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Michiko Ariga

Luvern V. Rieke

University of Washington School of Law

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THE ANTIMONOPOLY LAW OF JAPAN AND ITS ENFORCEMENT

MICHIKO ARIGA* AND LUVERN V. RIEKE**

The Antimonopoly Law of Japan¹ became effective in July 1947, less than two decades ago. The act was extravagantly endorsed by the U.S. occupation forces as a charter for the economic future of Japan.² It was indeed a significant undertaking, designed to implant democratic practices where none had existed before, and it required basic, almost revolutionary, changes in the economic structure of the nation. Equally important was the circumstance that this law was neither sought nor desired by the Japanese. It was imposed upon a defeated people, a device entirely alien to the history and culture of those who were expected to make it work. The purpose of this article is to examine the act and to attempt an evaluation.

The industrial developments which carried Japan from a feudalistic society to a major world power in less than a century, measured from the 1853 call of Commodore Perry to World War II, were accompanied by constant reliance upon government control and financing. Industries which had been acquired or initially developed by the Government were sold, at very low sums, to favored individuals or firms. These favored few were further aided and protected through a series of wars. The firms which in this fashion rose to predominance became known as the *Zaibatsu*.³ Need for development of industrial controls generated by the depression of the 1930's, the Manchurian Incident, and by an increased dependence on foreign trade brought about general and ultimately compulsory cartelization of Japan's economy. The government-*Zaibatsu* partnership reached an apex of mutual dependency and control during the years of World War II. Under such

* Counselor of the Japanese Fair Trade Commission.

** Professor of Law, University of Washington.

¹ Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade (*Shiteiki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu*) (Law No. 54, 1947) in 2 EHS No. 2270, enacted April 14, 1947.

² The notion that antitrust legislation constitutes "a charter of freedom" has been familiar to the U.S. lawyer at least since *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). The U.S. Court meant that the legislation was general and non-directive in character. As will be evident in reading the provisions of the Japanese act, the emphasis there is more regulatory in tone than the Sherman and Clayton Acts originally were.

³ The *Zaibatsu* clique were leaders in finance, industry, and commerce. Control was maintained and extended by the familiar pyramidal holding company technique. The same favored family or firm could, and did, have major interests in several areas.

circumstances it is not surprising that the occupation powers regarded the Zaibatsu as a structure of unique importance to military aggression which they felt must be dissolved in the interests of world peace.

In response to Allied demands, the Japanese Government, on November 4, 1945, submitted the Yasuda Plan, a proposal for the dissolution of four major holding companies. The reply was SCAPIN 244, issued on November 6, 1945.⁴ The proposed dissolutions were approved, but it was recognized that even such major surgery could not permanently supplant the Zaibatsu unless a new economic structure was developed as a substitute. Paragraph 6 of the SCAPIN dealt with this concern. In item C of that paragraph the Supreme Commander specifically directed the enactment of a law which would "eliminate and prevent private monopoly and restraint of trade, undesirable directorates, undesirable intercorporate security ownership and assure the segregation of banking from commerce, industry, and agriculture and as will provide equal opportunity to firms and individuals to compete in industry, commerce, finance, and agriculture on a democratic basis."

The Japanese Government, already committed to reformation of its economic structure along the lines of free competition, moved quickly to comply with the directive. Despite the Government's total lack of experience with antitrust laws, a bill was prepared. The General Headquarters Staff of the Allied Forces participated in the preparation of the measure and, if the resulting product was overly detailed and too meticulously patterned after both the current case and statutory laws of the United States, the blame must at least be shared by the joint drafters. The new law was enacted on April 14, 1945, the last day of the final session of the Imperial Diet under the Old (Meiji) Constitution. A general election, resulting in the shift of administration from the Liberal Party to the Socialist-Progressive coalition, delayed implementation of the act until July of that year.

