of collaborative, unitary, or vertical arrangements. As to horizontal collaborations, the JFTC customarily applies either Section 3<sup>26</sup> or Section 8 of the Antimonopoly Law, although it still condemns group boycott conduct both as an “undue restraint of trade” and as an unfair trade practice.

The prohibitions against unfair trade practices present two major problems: (1) the duplication of Section 3’s prohibition of private monopolization, and (2) the vague standard within regarding vertical arrangements. When deciding monopolization cases, the JFTC can apply either Section 3 or one of the clauses prohibiting unfair trade practices.<sup>27</sup> By using the all-embracing definition in Section 2(9), the JFTC uses the unfair trade practices clauses to find illegality in a diverse array of conduct. Recently, the JFTC has begun using Section 3’s monopolization clause to enforce illegal conduct, but this has been only infrequently.

Applying the clauses prohibiting unfair trade practices to unitary exclusionary conduct entails a danger of finding illegality in an overly broad range of conduct. This danger is most marked in pricing conduct. The JFTC has not regulated unitary pricing conduct as a monopolization or as predatory pricing, but rather as unduly low or differentiated prices through Section 2(9). The Antimonopoly Law does not require the JFTC to find actual market power before condemning companies’ conduct. As to unduly low prices, the JFTC published the Guidelines Concerning Unfair Price Cutting in 1984, explaining that consistent sales at a “price which is excessively below cost” and other unduly low prices violate the Antimonopoly Law when they harm other entities’ business.<sup>28</sup> This definition is too broad for two reasons. First, it enables the JFTC to prosecute those who price above their average variable cost. Second, it may enable the JFTC to find firms without market power guilty of violating the Antimonopoly Law. In addition, the JFTC may find

25. Antimonopoly Law § 2(9).

26. *See supra* note 13.

27. *See, e.g.*, Antimonopoly Law §§ 2(9), 19-20.

28. *See* Japan Fair Trade Comm’n, Guidelines Concerning Unfair Price Cutting (Nov. 20, 1984), available at <http://www.jftc.go.jp/e-page/guideli/pricecut.html>.

low prices to be illegal as unduly differentiated prices even when they fail to constitute unduly low prices. Recently, politicians receiving requests from liquor retailers have been pressuring the JFTC to prosecute low prices as unfair trade practices. This seems to indicate that the vague definition of unfair trade practices in the Antimonopoly Law creates an expectation among retailers that the JFTC will protect and rescue them. However, the JFTC would be better off applying Section 3's monopolization clause to unitary pricing conduct rather than prosecuting it as an unfair trade practice.

*D. Ambiguity and Inflexibility in the Regulation of Vertical Arrangements*

If one excludes horizontal collaborations and unitary exclusionary conduct from the domain of unfair trade practices, the role of unfair trade practices will rest solely on regulating vertical arrangements. This would result in more logical applications of the Antimonopoly Law. Nonetheless, the JFTC still should establish a clearer standard regarding the illegality of vertical arrangements.

The JFTC's Designation of Unfair Trade Practices classifies unfair trade practices into sixteen different categories, such as refusals to deal, tie-in sales, resale price maintenance, and trade restraining conditions.<sup>29</sup> Although minutely classified, the JFTC cannot find any conduct illegal unless it deems the conduct to be "undue" or lacking legitimate business reasons. Therefore, the JFTC's Designation adds little explanatory power to Sections 2(9) and 19 of the Antimonopoly Law.

Due to the vague provisions regarding unfair trade practices, the JFTC can find illegality in a vast array of business conduct. However, the JFTC still fails to actively apply the Antimonopoly Law to vertical arrangements. Resale price maintenance has dominated JFTC enforcement of the prohibition of unfair trade practices, which the JFTC treats as being "illegal in principle." The overly broad provisions on unfair trade practices have hindered rather than helped the JFTC to actively enforce the Antimonopoly Law against vertical arrangements.

The United States has never been completely satisfied with Japan's enforcement of the Antimonopoly Law. The most prominent example concerns the Structural Impediments Initiative negotiations from 1989 to 1990, during which the United States demanded more active enforcement against restrictive conduct committed by Japanese firms. In response to this pressure, the JFTC published the Guidelines Concerning Distribution

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29. See Japan Fair Trade Comm'n, Designation of Unfair Trade Practices (June 18, 1982), available at <http://www.jftc.go.jp/e-page/acts/gd.htm>.

