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Fair Trade Commission vs. MITI: History of the Conflicts Between the Antimonopoly Policy and the Industrial Policy in the Post War Period of Japan

by Seichi Yoshikawa*

I. INTRODUCTION

Since Japanese business activities have expanded on the international level, the Japanese government's behavior and economic policy have attracted increased attention from foreign businessmen, government officials and economists. One particular point of interest to foreign observers seems to be the apparent fact that in Japan various mechanisms exist to restrict the competition among enterprises. Certain terminologies, such as "Japan, Inc.," have been invented to refer to the seemingly unique business environment of Japan. Against such theory some economists argue that the Japanese market is highly competitive, even more so than that of the United States or of the economy of England, where important industries are nationalized.¹ It is nearly an undeniable fact, however, that the Japanese antimonopoly (or antitrust) policy has been considerably circumscribed by what is called the "industrial policy" of the Japanese government, administered most notably by its Ministry of International Trade and Industry (MITI).

Japanese antimonopoly policy is enforced by the Japanese Fair Trade Commission (FTC) based on the Law Relating to the Prohibition of Private Monopoly and Methods of Preserving Fair Trade (Antimonopoly Law).² When the Antimonopoly Law was promulgated shortly after World War II, it was termed the "Economic Constitution," which meant that all the economic policy and business activities were to be conducted in accordance with the mandate of free competition that it embodied. The Antimonopoly Law prohibits "private monopolies," "unreasonable

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¹ Tsujimura, *Sango seisaku no honshitsu to dockkin seisaku (Essence of the Industrial Policy and the Antimonopoly Policy)*, *ECONOMISTO*, 10-11 (Jan. 25, 1983).

² *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu (Law Relating to the Prohibition of Private Monopoly and Methods of Preserving Fair Trade)*, Law No. 54 of 1947 (as amended), translated in 2 *EIBUN-HOREI SHA LAW BULLETIN SERIES KA* [hereinafter cited as Antimonopoly Law].

restraint of trade,"³ and "unfair business practices."⁴ The FTC is equipped with broad powers, comparable to those given to the U.S. Federal Trade Commission, to enforce the Law. Yet, the restrictions on business activity imposed by the Antimonopoly Law have not been consistent with the industrial policy administered by MITI. On many occasions "battles" or "adjustments" between the FTC and MITI occurred over conflicts between the respective policies, and it is fair to state that MITI has had the better of the situation most of the time. However, by reviewing the relaxation of restrictions on cartels that occurred during the post-war period and the present status of the restrictions on cartels, certain new trends in Japanese antimonopoly policy become manifest.

II. RELAXATION OF RESTRICTIONS ON CARTELS

A. *Stipulated in Original Antimonopoly Law*

The Antimonopoly Law was promulgated in 1947 as one important part of the policy of the Allied Forces for the democratization of the Japanese economic environment. This original legislation reflected the idealism of the New Dealer economists of the Supreme Command Allied Powers (SCAP) and contained much stricter antimonopoly regulations than its American counterpart. In particular, Article 4 of the Antimonopoly Law flatly prohibited, with minor exceptions, entrepreneurs from conducting any concerted activities (cartels) for deciding, maintaining or increasing prices, restricting production or sales volume, restricting technology, products, distribution channels or customers or limiting the new installment or expansion of production facilities or the employment of new production methods.⁵ Likewise, Article 8 provided that if the FTC found an "undue imbalance of business capabilities," it could order the entrepreneurs concerned to take necessary measures, such as the transfer of business facilities, to eliminate the imbalance.⁶ Further, Chapter 4 of the Antimonopoly Law imposed sweeping restrictions on all sorts of business combinations.⁷

Such drastic antimonopoly legislation was greeted by the Japanese industrial leaders with much resentment. The Antimonopoly Law was enforced by the FTC, and observed by the industries, only under the force of SCAP.

With termination of the Occupation in 1952, the antagonism to the Antimonopoly Law and the FTC became open, and under such opposi-

³ *Id.* at art. 3.

⁴ *Id.* at art. 19.

⁵ *Id.* at art. 4.

⁶ *Id.* at art. 8.

⁷ *Id.* at ch. 4.

tion both the statutes and the enforcement of antimonopoly legislation were diluted. In particular, cartels came to be widely legalized or tolerated de facto. This was achieved by amendment to the Antimonopoly Law itself, by creation of "bypass statutes" and by *gyōsei shidō* (administrative guidance).