As originally enacted the Antimonopoly Law was considerably more stringent and detailed than the antitrust statutes of the United States. In the context of Japan's economic history the law was nothing short of radical. Businessmen, shocked by a measure which forbade so simple a thing as ownership of even a single share of stock in a competing company, regarded the law as purely theoretical and as wholly divorced from the realities of the social and economic condition of the

⁴ SCAPIN No. 244, *BISSON, DISSOLUTION OF ZAIBATSU* 241 (1954). A "SCAPIN" is a directive from "SCAP," the Supreme Commander of the Allied Powers.

nation. For the purpose of eliminating restraint of trade and monopolistic practices the original act was near perfection, and its enactment can be taken as a token of the Government's sincere determination to conform to competitive and democratic practices.

As the businessmen of Japan started the reconstruction of their war-devastated economy, they came to realize the full meaning of the antitrust provisions. Not only were they unable to do those things thought proper in the pre-war days,⁵ but it was soon evident that some of the provisions interfered with even legitimate business activities under the civil law. Some persons regarded the law as a purposeful deterrent to economic health foisted upon Japan by victorious nations eager to prolong the impotence of the defeated people. Even those persons who welcomed democratic concepts questioned the practicability of the law. The changing relationship between the United States and the U. S. S. R. influenced occupation policy toward accelerating the rebuilding of Japan's economy. In light of all these factors it was inevitable that the law had to be amended and that new legislation should create special exceptions to its rigor and scope. Both of these things have happened.

With the assent of the Supreme Commander of the Allied Powers, the basic law underwent major amendment in 1949. In 1953, after the Peace Treaty became effective, the law was again amended.⁶ Many exemptions, some of which are mentioned later in more detail, have been made to the original coverage of the act. In 1958, a further substantial amendment was considered but, due to confusion in the Diet with regard to other measures, the amendment was not passed. As this article is designed to provide a general explanation of the current law, and its enforcement, the amendments will be given only brief attention at pertinent points.

The law is now 17 years old. It seems safe to assume that it has passed the period of initial crisis. The remarkable growth of the

⁵ A circumstance which has been described as "a disappointment to many a business leader with nostalgic longing for the pre-war days of *laissez-faire*." Restrictive Trade Practice Specialists Study Team, Japan Productivity Center, Control of Restrictive Trade Practices in Japan, 1958 (mimeo). The term "*laissez-faire*" here means the freedom of government to favor some businesses and the freedom of businessmen to contract for a wide variety of restrictive practices.

⁶ The statement in the text is simplified and not complete. Minor amendments were made by Laws No. 91 and 195 of 1947, Laws No. 207 and 268 of 1948, and Laws No. 103 and 134 of 1949. However, Law 214 of 1949 was the first major amendment of the Antimonopoly Law, and Law 259 of 1953, the next. There were other additional minor amendments in 1951 and 1952. An outline of the original Antimonopoly Law and the subsequent amendments can be found in Osakadani, *Japan*, in ANTITRUST LAWS (Friedman ed. 1956), Adelaide Sheet, West Toronto, Canada.

Japanese economy has not gone unnoticed by the Japanese businessman. Nor has he failed to realize that this new maturity has occurred under the economic conditions produced at least in part by the anti-trust law. These factors have given rise to a host of supporters for the law and have confirmed the faith of the original advocates of free competition. The act is no longer called the law of the occupation, and it seems, finally, to have its roots firmly set in Japanese soil.

BASIC STRUCTURE OF THE ACT AND THE COMMISSION

As originally adopted, the act was lengthy and complex. The apparent effort was to incorporate not only the essential features of the Sherman, Clayton, and Federal Trade Commission Acts, but also specifically to legislate many of the refinements of antitrust law which had developed in U.S. courts and administrative agencies. Article 1 of the Japanese law indicates the wide sweep of the act as follows:

This Law, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of power over enterprises, and by excluding undue restriction of production, sale, price, technology, etc., through combinations, agreements, etc., and all other unreasonable restraint of business activities, aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and national income and, thereby, to promote the democratic and wholesome development of national economy as well as to assure the interest of the general consumer.⁷

The article keynotes the entire act. Examination of the detail in this statement of purpose will quickly disclose the breadth of the undertaking. The ultimate purpose is to develop a democratic and sound national economy *and* to assure the welfare of the general consumer.⁸ This objective is to be accomplished by two techniques.