Systems and Business Practices.<sup>30</sup> The Guidelines considerably improved standards regarding vertical restraints, particularly by limiting application of the prohibition of unfair trade practices to firms that are “influential in the market” for distribution-related conduct, excepting only resale price maintenance. This is similar to the market power standard, but is more broad and vague, as the Guidelines consider a firm to be influential if it either is within the top three entities in the relevant market or has more than 10% of the relevant market share.<sup>31</sup>

The JFTC should continue to delimit and clarify application of the provisions prohibiting unfair trade practices. First, it should adopt a market power standard rather than the standard set out in the Guidelines Concerning Distribution Systems and Business Practices in order to regulate vertical restraints in a more economically meaningful manner (and yet retain the *per se* prohibition against resale price maintenance). Second, the JFTC should publish general guidelines for vertical restraints. It is logically inconsistent to have guidelines that only target distribution-related conduct. The JFTC should use the same standard to regulate both production-related and distribution-related conduct.

#### *E. Lessons for Twenty-First Century Antitrust*

Vertical arrangements often have been considered to be trade issues. However, they should not be considered exclusively from the perspective of trade barriers, and should be scrutinized by competition authorities rather than trade officials.

Competition law standards toward vertical arrangements are universally in the evolutionary stage. No clear standards exist. Nonetheless, competition authorities should endeavor to create standards that are as clear and economically meaningful as possible. To achieve this objective, they should avoid ambiguous and all-embracing phrases such as “unfair” or “unreasonable” in their directive guidelines. In addition, competition authorities should adopt a market power requirement for delimiting illegality in vertical arrangements (excepting only resale price maintenance).

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30. See Distribution Guidelines, *supra* note 14.

31. *Id.* ch. 4.2.

## V. THE INCREASING REFINEMENT OF MERGER CONTROLS

### A. *The Need for Clear and Flexible Merger Guidelines*

The opening of WTO member countries' economies to global competition has pressed companies to restructure their businesses to enhance efficiency, which, in turn, has brought a worldwide increase in mergers and acquisitions.

The field of mergers and acquisitions, in particular, calls for administrative competition law guidelines. As mergers are difficult to unscramble, companies need a guide as to what sorts of mergers the competition authority will find illegal. Thus, merger guidelines should provide a systematic explanation regarding anticompetitive mergers. At the same time, the guidelines should give the competition authority enough flexibility to judge mergers on a case-by-case basis.

### B. *Improvements in the Japanese Merger Guidelines*

The JFTC revised its merger guidelines in December 1998.<sup>32</sup> The 1998 Merger Guidelines apply to both mergers and stock purchase acquisitions that lead to consolidation among firms. The old merger guidelines provided insufficient guidance as they only identified the types of mergers that the JFTC would select for "close examination" and did not explain what standard the JFTC employed to determine the illegality of mergers. The "25% market share," listed as a numerical guidepost in selecting mergers for "close examination," became the danger threshold for illegality. The JFTC itself seems to have taken such a standpoint. The 25% market share standard, however, should serve only as a starting point for merger examination. It should function as a safe harbor, below which companies may conduct mergers safely.

During the 1990s, the JFTC gradually increased the sophistication of its merger analysis. For example, in a 1997 consultation case regarding a merger between Mitsui Toatsu Chemicals, Inc. and Mitsui Petrochemical Industries, Inc., the JFTC permitted a merger that resulted in a market share of 57% because it found that overseas producers exerted sufficient competitive pressure within the market. The 1998 Merger Guidelines essentially follow

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32. See Japan Fair Trade Comm'n, Guidelines for Interpretation on the Stipulation that "The Effect May Be Substantially to Restrain Competition in a Particular Field of Trade" Concerning M&As (Dec. 21, 1998), available at <http://www.jftc.go.jp/e-page/guideli/maGL.pdf> [hereinafter 1998 Merger Guidelines].

the general approach of the U.S. merger guidelines (a fact the JFTC does not admit) and include, as a condition to finding a merger illegal, the formation of oligopolistic coordination in the industry as well as the unitary market power of a merging firm. For the first time, the JFTC advocated that market power (i.e. a “substantial restraint of competition”) is formed by oligopolistic coordination as well as by unitary conduct—a standard first established by the U.S. merger guidelines.<sup>33</sup>

Similar to the U.S. merger guidelines, the JFTC’s 1998 Merger Guidelines show (1) a concentration ratio (70% by the top three firms in a market) above which the JFTC is likely to find market power, and (2) a safe harbor market share below 10% for a merged company.