B. *The 1953 Amendment to the Antimonopoly Law*

In 1953, one year after termination of the Occupation, the Antimonopoly Law underwent a fundamental change.⁸ The change included the repeal of the anti-cartel provisions in Article 4 and the creation of provisions specifically permitting cartels under certain circumstances,⁹ the repeal of Article 8 concerning elimination of the "undue imbalance of business capabilities" and a substantial relaxation of the restrictions on merger, shareholding and interlocking directorates.¹⁰ The change was considered so drastic that a leading scholar of Japanese business law termed this amendment a "qualitative change" in the antimonopoly policy.¹¹

It should be noted that even after repeal of Article 4, cartels are still, in principle, illegal under Article 3 of the Antimonopoly Law's prohibition of the "undue restraint of trade."¹² However, newly created Articles 24-3 and 24-4 exempt from the application of the Antimonopoly Law "concerted activity against depression"¹³ (usually called "depression cartel") and "concerted activity for enterprise rationalization"¹⁴ (usually called "rationalization cartel"). The "depression cartel" is a concerted activity of producers of a specific product (or their trade association) which will be implemented if the price of the product becomes lower than the average cost of its production, the continuation of the major part of the producers' business will be difficult and if the circumstances make it difficult for them to overcome the situation by their efforts to rationalize their business.¹⁵ The "rationalization cartel" is concerted activity by the producers of a specific product (or their trade association) for the purpose of limiting technology or specific items of the product, or moves with respect to utilization of facilities for raw materials of the product, or for delivery thereof or utilization or purchase of by-products, refuse or waste, under circumstances where such concerted activity is especially necessary for ef-

⁸ Law for Partial Amendment to the Law Relating to the Private Monopoly and Methods of Preserving Fair Trade, Law No. 259 of 1953.

⁹ Antimonopoly Law, *supra* note 2, at arts. 24-3, 24-4.

¹⁰ *Id.* at arts. 9-18.

¹¹ S. IMAMURA, *DOKUSEN KINSHI-HŌ (THE ANTIMONOPOLY LAW) 17* (1961).

¹² Antimonopoly Law, *supra* note 2, at art. 3.

¹³ *Id.* at art. 24-3.

¹⁴ *Id.* at art. 24-4.

¹⁵ *Id.* at art. 24-3.

fecting technical promotion, quality improvement, cost reduction, increases in efficiency and other enterprise rationalization activities.¹⁶ Under such circumstances, the producers (or their trade association) may engage in the respective concerted activities after obtaining approval from the FTC.

C. Enactment of "Bypass Statutes"

In addition to the above exempting provisions of the Antimonopoly Law itself, special laws, "bypass statutes," have been enacted one after another to exempt application of the Antimonopoly Law to cartels formed under certain specific circumstances. At present, there are twenty-eight such bypass statutes.¹⁷ They cover cartels of entrepreneurs belonging to certain industries which are subject to special governmental regulations (e.g., air transportation and insurance), cartels of small or medium sized enterprises, cartels formed to avoid excessive competition in the field of export and import transactions, cartels formed in the case of severe depression to avoid irreparable damage to the industry concerned and cartels formed for the purpose of enterprise rationalization.¹⁸

These bypass statutes have been enacted under the strong leadership of MITI, which often regarded the Antimonopoly Law as an "obstacle" to the effective administration of its industrial policy. MITI and other proponents of cartels¹⁹ considered such special legislation necessary even after "depression cartels" and "rationalization cartels" were legalized under the Antimonopoly Law, since these cartels are still subject to case-by-case FTC approval. Furthermore, MITI feared that if the FTC stringently interpreted the requirements for the implementation of cartels, the forma-

¹⁶ *Id.* at art. 24-4.

¹⁷ KŌSEI TORIHIKI INKAI (FTC), 1982 KŌSEI TORIHIKI INKAI NENJI HŌKOKU (ANNUAL REPORT OF THE FAIR TRADE COMMISSION) 308-309. In fact, there is still another exempting statute. The original Antimonopoly Law contained, and still contains, Article 22 which provides that the law will not apply to a legitimate act of an entrepreneur or a trade association conducted under the authority of certain statutes designated by a special statute. In order to enforce this mandate, a designating statute called the Law Concerning Exemption, etc. of Application of the Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade, Law No. 138 of 1947 was promulgated. Law No. 138 exempts from application of the Antimonopoly Law cartels under five statutes, including the Local Railway Law, Law No. 52 of 1919 (as amended) and the Land Transportation Business Adjustment Law, Law No. 71 of 1938 (as amended).

¹⁸ KŌSEI TORIHIKI INKAI, *supra* note 17, at 174-75.

¹⁹ Many businessmen favor cartels. For example, Mr. Yoshihiro Inayama, Chairman of Keidanren (the Federation of Economic Organizations), the most influential organization of the Japanese business, is an outspoken proponent of cartels and, for that reason, he is called "Mr. Cartel." See also Inayama, *Watashi no jiron (My Cherished Opinion)* in KOKUSAI KYOSORYOKU TO DOKKIN-HO (ABILITY OF INTERNATIONAL COMPETITION AND THE ANTIMONOPOLY LAW) (1963).

tion of cartels would not be permitted as a practical matter. This fear is the reason why some bypass statutes specifically deal with the circumstances in which depression and rationalization cartels are allowed. For example, under the Specified Industry Structural Improvement Temporary Measures Law,²⁰ one of the most important bypass statutes, MITI is authorized to instruct entrepreneurs in specified industries (aluminum, chemical textiles, chemical fertilizer, paper and petro-chemical industries) to conduct concerted activity with respect to disposition and construction of production equipment.²¹ The resultant concerted activity is exempted from the Antimonopoly Law.²²