⁷ The use of *et cetera* in a statute may strike a jarring note for most U.S. lawyers. It is a translation of the Japanese word "*sonota*," meaning "and others" of similar kind. This type of expression, not uncommon in specialized Japanese legislation, is seldom or never used in the fundamental code provisions.

⁸ The statement in itself forecasts possible deviation from basic Sherman Act philosophy. It has been said that the only direct purpose intended by the U.S. Congress in enacting the antitrust laws was to protect competition, believing that the public benefit would be an inevitable but indirect result of such legislation. "[I]t cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." *United States v. Trenton Pottery Co.*, 273 U.S. 392, 397 (1927). As will be seen below in connection with the discussion of the "public interest" test there has always been a difference of opinion in Japan with reference to the direct vs. indirect purpose of the antimonopoly laws.

The first of these is the familiar prohibition of conduct which would be destructive of free and fair competition. Three types of conduct are prohibited: (1) private monopolization, (2) unreasonable trade restraints, and (3) unfair business practices. The prohibitions are designed to prevent excessive concentration of economic power and to eliminate restraints resulting from combination or agreements and other unreasonable restraint of business activities which need not be the product of agreement.

The second general technique is the positive development, as contrasted with the preceding prohibitions, of entrepreneurial initiative, business activity, employment, and national income. It will also be noted that the positive aims of the legislation are directed toward three distinct divisions within the total population: entrepreneurs and businessmen, employees, and the general consumer.

The decision to include regulatory measures as well as prohibitions in the act made it necessary to create an administrative body. The agency which was created for this purpose,⁹ known as the Fair Trade Commission (*Kōsei Torihiki Inkaï*) is composed of a chairman and four other members.¹⁰ The Commissioners are appointed by the Prime Minister subject to the approval of the Diet. The act requires that the Commissioners shall be persons who are "of learning and experience in laws or economy."¹¹

Prior to World War II, Japan had no administrative agencies or commissioners which were independent of the executive ministries. There simply was no counterpart to the administrative bodies of the United States. A few commissions were established during the occupation days, but most have since been abolished. For budgetary and organizational purposes the Commission is under the Prime Minister's Office.¹² It enjoys complete independence in its enforcement procedures,¹³ and the Commissioners enjoy a type of civil service protection from salary reduction or, except for grounds specified in the act, dismissal from their positions.¹⁴ The Commission makes an annual report to the Diet through the Prime Minister.¹⁵

The Commission staff, currently 266 people including typists and clerks, is divided into a Secretariat, Investigation Division, Economic

⁹ Art. 27.

¹⁰ Art. 29. The original act provided for a total of seven members. The later reduction in number was solely for purposes of economy.

¹¹ Art. 29 (2).

¹² Art. 27 (2).

¹³ Art. 20.

¹⁴ Art. 31.

¹⁵ Art. 44.

Division, and, as of April of this year, a Transaction Division. For the year 1964 the appropriation for Commission work is approximately \$617,000. In addition to the central office in Tokyo, the Commission has branch offices in the cities of Nagoya, Osaka, Fukuoka, and Sapporo.

Because Japan lacked her own precedent for administrative agencies, and because of the considerable influence exerted by the occupation staff, the Fair Trade Commission has much the same function as the American counterpart. It is expected to use its expertise, guided, of course, by the fundamental objective of the act. The Commission investigates, conducts hearings, issues cease and desist orders, receives reports and issues certain permits, studies trade practices, and formulates standards of fair dealing—all in a pattern familiar to the U.S. lawyer. Specific procedures have, of necessity, developed. These will be considered below.