The JFTC’s decision to revise its merger guidelines to follow the U.S. merger guidelines in essence is sensible, as the U.S. guidelines, with their polished economic analysis, possess significant international relevance. Nonetheless, merger guidelines show only methods for delineating markets and finding market power. Competition authorities and courts should develop detailed standards through an accumulation of actual cases.

### *C. The Need for Formal Merger Cases*

Since the last formal merger case in 1969 involving the merger of Yawata Iron & Steel Co. and Fuji Iron & Steel Co.,<sup>34</sup> the JFTC has resolved all merger cases at the informal consultation stage prior to the mandatory merger filings. Companies have welcomed the informal procedure because they can obtain opinions from the JFTC confidentially. This system also benefits the JFTC, as informal consultation does not trigger mandatory time constraints. The informal procedure, however, possesses an obvious problem: a lack of transparency. Recognizing this criticism, the JFTC increased the transparency of consultation by publishing the essence of consultation cases online. Regardless, formal merger cases are needed, as consultation cases, even when published, only summarize the decisions and do not contain a detailed explanation of the underlying legal reasoning. Moreover, parties to consultation cases cannot appeal the decisions to the courts. To continuously clarify regulation standards, detailed legal analyses of actual cases should accompany the 1998 Merger Guidelines. Therefore, the JFTC occasionally must resolve important merger cases using a formal decision procedure.

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33. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (Apr. 8, 1997), available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html).

34. Japan Fair Trade Comm’n, 16 SHINKETSUSHU 46 (Oct. 30, 1969).

#### *D. Lessons for Twenty-First Century Antitrust*

Prohibiting (or conditionally approving) mergers that produce market power has become the common standard in the United States, European Union, and Japan. Market power should include that caused by oligopolistic coordination, as explicitly indicated by the 1998 Merger Guidelines.

In order to assure companies of the legality of their mergers, merger guidelines should indicate numerical market share or concentration ratios to signify safe harbors as well as the formation of market power. However, competition authorities should not treat such ratios as creating automatic illegality. Instead, authorities should analyze elements of market power systematically, including foreign competition and ease of entry. The U.S. merger guidelines present the best example of an economically meaningful and step-by-step analysis of market delineation and market power. Competition authorities worldwide are advised to study the U.S. guidelines closely and incorporate its methods into their own guidelines.

Competition authorities tend to handle mergers through an informal consultation procedure, which most companies seem to prefer. Regardless, it is only through an accumulation of formal merger cases that detailed legal reasoning will emerge.

### VI. CONTROL OF “GENERAL CONCENTRATION”

#### *A. “General Concentration” vs. Market Concentration*

The Japanese Antimonopoly Law contains provisions concerned with “general concentration,” which refers to the concentration of economic power in individual companies or groups across industries. Control of general concentration remains distinct from control of mergers and stock purchase acquisitions, which aims to prevent the formation of market power in individual markets. Control of general concentration does not require a finding of market power in any particular market. Japan and Korea remain the only countries in the world with such competition law provisions, and now that the Japanese economy is at the forefront of global competition, the time has come to reexamine the rationale for general concentration control.

The Antimonopoly Law regulations regarding general concentration reside in three provisions: (1) the prohibition against certain holding companies;<sup>35</sup> (2) the restriction on stockholding by financial companies;<sup>36</sup>

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35. Antimonopoly Law § 9.

36. *Id.* § 11.

and (3) the restriction on the total amount of stockholding by large non-financial companies.<sup>37</sup> Historically, general concentration provisions have occupied an important place in the Antimonopoly Law. In particular, the prohibitions against stockholding by certain companies symbolized a central measure for democratizing the Japanese economy. This explanation was convincing until sometime after Japan's defeat in World War II, when memories of the pre-war *zaibatsu* were still fresh in the minds of Japanese citizens.