Under most of these statutes, entrepreneurs do not have to deal with the FTC; they are to obtain an approval from, or file a report to, the competent minister in charge of the particular industrial sector concerned.²³ In many of such occasions the competent ministers have only to "consult" or "notify" the FTC in granting the approval or accepting the report. Consequently, apart from the cartels formed under administrative guidance, more cartels have been formed based on the bypass statutes than on the exempting provisions of the Antimonopoly Law. For example, after the Specific Depressed Industry Stability Temporary Measures Law came into force in 1978, twenty-five depression cartels have been formed under this law compared to only eight cartels formed under Art. 24-3 of the Antimonopoly Law.²⁴ In the period from 1953 to March 1982, the total number of cartels formed under the bypass statutes is 19,762 compared to 265 formed under the Antimonopoly Law.²⁵

D. Cartels Formed under Administrative Guidance

Even more important than the bypass statutes in the formation of cartels is the frequent intervention of *gyōsei shidō* (administrative guidance) which is conducted by various ministries, particularly MITI. It is already well known abroad that administrative guidance permeates every aspect of Japanese administration.²⁶ This technique has also been widely

²⁰ Specified Depressed Industry Stability Temporary Measures Law, Law No. 44 of 1978, as amended and renamed by amending statute of May 24, 1983, Law No. 53 of 1983. See *infra* note 77 and accompanying text.

²¹ *Id.* at art. 5.

²² *Id.* at art. 11.

²³ Export Import Transaction Law, Law No. 299 of 1952 (as amended), arts. 5, 5-2, 5-3, 7-2 and 7-3; Specified Equipment Information Industry Promotion Temporary Measures Law, Law No. 84 of 1978, arts. 6 and 10.

²⁴ KŌSEI TORIHIKI INKAI, *supra* note 17, at 310-15.

²⁵ *Id.*

²⁶ The concept of administrative guidance is discussed in Sanekata, *Administrative Guidance and the Antimonopoly Law*, 10 LAW IN JAPAN 65 (1977). Literature on administrative guidance is abundant. See Matsushita & Repeta, *Restricting the Supply of Japanese*

used in the formation of cartels.

A typical example of this practice is *kankoku sotan* (literally translated, recommended curtailment of operation) which was started in 1952, a year before the 1953 Amendment of the Antimonopoly Law, and has since been frequently repeated. In 1952, the price of cotton yarn started to decline and MITI issued a "recommendation" to all major spinning mills that the total monthly production be limited to 150,000 bales. Each mill received a suggested volume of maximum production. Since such "recommendation" was not based on any specific statutory authorization, it was possible, as a matter of law, for the mills not to follow the guidance. However, in conjunction with the issuance of the recommendation, MITI declared that if any mill did not follow the guidance it would reduce the import quota of raw cotton to be allocated to that mill. Thus, all the mills curtailed their operations in compliance with the recommendation, and the price of cotton yarn became stabilized soon thereafter.²⁷

Other examples of cartels based on administrative guidance include the purchase and stockpiling by the Cotton Products Export Association of cotton cloth produced by major mills, the freeze of inventory of textile products and the "open sale" system under which MITI supervised sale of steel by major manufacturers.²⁸

As already noted, administrative guidance is conducted in most cases without any specific statutory authorization, but the guidance is justified on the basis of the general authority conferred upon the particular ministry, such as MITI, by the law establishing it.²⁹ As a matter of law, entrepreneurs may refuse to comply with guidance; however, actually they do follow the guidance for a variety of reasons. An important reason is that guidance directed towards formation of cartels is, in most cases, exactly what entrepreneurs want. Another reason is that, although guidance may not be legally enforced, non-compliance is frequently thought to trigger unfavorable action by the ministry in the future. A classic example of this is provided by the refusal of Sumitomo Metal Industries, Ltd. to follow MITI's guidance for *kankoku sotan* in 1975. This refusal provoked MITI to declare that it would reduce the import quota for coal to be allocated to Sumitomo. This action eventually forced Sumitomo to yield.³⁰

Automobiles: Sovereign Compulsion or Sovereign Collusion?, 14 CASE W. RES. J. INT'L L. 47, 69 n.97 (1982).

²⁷ KŌSEI TORIHIKI IINKAI, DOKUSEN KINSHI SEISAKU 30 NEN-SHI (A THIRTY-YEAR HISTORY OF ANTIMONOPOLY POLICIES) 96-97 (1977).

²⁸ *Id.* at 97-99.

²⁹ *Hearing before the Budget Committee of the House of Representatives* (Mar. 12, 1974) (testimony of the Director-General of the Legislative Bureau of the Cabinet) 741 JURISUTO 38 (1981).

³⁰ Kawasaki, *Gyōsei shidō no jittai (Actual Conditions of Administrative Guidance)*, 342 JURISUTO 51 (1966).