BASIC CONCEPTS OF THE LAW

The historic struggle in the United States between those advocating a per se test of violation and those who prefer the rule of reason approach is too well known to require extended retelling here. Our purpose will be sufficiently served by a reminder that this classic battle which commenced in the relatively simple setting of the Sherman Act¹⁶ has also been fought in the more sophisticated environment of the Clayton provisions¹⁷—and no doubt will continue to be a lively issue for years to come. The significant point is that the trend has been from the rigor of per se to the flexibility of rule of reason in all areas. This same progression is evident in the Japanese antitrust experience.

THE "PUBLIC INTEREST" TEST

In the definition of private monopolization and unreasonable restraint of trade, the Japanese act prohibits certain types of activity when the consequence would be "contrary to the public interest."¹⁸

¹⁶ The first definitive statement of the modern rule was, of course, made in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

¹⁷ Examples familiar to any antitrust student involve such problems as the tying clauses of *International Salt Co. v. United States*, 332 U.S. 392 (1947); the exclusive dealing problems of *Standard Oil of California v. United States*, 312 U.S. 457 (1941); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); the use of vertical customer and territory restrictions, *United States v. White Motor Co.*, 372 U.S. 253 (1963); and of course the merger problems, perhaps best illustrated by *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹⁸ Art. 2 (5) and (6).

This phrase is not a substitute for the familiar "substantially to lessen competition or tend to create a monopoly"¹⁹ but is an additional test. During the occupation period the phrase did not give rise to any difficult problem of interpretation as a restraint of competition was in itself regarded as contrary to the public interest. It was sufficient for purposes of the Antimonopoly Law simply to find concerted activity or an act of private monopolization.

Doubt concerning proper interpretation of the "public interest" language accompanied the growing interest in relaxation of the law. As a commentary prepared by the Fair Trade Commission Staff Office at the time of the 1953 amendment to the law stated:

[T]here can be two fundamental opinions sharply divided as to what 'public interest' indicates. The one group, viewing it narrowly, is of the opinion that the public interest referred to in this place indicates the economic order based on free competition and any matter effecting it contravenes, immediately and directly, public interest. The other group, viewing it broadly, is of the opinion that, though the principle of free competition is accepted as a rule, the public interest here referred to indicates general national public interest on the level going far beyond the interest of free competition.²⁰

The statement reflects the division of opinion between those who advocate prohibition of all restraint upon competition as evil in itself, and those who would apply the law only as a corrective to a restraint found to be abusive of the public welfare generally as contrasted to injurious to competitive freedom.²¹ There is obviously a significant difference in these points of view, especially in the setting of traditional Japanese affinity for government-aided and approved oligopolies. The first interpretation would, for example, leave no room for a cartel—good or bad—while the second approach leaves this question open for consideration.

Article 1 of the Antimonopoly Law, which states the purpose of the

¹⁹ The Japanese counterpart to this Clayton § 3 and § 7 language is stated in terms of "a substantial restraint of competition" and is discussed in greater detail later in this article.

²⁰ KAISEI DOKUSEN KINSHIHO KAISETSU (Commentary on the Antimonopoly Law, as amended) 106 (FTC Staff Office ed. 1953).

²¹ Justice Frankfurter, in *Standard Oil of California and Standard Stations, Inc., v. United States*, 337 U.S. 293, 311 (1949), states the distinction this way: "Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition. It has not left at large for determination in each case the ultimate demands of the 'public interest.' . . . We are faced not with a broadly phrased expression of general policy, but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision."

act, does indeed pronounce the principle of free and fair competition as a means of advancing the interest of the general consumer. However, this is not the definition of "public interest," nor does it control the interpretation of that standard of legality.