A more modern rationale for controlling general concentration is to prevent corporate groupings popularly known as *keiretsu*. After the dissolution of the *zaibatsu*, loose forms of corporate groupings gradually formed through cross-holdings led by main banks and trading houses. After a gradual loosening of prohibitions, the Japanese government reinvigorated general concentration control in 1977, lowering banks' stockholding ceiling from 10% to 5% and adding a new stockholding ceiling for large non-financial companies (most notably the large trading houses). Citizen hostility toward large corporate groups and trading houses that they believed profited from galloping inflation during the oil crisis in the 1970s fueled the revival of general concentration regulation.

### *B. Increased Toleration of Holding Companies*

General concentration may affect democracy through large companies' political influence. Moreover, corporate groups may affect competition in markets through conglomerate effects. However, these effects remain ambiguous and unproven. Therefore, when Japanese companies facing global competition in the 1990s demanded more freedom in corporate form, the government responded by mitigating the Antimonopoly Law provisions against general concentration. Then, in 1997, the government amended Section 9, replacing the general prohibition of pure holding companies with a prohibition limited to three types of holding companies.

The 5% stockholding ceiling for banks in Section 11 survived the 1997 revision of the Antimonopoly Law. Nevertheless, the JFTC proclaimed that holding companies fall outside the domain of Section 11. Therefore, bank holding companies are regulated only by the Banking Law and thus may hold stock up to a 15% ceiling. With the objective of eliminating this discrepancy between the Antimonopoly Law and Banking Law, proposals have suggested replacing Section 11 of the Antimonopoly Law with

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37. *Id.* § 9-2.

language identical to the Banking Law. In addition, the Japan Federation of Economic Organizations, the *Keidanren*, proposed the elimination of Section 9(2)'s restriction on stockholdings by large non-financial companies. The declining influence of large trading houses made the *Keidanren*'s proposal that much more convincing. On May 22, 2002, the Parliament passed the bill to repeal Section 9(2).<sup>38</sup>

Even after the 1997 revision of the Antimonopoly Law, the rationale for controlling general concentration remains ambiguous. Section 9 states that holding companies that lead to an "excessive concentration of economic power" are prohibited.<sup>39</sup> However, the Antimonopoly Law defines "economic power" vaguely and without any convincing logical connection. In addition, Section 9 lists three types of prohibited holding companies, each of which it delineates using numerical standards.

### *C. Lessons for Twenty-First Century Antitrust*

The control of general concentration is rational when giant corporate groups such as Japan's pre-war *zaibatsu* or postwar *keiretsu* control national economies. However, overly strict regulation of general concentration possesses demerit in the narrowing of the freedom of corporate organizations. As increases in competition weaken the power of large corporate groups, competition authorities should loosen control over general concentration for the sake of giving corporations organizational freedom.

In contrast with the market power standard for merger control, the control over general concentration lacks an economically meaningful standard. This led to inflexible numerical ceilings for prohibiting certain corporate forms or levels of stockholding but without any logical explanation as to how the government arrived at such thresholds. Inflexible ceilings obstruct the flexible interpretation necessary to parallel changing economic conditions. The increasing diversification of corporate forms and alliances together with the changing relationships between banks and commerce necessitate governmental reconsideration of the rationale for controlling general concentration. Such control may prove useful at certain stages of economic development, but its rationale should be evaluated constantly and its regulations should remain flexible.

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38. See Press Release, Japan Fair Trade Comm'n, Approval of the Amendment of the Antimonopoly Law by the Diet (May 22, 2002), available at <http://www.jftc.go.jp/e-page/press/index.html>.

39. Antimonopoly Law § 9.

## VII. INNOVATION AND COMPETITION LAW

It is nearly unanimous among economists that upgrading national economies requires dynamic efficiency (efficiency through innovation or improvements in technology) more than static efficiency.<sup>40</sup>

*A. Guidelines for Collaborative Research and Development*

Generally, companies do not collaborate in research and development to restrict competition. Therefore, competition authorities should balance competition restraint and efficiency effects using a rule of reason analysis. In addition, the general antitrust rules regarding collaborative activities should incorporate characteristics of technology-related collaborations.

For collaborative research and development, the JFTC published the Guidelines Concerning Joint Research and Development in 1993.<sup>41</sup> The guidelines point out that collaborative research and development often increases efficiency, and thus is pro-competitive. The expectation is that the JFTC's viewpoint eventually will lead to the use of a rule of reason analysis in which the efficiency and anticompetitive effects are balanced. However, the guidelines only list elements such as market share and the nature of research for determining a "substantial restraint of competition" and do not indicate that efficiency effects are taken into account. In practice, the JFTC may take efficiency into account, as it has never found a joint research and development collaboration to be illegal. Nevertheless, the JFTC should explicitly adopt a rule of reason analysis to clarify efficiency consideration.