It is generally considered that administrative guidance without specific statutory authorization is legal,³¹ although to force the party to whom the guidance is directed to comply by resorting to a threat of sanction is sometimes considered illegal.³² MITI's action in the Sumitomo Metal case was criticized on this basis.³³ Apart from the legality of administrative guidance in general, the question of the legality of administrative guidance in light of the Antimonopoly Law has always been a point of heated discussion, especially between the FTC and MITI.³⁴

III. FACTORS CAUSING "WEAKNESS" IN THE ENFORCEMENT OF THE ANTIMONOPOLY POLICY

Since the Antimonopoly Law's introduction in Japan, antimonopoly policy has been weakened considerably. The FTC's thirty year history, from its inception to 1974, was termed by some journalists as a "history of humiliation."³⁵ Several factors caused this description of the FTC's performance.

Firstly, it is often pointed out that Japanese people have the peculiar mentality of preferring cooperation or harmony to competition. Thus, to do something together with others (even with one's competitor) is a virtuous deed and is hardly considered a crime. This stereotype may be true; yet, it is not quite clear whether the Japanese mentality is really relevant to the proliferation of cartels in Japan, because, as some writers point out,³⁶ Japanese entrepreneurs do compete vigorously.

Secondly, cartels are deeply rooted in the history of Japanese industrial development from the time of the Meiji Restoration in 1868. One remarkable characteristic of Japanese capitalism lies in the fact that the government has played a leading role in its development. Governmental agencies, notably the Ministry of Commerce and Industry in the prewar days and MITI at present, have planned overall industrial policy, and supervised the business activities of entrepreneurs to a great extent through the power to license and grant subsidies. In so doing, the agencies have various divisions which correspond to industrial sectors, and each division is in charge of a specific industrial sector (*tatewari gyosei*). Industry-wide trade associations have been created to function as a con-

³¹ Yamanouchi, *Gyōsei shidō to hōchi shugi (Administrative Guidance and the Rule of Law)*, 566 JURISUTO 14 (1974).

³² Suzuki, *Gyōsei shidō o meguru hanrei no dōkō (Trend of Court Decisions Concerning Administrative Guidance)*, 741 JURISUTO 46 (1981).

³³ Atsuya, *Dokusen Kinshiho to gyōsei shidō (The Antimonopoly Law and Administrative Guidance)*, 741 JURISUTO 55 (1981).

³⁴ This dispute was a key issue in the oil cartel case, discussed *infra*.

³⁵ MAINICHI SHIMBUN KEIZAI-BU, *KŌTORI-I WA MOETA (THE FTC BURNED)* 134 (1975).

³⁶ Tsujimura, *supra* note 1, at 11.

duit between their members and the relevant divisions of the ministry. Such a mechanism for conducting business activity creates a situation in which entrepreneurs are constrained to take a nearly uniform action within the industrial field to which they belong in compliance with the policy and guidance of the government. Under such circumstances, the government has sponsored creation of cartels to keep industry in order, especially in times of recession.

Thirdly, Japanese business has a special nature which renders it much more in need of cartels than business in western countries. Generally, labor mobility in Japan is quite low; white collar and blue collar workers alike stay with one employer throughout their career. The bankruptcy of an employer and the resultant unemployment, therefore, tend to create much more severe consequences for the workers than in countries with higher labor mobility. Accordingly, prevention of a bankruptcy is always an utmost concern of the nation. Further, Japanese business lacks flexibility in adjusting the volume of production according to market conditions for a variety of reasons. Japanese firms borrow heavily and their fixed costs are quite high. The Japanese employment system is such that laying off workers is difficult. The maintenance of market shares is of utmost importance to Japanese businesses. Thus, even during a recession, Japanese companies try extremely hard to maintain levels of production (even at the expense of profit) and competing companies tend to get stuck in endless cut-throat competition. It is only by a mutual agreement (cartel), made frequently at the initiative of a governmental agency, that Japanese companies are able to put an end to such competition.³⁷

Fourthly, the "weakness" of the FTC vis-à-vis MITI and other ministries administering economic policy results partly from a lack of political support. Whenever major disputes have occurred between the FTC and MITI over the enforcement of antimonopoly policy, the Liberal Democratic Party (LDP)³⁸ has supported MITI. For example, when the FTC persistently refused to approve the merger plan of Yawata Steel and Fuji Steel in 1968, the LDP attacked the FTC. It even threatened to "reorganize" the Commission.³⁹ Unlike most of the other administrative agencies, the FTC, taking as a model the independent administrative agencies in the United States, is granted status and authority independent of the Cabinet,⁴⁰ and the Commissioners enjoy guarantees against discharge and

³⁷ *Id.* at 14-15; K. KŌMI & Y. SHINONoya, *NIHON KEIZAI-RON (ON JAPANESE ECONOMY)* 324-25 (1973).

³⁸ The Liberal Democratic Party has been the ruling party throughout the entire post war era, except for a short period, 1947-48.