As suggested earlier, the intent of the original act was clear enough. Article 4, for example, was an emphatic application of the *per se* doctrine²² and article 8 was more extreme in its provision concerning bargaining strength than comparable U.S. law has ever been.²³ Article 9 prohibited all holding companies. Holding any stock in competing firms was prohibited by articles 10 and 11, and article 13 made interlocking directorates unlawful. Intercompany loans, a maneuver never expressly prohibited in the United States, were outlawed by detailed provision in article 12. Article 15 placed extensive limitations upon mergers and acquisitions between competing firms. Under these sections of the original act there was no room for a moderate rule of reason interpretation, and early cases reflected this fact. In the *Yuasa Mokuzai Kabushiki Kaisha* (Yuasa Lumber Co.) and *64 Others Case*,²⁴ the Fair Trade Commission said:

As in the case herein, the act of joining price-fixing on the occasion of the open bidding by entrepreneurs . . . contravenes the spirit of article 1 of the Antimonopoly Law, the target of which is preservation of free competition, and blurs the virtue of the bidding system. It is justifiable to admit the act itself was in conflict with the public interest; and whether the content of the agreed price was appropriate or not, or

²² Article 4, applicable to concerted practices, made illegal *per se* the fixing, maintaining, or increasing of price; restraints upon amount of production or sales; restraints upon technology, kinds of production, or allocation of market or customers; and restraints upon construction, expansion, or improvement of productive capacity. The article did not apply if the effect of the concerted activity would be "negligible"—a concept which might be close kin to the quantitative substantiality implications of *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), and the *de minimis non curat lex* arguments frequently encountered in U.S. antitrust cases.

²³ It is of course familiar doctrine that the U.S. law does not make "monopoly in the concrete" illegal. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). There must be evidence of abusive use, purpose, or intent to make bigness bad, or at least such is the theory. See generally the discussion at page 55 *et seq.* of REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955). Not so under the original article 8 of the Antimonopoly Law. It authorized the issuance of orders designed to eliminate "undue substantial disparities in bargaining power" which were not the result of monopolization nor other wilful conduct.

²⁴ 1 KOSEI TORIHIKI IINKAI SHINKETSUSHU [hereafter cited FTC DECISION REPORTS] (FTC, Aug. 30, 1949) 62, 84; Restrictive Trade Practice Specialists Study Team, Japan Productivity Center, *op. cit. supra* note 5, at 130. Similar statements can be found in the *Noda Shōyu Kabushiki Kaisha* (Noda Soy Sauce Co.) case, 9 FTC DECISION REPORTS (FTC, Dec. 27, 1955) 57 (includes Tokyo High Ct. decision, Dec. 25, 1957; FTC decision translated into English in 1 FAIR TRADE (No. 4) 18 (1958)), and in the *Kabushiki Kaisha Asahi Shimbunsha* (Asahi Newspaper Co.) Case, 3 FTC DECISION REPORTS (FTC, April 7, 1951) 4.

whether the entrepreneur got undue benefit or not, or there was a loss to the country or not; these matters do not necessarily constitute a standard to determine the existence or non-existence of public interest.

This early orientation is no longer universally accepted. Amendment or repeal of some of the original provisions, and the creation of new exemptions for some cartelization²⁵ has clouded the meaning of "public interest" even though article 1 has remained substantially unchanged. There were some allowances for cartels and monopolies in the original Antimonopoly Law. Some of these, for example the operation of "natural" monopolies²⁶ and the utilization of patent or copyright interests,²⁷ will seem ordinary enough to the American lawyer. Nor will the exemption of article 24, applicable to voluntary, small-scale business cooperatives, seem inappropriate. The departure from the historical U.S. pattern lies in exemptions granted "under the provisions of a special law,"²⁸ especially as exemptions have multiplied in areas which present no obvious reason for special consideration.²⁹

In light of these developments it is not unnatural that there is a question concerning the proper interpretation of "public interest." The extensive exemptions do suggest a philosophy other than that of the preservation of free competition. However, as will be discussed in greater detail below, the Fair Trade Commission is still authorized to evaluate the justification for each cartel requested under a provision of the Antimonopoly Law. Cartels permitted under industry