*B. Guidelines for Intellectual Property Rights and Competition Law*

In the areas of innovation and research and development, the most important task for competition authorities today is to clarify the relationship between intellectual property rights and competition law. Most business activities in the technology sector involve intellectual property rights, most notably patent rights and copyrights. The importance of intellectual property rights increases as the role of technology in the economy increases. Monopolies authorized according to intellectual property rights are legal monopolies, and yet competition laws still apply to the abuse of intellectual

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40. See PORTER, *supra* note 6, at 18-30; AKIRA GOTO & KOTARO SUZUMURA, COMPETITION POLICY IN JAPAN 4-5 (1999).

41. See generally Japan Fair Trade Comm'n, The Antimonopoly Act Guidelines Concerning Joint Research and Development (Apr. 20, 1993).

property rights, including the extension of monopolization caused by misused licenses

In 1995, the FTC and DOJ jointly issued the Antitrust Guidelines for the Licensing of Intellectual Property, which methodically explain the U.S. rule of reason analysis using case methods.<sup>42</sup> These guidelines could serve as a model for other countries' competition authorities, as the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights essentially homogenized the relationship between intellectual property rights and competition law worldwide.

In 1999, the JFTC revised its Guidelines for Patent and Know-how Licensing Agreements.<sup>43</sup> The revised guidelines represent a considerable improvement over the previous categorical classifications of legality as they adopt flexible standards for discerning illegality in licensing contracts. However, the JFTC could further improve the guidelines by considering two points. First, the JFTC should abolish the revised guidelines' dogmatic view of treating certain types of licensing arrangements (including territorial divisions) as being legal "in principle."<sup>44</sup> Licensing contracts and arrangements are not purely exertions of intellectual property rights and thus competition law should control all of them. Second, the revised guidelines closely detail the standards regarding the "unfair trade practices" clauses in the Antimonopoly Law, but make only general statements regarding standards for collaborative activities.<sup>45</sup> The JFTC would be wise to clarify the standards for intellectual property right-related collaborative activities by adopting a rule of reason analysis.

### *C. Lessons for Twenty-First Century Antitrust*

Most collaboration in research and development is intended to increase efficiency, and thus a rule of reason analysis should apply. This represents an extension of general antitrust treatment for collaborations and, therefore, before composing special guidelines for collaborative research and development activities, competition authorities should establish general

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42. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (Apr. 6, 1995), available at <http://www.usdoj.gov/atr/public/guidelines/guidelin.htm>.

43. Japan Fair Trade Comm'n, Guidelines for Patent and Know-how Licensing Agreements (July 30, 1999), available at <http://www.jftc.go.jp/e-page/guideli/patent99.htm>.

44. TOSHIAKI TAKIGAWA, HI-TECH SANGYO NO CHITEKIZAISANKEN TO DOKKINHO [INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAWS IN HI-TECHNOLOGY INDUSTRIES] 73-112 (2000).

45. *Id.*

guidelines for all collaborations.

Intellectual property rights occupy a vital role in innovation, research, and development. Nevertheless, competition authorities should regulate the abuse of intellectual property rights. They should not exempt licensing contracts from competition law as belonging simply to the domain of intellectual property rights, and should analyze most of the licensing contracts using a rule of reason analysis.

### VIII. THE ELIMINATION OF EXEMPTED SECTORS

The exemption of substantial parts of the Japanese economy from the application of competition laws limits the effectiveness of the competition laws. Therefore, exempted sectors should be eliminated. However, the elimination of the exempted sectors should not mean that all agreements concluded in those sectors should be considered illegal per se. Instead, the JFTC should apply a rule of reason analysis to determine their illegality.

#### *A. Curtailment of Exempted Sectors*

The language of the original 1947 Antimonopoly Law prohibited all cartels. The 1953 amendment subsequently exempted depression and rationalization cartels. More importantly, the MITI (and other ministries) enacted laws that exempted cartels located within their particular industries from the reach of the Antimonopoly Law, which significantly limited its effectiveness. The fact that ministries can shield their industries from competition using industry-specific exemptions has rendered the declaration of the Antimonopoly Law as the so-called “economic constitution” mere rhetoric. However, this phenomenon is not limited to Japan. Only in the European Union do competition laws restrain governments at all levels from enacting competition-restricting laws.