³⁹ *MAINICHI SHIMBUN KEIZAI-BU*, *supra* note 35, at 184-87.

⁴⁰ Antimonopoly Law, *supra* note 2, at art. 28.

reduction of salary.⁴¹ In advocating the reorganization of the FTC, influential members of the LDP declared that such provisions were unconstitutional since they violated Article 65 of the Constitution which provides that the executive power rests with the Cabinet.⁴² It was under such political pressure that the merger was eventually approved by the FTC with certain changes in the original plan.

Lastly, some critics attribute the "weakness" of the FTC to the prevailing practices of appointment of its Commissioners and personnel.⁴³ An overwhelming majority of FTC Commissioners have been appointed from the ranks of senior officials of various government ministries. Out of twelve chairmen appointed to date, seven have been former officials of the Ministry of Finance (MOF).⁴⁴ In addition, a tacit rule has been established that the five Commissioners (including the chairman) always include one MOF, one MITI and one Ministry of Justice official, with the remaining two frequently recruited from former officials of the Ministry of Foreign Affairs and the Bank of Japan.⁴⁵ Though in the early days several judges, lawyers and law professors were appointed to the FTC, no such professional has become a Commissioner since 1952. Furthermore, the post of Secretary General, a top official second only to the Commissioners, and a few other key positions are now "reserved" for officials temporarily "transferred" (*shukko*) from the MOF.⁴⁶

Accordingly, critics opine that even though the FTC is supposed to be independent it tends to be "conciliatory" towards MITI, which normally represents the interest of business vis-à-vis the FTC.⁴⁷

IV. NEW TRENDS IN THE 1970's

In 1973, however, new trends began to emerge. In that year, the Japanese economy was in turmoil as a result of the *oil shokku*, and the price of oil increased sharply. Increases in the price of many commodities became a fact of everyday life, and some items of daily use, such as detergent and toilet paper, disappeared from supermarkets. At the same time of this panic, the newspapers reported that large trade firms were

⁴¹ *Id.* at arts. 31 and 36.

⁴² MAINCHI SHIMBUN KEZAI-BU, *supra* note 35, at 184-87.

⁴³ *Id.* at 188-201.

⁴⁴ For a list of all the commissioner's appointed up to 1977, see KŌSEI TORIHIKI IINAKI, *supra* note 27, at 551. Since then, two former MOF officials and a former Bank of Japan official have been appointed as chairmen.

⁴⁵ MAINICHI SHIMBUN KEZAI-BU, *supra* note 35, at 193.

⁴⁶ *Id.* at 198. From 1953 to 1958, when the Antimonopoly Law was amended and bypass statutes were enacted, an important post at the FTC was occupied by Mr. Norifumi Kumagai, who was then temporarily transferred from MITI and later became Vice Minister of MITI. *Id.* at 199.

⁴⁷ *Id.* at 202-06.

manipulating prices by withholding inventory⁴⁸ and that oil companies were engaging in concerted activities to raise the price of oil.⁴⁹ Thus, big business and, in particular, the trade firms and the oil companies were severely criticized by consumer organizations and opposition parties.⁵⁰ Even MITI's Vice-Minister said that the oil industry was the "cause of all evils."⁵¹

Consequently, the FTC, under the strong leadership of Chairman Toshihide Takahashi, took a firm stand in enforcing the Antimonopoly Law and proposing its amendment to provide for more stringent restrictions.⁵² A typical example was the FTC's action directed towards indictment of oil companies and their trade association.

A. Criminal Indictment of Oil Companies and their Trade Association

The FTC investigated the major oil companies and their trade association, which had formed cartels for production and price control several times in 1973 even after the FTC issued "recommendations" to stop the cartels. In 1974 the FTC not only issued another "recommendation" to terminate the cartels, but it filed accusations against twelve major oil suppliers and *sekiyu remmei* (Japan Petroleum Association) for criminal indictment with the Tokyo Public Prosecutor's Office.⁵³ Although the Antimonopoly Law makes it a crime to form cartels unless it is permitted under the exempting provisions of the Antimonopoly Law or one of the bypass statutes,⁵⁴ during the entire period in which the Antimonopoly Law was in force no single case of criminal sanction was ever sought by the FTC against parties who engaged in illegal cartel activities. It appears that the Japanese business community had little comprehension, if any, that it was a crime to form cartels.⁵⁵ Accordingly, the FTC's initiative was a surprise to many.

Subsequently, the oil companies and the Japan Petroleum Association were brought to trial before the Tokyo High Court.⁵⁶ It was alleged

⁴⁸ Asahi Shimbun, Mar. 7, 1973, at 3; *id.*, Mar. 9, 1973, at 22; *id.*, Mar. 22, 1973, at 3.

⁴⁹ *Id.*, Nov. 13, 1973, at 9; *id.*, Nov. 21, 1973, at 9.

⁵⁰ *Id.*, Apr. 5, 1973, at 1 (evening ed.); *id.*, Apr. 11, 1973, at 1 (evening ed.); *id.*, Apr. 14, 1973, at 22; *id.*, Jan. 29, 1974, at 9 (evening ed.).