To make its competition laws truly effective, Japan must establish a general policy for prioritizing competition over regulations. Competition policy in Japan has received a slowly increasing level of support at the highest levels of government. In addition, due to Japan’s membership in the IMF and GATT/WTO, the MITI and other ministries progressively have lost their legal apparatus for forcing and inducing companies into cartels. Since the mid-1990s, the number of exempted cartels has decreased, with their curtailment reaching a zenith in 1997.

### *B. Abolishing Exemptions for Depression and Rationalization Cartels*

In addition to the aforementioned curtailment of specific exemptions, there has been a reduction in stipulated exemptions under the Antimonopoly Law. The two most notable examples are the former exemptions for depression cartels<sup>46</sup> and rationalization cartels.<sup>47</sup> However, the elimination of these exemptions should not be interpreted as indicating that all such cartels are now per se illegal. Rather, if the cartels are pro-competitive in nature or increase efficiency, the JFTC should evaluate them using a rule of reason analysis. Depression cartels generally are inefficient by nature, and unless significant reasons exist to the contrary, they should be treated as illegal per se in order to eliminate as many inefficient enterprises as possible. Such agreements only tend to slow down industry adjustments. However, rationalization cartels should not necessarily receive the same per se treatment, as a relatively much larger portion of them possess legitimate efficiency-increasing objectives.

### *C. Lessons for Twenty-First Century Antitrust*

Competition law exemptions should be eliminated. Moreover, competition laws and enforcement authorities should possess the power to restrain ministries and the Parliament from exempting specific sectors from application of the competition laws. In this respect, the Treaty Establishing the European Community can serve as a model for other countries to follow. On the other hand, the elimination of exemptions should not mean that all agreements in those sectors are subsequently illegal per se. Rather, competition authorities should apply a rule of reason analysis to those collaborations or agreements that serve to increase economic efficiency.

## IX. REGULATED INDUSTRIES AND COMPETITION LAW

### *A. Regulated Industries as a Cause of Structural Weakness*

The elimination of exempted sectors will not produce a competition-oriented economy single-handedly. To achieve this it also is necessary for governments to deregulate industries or conduct regulatory reform in pro-competitive fashion. The most competitive Japanese industries (most notably the consumer electronics and automotive industries) grew as a result of

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46. Antimonopoly Law § 24(3) (repealed 1999).

47. *Id.* § 24(4) (repealed 1999).

intense domestic competition, and yet the Japanese government still continues to shield large parts of the Japanese economy from competition (including the financial, telecommunications, electric, airline, and construction industries).<sup>48</sup> The existence of industries shielded from competition is one of the largest structural weaknesses in the Japanese economy, and it has contributed heavily to the decade-long economic slump.<sup>49</sup>

Structural reforms and the introduction of competition are necessary to increase productivity in these protected sectors. This is something the Japanese government recognized, and has been trying to improve, since 1980. Japan's initial efforts were the result of consistent pressure by the United States to open up Japan's markets. However, the pressing need to revitalize the Japanese economy has spurred the overwhelming majority of its increasingly productive efforts in recent years.

Although it is not as advanced as the United States and United Kingdom, Japan has deregulated and reformed its economic regulations considerably, including large parts of the financial, telecommunications, and electric industries. While incumbent monopolists such as Nippon Telegraph and Telephone Corporation (NTT) have opposed regulatory reform, the business community in general has supported structural reform. The only question that persists concerns how rapidly the government can proceed under opposition from the incumbent monopolists and select bureaucrats. In addition, the government will have to deal with a seemingly increasing public antipathy toward deregulation and competition. The insistent tendency among Japanese scholars and journalists to place too much of an emphasis on a social "safety net" has contributed to protecting the interests of the status quo.