⁵¹ *Id.*, Dec. 4, 1973, at 7.

⁵² MAINICHI SHIMBUN KEIZAI-BU, *supra* note 35, at 10-17, 30-40.

⁵³ *Id.* at 11.

⁵⁴ Antimonopoly Law, *supra* note 2, at art. 89.

⁵⁵ When the FTC filed the accusation against the oil companies, Mr. Toshihide Takahashi, chairman of the FTC, emphasized that one objective of taking such a course of action was to let the business circle and the public recognize that a cartel constitutes a crime. MAINICHI SHIMBUN KEIZAI-BU, *supra* note 35, at 16.

⁵⁶ With respect to most actions, civil or criminal, brought under the Antimonopoly Law, the Tokyo High Court has exclusive and original jurisdiction. Antimonopoly Law,

that the twelve companies engaged in concerted activities for raising the prices of various oil products and that the Association allocated to fourteen oil refineries the amount of oil that each refinery was to process into final products. The Court rendered judgment on September 26, 1980.⁵⁷ The Court acquitted the Association but held that the twelve oil companies and their executives were guilty of price fixing. The Court sentenced the executives to from four to ten months imprisonment (although the sentences were suspended) and imposed fines ranging from 1,500,000 to 2,500,000 yen.⁵⁸ The defendants who were found guilty appealed to the Supreme Court where the case is still pending.

The oil cartel case presented an interesting legal issue of how the involvement of administrative guidance affects the legality of a cartel. The defendants strongly argued that they acted in compliance with MITI's administrative guidance, which was given upon its authority under the Oil Business Law,⁵⁹ and that their acts, if otherwise illegal, therefore were legal. The High Court, noting the existence of potentially conflicting policies between the Antimonopoly Law and the Oil Business Law, held that, as a general rule, while administrative guidance directed independently to each company was legal, guidance which invited concerted actions among the companies could not be considered permissible.⁶⁰ Based on this principle, the Court concluded that both the acts of the Association and the twelve companies were illegal,⁶¹ but, in the case involving the Association, circumstances existed which caused the defendants to legitimately believe that its conduct was not illegal. Thus, under such circumstances, the Association could not be held criminally responsible.⁶²

B. Amendment of the Antimonopoly Law Toward More Stringent Restrictions

In 1973 the FTC initiated a move towards amending the Antimonopoly Law to eliminate what it considered evils caused by insufficient restrictions on oligopolistic enterprises and the formation of cartels. For example, under then existing Antimonopoly Law provisions, even though the FTC issued an order to cease a cartel activity and it was in fact terminated, consequences already created by the cartel, such as price increases,

supra note 2, at art. 85.

⁵⁷ Judgment of September 26, 1980, Tokyo High Court, 983 Hanrei jihō 22, 985 Hanrei jihō 3.

⁵⁸ *Id.* 985 Hanrei jihō at 8.

⁵⁹ Law No. 128 of 1962 (as amended).

⁶⁰ Judgment of September 26, 1980, 983 Hanrei jihō at 58-59.

⁶¹ *Id.* 983 Hanrei jihō at 60.

⁶² *Id.* 983 Hanrei jihō at 66.

could not be eliminated. Thus, against a cartel activity which could achieve its objective within a short period of time, no effective sanction existed, especially when a criminal sanction is rarely invoked.

The FTC decided to tackle these problems by incorporating more effective sanctions in the Antimonopoly Law. It prepared its own draft for the amendment, but this move naturally met strenuous objections from MITI and business concerns. A stormy battle ensued; yet, after three years of deliberations the amending bill finally passed the Diet on May 26, 1977,⁶³ although the bill had been somewhat diluted from the original FTC draft. Throughout this process, the FTC acted so enthusiastically for its cause that a group of journalists, who published a book on the background of the amendment, described the FTC's enthusiasm by entitling the book, *The FTC Burned*.⁶⁴

The 1977 amendment to the Antimonopoly Law⁶⁵ includes the following major features:

1. Elimination of "Monopolistic Conditions"

Newly created Article 8-4 provides that if "monopolistic conditions" exist, the FTC may order the entrepreneur(s) in question to "effect partial transfer of business or take other measures necessary for recovering competition in respect of the commodity or service" concerned.⁶⁶ Article 2, paragraph 7 gives a detailed definition of the "monopolistic conditions."⁶⁷ Summarized, "monopolistic conditions" are defined in three ways: (1) in the industrial sector, when the total value of a particular commodity or other commodities having a similar function or a particular service supplied in Japan during the last one year period exceeds fifty billion yen, when the market share of an entrepreneur exceeds fifty percent or when the total of the market shares of two entrepreneurs exceeds seventy-five percent; (2) when circumstances exist which render it extremely difficult for other entrepreneurs to enter the market; and (3) when, during a considerable period of time, there has been remarkable increase in prices, or little reduction thereof, in light of the fluctuation of supply and demand and the costs for supplying the particular commodity or service, and the entrepreneurs have acquired profits greatly exceeding "average" rates of profit or expended sales and general administration expenses extremely greater than "average" sales and general administra-

⁶³ Law for Partial Amendment to the Law Relating to the Prohibition of Private Monopoly and Methods of Preserving Fair Trade, Law No. 63 of 1977.

⁶⁴ MAINICHI SHIMBUN KEIZAI-BU, *supra* note 35, at title page.

⁶⁵ Law No. 63 of 1977, *supra* note 63.

⁶⁶ Antimonopoly Law, *supra* note 2, at art. 8-4.

⁶⁷ *Id.* at art. 2, para. 7.

tion expenses.⁶⁸

2. Imposition of Surcharge on Illegal Cartels

Articles 7-2 and 8-3 were created to rectify the absence of effective sanctions against a cartel which had already dissolved by the time the FTC became apprised of it. Under these provisions the FTC *must* levy a surcharge upon the entrepreneurs or the trade association that engaged in unreasonable restraint of trade or concluded an international agreement or contract constituting unreasonable restraint of trade, which pertains to the price of a particular commodity or service, or affects the price by limiting the supply of the commodity or services in question. The amount of the surcharge is prescribed to be one half of the sum equivalent to three percent of the amount of sales realized by the entrepreneurs concerned during the period that the activity continued (four percent in the case of a manufacturing business, two percent in the case of a retail business, and one percent in the case of a wholesale business).⁶⁹

3. Reporting Requirement in the Case of Parallel Price Increases

It frequently happens that, even when entrepreneurs in the same business increase the price of their products at approximately the same time, no evidence can be gathered to prove that such price increases are the result of a cartel arrangement among the entrepreneurs concerned. To cope with such a situation, the 1977 amendment has authorized the FTC to obtain a report concerning such "alignmental price increases" from the entrepreneurs concerned, under certain conditions meticulously defined:

(1) if such price increase has occurred in an industrial sector where the total value of the commodity or service supplied during a defined one-year period exceeds thirty billion yen; and

(2) if the total volume of the commodity or services supplied by the three largest suppliers occupies more than seventy percent of the total volume of the commodity or service supplied by the entire industrial sector; and

(3) if two or more of the five largest entrepreneurs in that industrial sector (including the largest) have increased the price at the same or a similar rate during a three-month period.⁷⁰

4. Restriction on Shareholding by Large Corporations

Still another major point of amendment was the creation of a ceiling

⁶⁸ *Id.*

⁶⁹ *Id.* at arts. 7-2 and 8-3.

⁷⁰ *Id.* at art. 18-2.

with respect to the aggregate amount of shares that a large-sized corporation is permitted to hold in other corporations.⁷¹ This was designed to alleviate the competition-impeding effect of a large corporation's grouping (*keiretsu-ka*) of enterprises, especially a trading firm, by way of acquisition of shares in other corporations. A restriction on shareholding by financial institutions already existed, and they are not permitted to hold shares in any domestic corporations in excess of five percent of the total issued and outstanding shares of such corporation.⁷² However, newly established Article 9-2 applies to any stock corporation not engaged in financial business. Article 9-2 provides that any such corporation, having capital of ten billion yen or more or net assets of thirty billion yen or more, shall not acquire or hold shares in any domestic corporation if the aggregated acquisition price of all the shares in domestic corporations held by it exceeds the amount of its paid-in capital or the amount of its net asset, whichever is greater.⁷³

Indictment of the oil companies and the 1977 amendment of the Antimonopoly Law are considered to be epoch-making events in the post-war history of antimonopoly policies in Japan. These two events were the first major move toward more stringent regulation of cartels. The occurrence of these events may be attributable to a number of factors. Undoubtedly, an important factor was the anti-big business atmosphere existing during this period. Coupled with this was the fact that at that time, the ruling party held the majority of the Diet by only a small margin and could not resist the demand of the opposition parties to amend the Antimonopoly Law. Still another factor was the strong leadership of Chairman Toshihide Takahashi,⁷⁴ who created the FTC's image that it is an agency to be feared.

V. FUTURE TRENDS

It is true that by now the Antimonopoly Law and the FTC, the creations of SCAP, have established themselves well in the Japanese legal and administrative system. In particular, the FTC has been quite active in enforcing the prohibition against employment of "unfair business practices" and "undue premiums and indications."⁷⁵ Also, since the Japanese government liberalized its policy concerning capital investment and licensing of technology by foreign corporations in the early part of the 1970's, the FTC has undertaken the role of carefully screening problemat-

⁷¹ *Id.* at art. 9-2.

⁷² *Id.* at art. 11.

⁷³ *Id.* at art. 9-2.

⁷⁴ MAINICHI SHIMBUN KEIZAI-BU, *supra* note 35, at 188-192.