### *B. The Role of the JFTC in Conducting Regulatory Reform*

The JFTC has remained relatively silent in the conduction of deregulation and regulatory reform, only establishing scholarly study groups to study regulated industries and subsequently publishing their reports. Although well researched, these reports have no binding legal authority, and ministries are free to follow or ignore them as they see fit. One example concerns the Ministry of Public Management, Home Affairs, Posts and Telecommunications, which has ignored the JFTC's reports on

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48. According to a report by the JFTC in June 1995, regulated industries account for more than 40% of Japan's gross national product. Jun Ichiji, *Seifu-Kisei Bunya No Weight Shisan [Weight Calculation of Regulated Sectors]*, KOSEI TORIHIKI [FAIR TRADE], Sept. 1995, at 48-49.

49. See MICHAEL PORTER ET AL., CAN JAPAN COMPETE? 32-35 (2000).

telecommunications reform completely. The OECD's 1999 report on regulatory reform in Japan explicitly indicated that the insufficient presence of the JFTC represented a primary point of weakness in Japanese regulatory reform.<sup>50</sup> It is crucial that the Japanese Parliament give the JFTC the formal capacity to engage in regulatory reform.

With regard to its present role in regulatory reform, the JFTC should concentrate its efforts on enforcing the Antimonopoly Law against incumbent enterprises in regulated industries. The financial, telecommunications, and electricity sectors already have experienced substantial deregulation and are now eligible to receive strict Antimonopoly Law scrutiny. The elimination of the exemption clause in Section 21 of the Antimonopoly Law in 2000 made it clear that the Antimonopoly Law applies to inherently monopolized industries.<sup>51</sup>

Despite the JFTC's ability to enforce the Antimonopoly Law in the telecommunications, electric, and financial sectors, it rarely has done so because it previously has considered regulation in these sectors to belong exclusively to the individual sectoral ministries. However, the JFTC may be changing its attitude: in December 2000, it issued a warning to NTT East for a potential violation of the Antimonopoly Law regarding obstructive conduct toward new entrants in the Digital Subscriber Line (DSL) industry.

### *C. Lessons for Twenty-First Century Antitrust*

Governments should give competition authorities formal status in governmental activities for regulatory reform. At the same time, competition authorities should not remain content with simply publishing study reports on regulated industries. They should devote a substantial portion of their human resources to enforcing competition laws in regulated industries like the telecommunications, electric, and financial sectors. The existence of regulatory ministries in each regulated industry should not inhibit competition authorities like the JFTC from enforcing competition laws. Competition authorities are more experienced and much better equipped to deal with the anticompetitive behavior of dominant incumbent businesses than industry ministries.

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50. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REGULATORY REFORM IN JAPAN 109 (1999) (stating that increasing the visibility and impact of JFTC participation in policymaking is necessary to help reform succeed).

51. Former Section 21 stated that "[t]he provisions of this Act shall not apply to such acts . . . as are done in the proper course of business by a person engaging in [the] railway, electricity, gas, or any other business constituting a monopoly by the inherent nature of the said business."

## X. PRIVATE ENFORCEMENT OF COMPETITION LAW

*A. Scarcity in Private Enforcement of the Antimonopoly Law*

Much of the strength of U.S. antitrust law rests on its private enforcement, which is comprised of (1) lawsuits to recover treble damages,<sup>52</sup> and (2) lawsuits for injunctive relief against a potential or threatened loss or damage. In contrast, the JFTC has monopolized enforcement of the Antimonopoly Law in Japan. However, private enforcement of the Antimonopoly Law would augment its efficacy significantly. The limited resources of the JFTC prevent it from enforcing the Antimonopoly Law as effectively and completely as possible. Citizens and businesses should be empowered to utilize the Antimonopoly Law by directly filing private causes of action. Moreover, the introduction of private enforcement would enable the JFTC to concentrate its resources on cases of the utmost interest to the public, leaving citizens and businesses to resolve private conflicts personally.

Japanese citizens already are empowered to sue to recover damages under either the Antimonopoly Law<sup>53</sup> or the Civil Law.<sup>54</sup> However, there only have been a few private lawsuits to recover damages caused by violations of the Antimonopoly Law.<sup>55</sup> Japanese courts' stringent standards regarding causation and damages have minimized the likelihood of a successful recovery of damages. Nevertheless, in a 1993 civil suit, Tsuzuki, a manufacturer of elevator parts, successfully sued to recover damages from Toshiba, an elevator manufacturer, for monopolizing the market for maintenance of its own equipment.<sup>56</sup> While not yet a clear trend, in the future, Japanese companies may utilize private causes of action more and more for damage recovery.