⁷⁵ *Id.* at 174-175.

ical provisions contained in international agreements in these fields. Ironically, this is what MITI expected of the FTC.⁷⁶

However, even after the epoch-making events of the oil cartel indictment and the 1977 amendment to the Antimonopoly Law, the pro-cartel climate in Japan seems to be unchanged, and the tide may turn again toward further relaxation of the limitations upon cartels. A sign of this shift is the fact that in May, 1983 an important bypass statute, Specified Depressed Industry Stability Temporary Measures Law, which had been promulgated in 1978 with limited duration of five years, was not only renewed, but also was substantially amended and renamed as Specified Industry Structural Improvement Temporary Measures Law,⁷⁷ which is considered by many businessmen to be extremely important in saving ailing industries. The new law is designed to grant MITI a more positive role in the creation of cartels than the pre-amendment law, i.e., a broad authority to prepare and effectuate "business collaboration plans" in specified industries, such as those related to the aluminum, chemical textile, chemical fertilizer, paper and petro-chemical sectors. Under these plans, major manufacturers belonging to the respective industries would engage, under MITI's supervision, in the joint sale of products, the merger or assignment of business facilities, the joint development of technology and the assignment of production to other companies.⁷⁸ As a result of the negotiation between MITI and the FTC, it has been decided that the cartels formed under this statute will not be technically immune from FTC screening under the Antimonopoly Law, and, if any problems arise under the Antimonopoly Law in a specific case, they will be resolved by prior consultation between MITI and the FTC.⁷⁹ It remains to be seen how effectively the FTC will be able to check cartel arrangements based on the prior consultation with MITI.

Another sign of change is a move within the ruling party towards a "backward" amendment of the Antimonopoly Law. The LDP's Antimonopoly Law Investigation Special Committee is seriously considering

⁷⁶ An official of the Foreign Investment Section of the Ministry of Finance wrote in 1972: "As the regulation of foreign capital at the entrance is relaxed under the liberalization measures, great hope is placed upon the Antimonopoly Law for regulating evils caused by mono- or oligopoly of foreign capital." Tomizawa, *Shihon jiyuka to hoteki shomondai (Capital Liberalization and Various Legal Problems)*, 496 JURISUVO 187 (1972). This opinion is considered to represent the view of the Japanese government, most notably that of MITI.

⁷⁷ Law No. 53 of 1983.

⁷⁸ *Id.* at art. 8-2. MITI has acted quickly under the authority of the new law and has already prepared "business structure improvement plans" covering such industries as ethylene, chemical fertilizer and aluminum, under which companies within the industries concerned are instructed, among other things, to curtail production and undertake joint production with competitors. Nihon Keizai Shimbun, June 21, 1983, at 1, 5.

⁷⁹ Nihon Keizai Shimbun, Feb. 4, 1983, at 3.

an amendment specifically designed to further relax restrictions on cartels, including the repeal of the provision concerning the imposition of a surcharge which, as discussed *supra*, was inserted only as of the 1977 amendment.⁸⁰

In a time of depression, opposition to such moves is not vocal in Japan. Some scholars and critics warn, however, that the further relaxation of cartel restrictions would adversely affect the mounting trade conflicts Japan is presently encountering.⁸¹ As a matter of fact, U.S. Trade Representative William Brock had expressed, before the Specified Industry Structural Improvement Temporary Measures Law was enacted, his concern that the proposed legislation would lead to the creation of new barriers to the entry of foreign entrepreneurs into the Japanese market.⁸² These statements illustrate the emergence of a new situation where the Japanese antimonopoly and industrial policies can no longer remain a purely domestic question for the Japanese government.⁸³

In retrospect, foreign pressure has exerted considerable influence upon Japanese antimonopoly policy. The Antimonopoly Law itself was created by foreigners and it underwent the first "qualitative" change when the Occupation ended. Mergers between or among giant corporations (Yawata Steel-Fuji Steel, Ishikawajima Heavy Industry-Harima Shipbuilding, Nissan Motor-Prince Motor, the three Mitsubishi Heavy Industries, etc.) were approved under the perceived threat of a foreign "menace" just before trade and capital liberalization. If viewed in this context, Japanese antimonopoly and industrial policies will have a new impact overseas under the new circumstances of stronger Japanese corporations and will be subjected to new criticism by foreign competitors for their "excessive" export drive and the "closed nature" of the Japanese market.

⁸⁰ Nihon Keizai Shimbun, Jan. 28, 1983, at 2.

⁸¹ Tanso, *Dokkin-ho (kyoso-ho) no Kokusai-sei (International Nature of the Antimonopoly Law (Competition Law))*, 781 JURISUTO 161 (1983).

⁸² Nihon Keizai Shimbun, Feb. 3, 1983, at 3.

⁸³ Another ready example is provided by the fact that export cartels formed by Japanese television manufacturers, under MITI's guidance, were met with the antitrust lawsuits instituted by American manufacturers in the United States. *Zenith Radio Corp. v. Matsushita Electric Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). For an interesting treatment of this case, see *Matsushita & Repeta*, *supra* note 26, at 69-70, 74.