*B. Introduction of Injunctive Relief to the Antimonopoly Law*

For citizens, and businesses in particular, injunctive relief deals with violations of the Antimonopoly Law more directly than the recovery of damages. However, prior to 2000, the Antimonopoly Law did not enable private suits for injunctive relief. The JFTC was the only entity that could institute such a suit. However, the Japanese Parliament added Section 24 to

52. 15 U.S.C. § 15(a) (1997).

53. Antimonopoly Law § 25.

54. MINPŌ art. 709.

55. Official statistics are unavailable due to the lack of an official reporting system for civil cases involving violations of the Antimonopoly Law.

56. *Tsuzuki v. Toshiba Elevator*, 1479 HANREI JIHŌ 21 (Osaka High Ct., July 30, 1993).

the Antimonopoly Law in 2000 specifically to allow private suits for injunctive relief by individuals and companies. Presently, with the exception of cartelization and monopolization cases, Section 24 only allows the institution of private suits to recover for “unfair trade practices.” However, over time, the scope of allowable injunctive relief is expected to be broadened significantly.

### *C. Judicial Reform and Private Enforcement of the Antimonopoly Law*

Citizens and companies will not institute private suits for violations of the Antimonopoly Law if Japanese courts take years to resolve a single case. In addition, competent attorneys often are difficult to find. Determined to correct these longstanding problems, the Japanese government recently began reforming the judicial system. One measure suggested by a government-commissioned study group was a radical increase in the number of lawyers through reformation of the National Bar Examination and the institution of law schools moderately modeled after law schools in the United States.<sup>57</sup> In time, the judicial reform will alter the Japanese judicial system to parallel those of the United States and the European Union, which likely will induce more private suits to enforce the Antimonopoly Law.

### *D. Lessons for Twenty-First Century Antitrust*

The introduction of private enforcement (particularly private injunctive relief) will increase the effectiveness of competition law substantially. Allowing citizens and companies to directly file private lawsuits will free competition authorities to concentrate on cases of only the utmost public importance. To complement such a surge in private litigation, there must be a dramatic increase in the number of lawyers, and courts should increase their overall efficiency and effectiveness.

## XI. CONCLUSION

Most areas of competition law evolve constantly. Competition authorities worldwide should strive to continuously improve and update their particular country’s competition laws, which require learning from the practices, successes, and failures of other countries. Market economies function

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57. See Shihō Seido Kaikaku Shingikai [Deliberation Council on Judicial System Reform], Shihō Seido Kaikaku Shingikai Ikensho [Report of the Deliberation Council on Judicial System Reform: Toward a Judicial System That Supports Japanese Society in the Twenty-First Century], June 12, 2001, at 57.

similarly regardless of location, which means it is possible for the underlying principles and provisions of competition laws throughout the world to become more and more alike. However, while adopting ideas from other countries is important, such adoption should come through a gradual adaptation of the general principles of the adopted laws to the host country's laws rather than through a forced harmonization.

The JFTC has improved its enforcement of the Antimonopoly Law in every area of competition law, but fundamental changes are still necessary. One important change that should be made concerns the adoption of a balancing consideration of competition restraints and efficiency. In addition, the market power standard should be adopted to demarcate the coverage of the unfair trade practices clause.

Development of competition law principles requires a high degree of intellectual capacity, and therefore the professional capacity of JFTC personnel must be improved. With its increased legal power and favorable political environment, the JFTC's performance depends on the intellectual capacity of each commissioner and Secretariat personnel now more than ever. The necessity of their upgrading has reached a zenith and it is important that Japan respond appropriately and promptly.

Japan also should abolish the traditional appointment system by which former ministry directors-general receive appointments to become JFTC commissioners. In their place should go extremely proficient economists and lawyers who understand the dynamics inherent in the practical application of competition law. Adding regulatory reform to the powers of the JFTC and renaming the JFTC to an appropriately titled agency such as the "Competition Commission" should attract more capable personnel.

The introduction of private enforcement (primarily private injunctive relief) possesses the potential to significantly strengthen enforcement of the Antimonopoly Law by enlarging initiators of lawsuits under the Antimonopoly Law. The ongoing reform of the judicial system in Japan will transform Japanese society into one that is more rule oriented, one in which competition law and policy will play central roles.