²⁵ Article 24-3 permits "concerted activity against depression," and Article 24-4 permits "concerted activity for enterprise rationalization." A current statement and report bearing on this matter can be found in an article by Hiroshi Iyori, *Cartels in Japan*, *The Oriental Economist*, Jan., 1964, p. 25. One is reminded of the closely parallel behavior of the European Economic Community which, by article 85(3) of the Rome Treaty, has permitted certain group restrictive practices and is now considering enlargement of these exemptions. This parallel is to be expected, of course, as Japan is a civil law nation. The 1953 exemptions to the Japanese law for "anti-depression" and "rationalization" cartels, cited above, were patterned after provisions then pending in West Germany. Articles 5 and 8 of the German law, I BUNDESGESETZBLATT 1081, adopted in 1957, provide for similar cartels.

Another interesting comparison can be made to the Monopolies and Restrictive Practices (Inquiry and Control) Act of England, adopted on July 30, 1948. That act prohibits restrictions which "operate or may be expected to operate against the public interest," 11 & 12 Geo. VI, c. 66, § 6(2).

Even the United States experimented with "rationalization" and "codes of fair competition" during the depression of the 1930's. See: REP'T OF THE ATT'Y GEN.'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, *supra* note 23, at 129.

²⁶ Art. 21. This article exempts those persons engaged in "railway, electric, gas, or any other enterprise which is a monopoly by its very nature."

²⁷ Art. 23.

²⁸ Art. 22.

²⁹ Statutes exempting given industries from the Antimonopoly Law are numerous. The exemptions are granted in the law dealing with the specific industry, not the basic antimonopoly act.

laws are authorized by the ministry in charge of that segment of the economy, not by the Fair Trade Commission, but even in these instances the exemption may be granted only after the Commission has been duly consulted.³⁰ There is, in short, still some opportunity for the free competition principle to operate.

THE "SUBSTANTIAL RESTRAINT" TEST

The phrase "substantial restraint of competition in a particular field of trade" is found in almost identical form in various provisions of the Antimonopoly Law.³¹ This test is basic to the entire act and it will be expedient to explain the terms used before going on to other substantive provisions.

1. Particular field of trade.

With these words, the Japanese law introduces the familiar concept of the market. In the search for the area of effective competition, significant considerations include geographical trade patterns, product identity, and the level of function, or distribution, common to the entrepreneurs involved.

The *Tōhō Kabushiki Kaisha* (Tōhō Co.) *Case*³² involved a long-term lease, with Tōhō as lessee, of the Orion and Subaru theaters in Tokyo. The Fair Trade Commission treated the Marunouchi and Yūrakuchō districts as the relevant geographical area involved, but stated that an additional area, the Ginza district, might also be included. The Tokyo High Court, affirming the finding of a substantial restraint, indicated that the market was the broader area because most of the theaters which specialized in high-quality foreign films and road shows, and which drew patronage from all the surrounding regions, were located within the three named districts.

³⁰ U.S. lawyers, having in mind the history of the banking, petroleum, transportation, and other regulated segments of the economy, may wonder if a struggle for control will develop between a given Japanese ministry and the FTC when these bodies disagree. It seems still too early to know, but the history of Japan would suggest that the regulatory ministry would emerge the victor. This does not seem to be the trend in the United States. See *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), as a recent illustration.

³¹ The lineage is clear, but the words are not identical. Clayton Act § 3 says, "may be to substantially lessen competition or tend to create a monopoly in any line of commerce," and Clayton § 7 says, "where in any line of commerce in any section of the country, the effect . . . may be substantially to lessen competition, or tend to create a monopoly."

³² 2 FTC DECISION REPORTS (FTC, Sept. 29, 1950) 146. The FTC decision is also appended to *Tōhō Kabushiki Kaisha* (Tōhō Co.) v. FTC, 8 Saikō saibansho minji hanreishū 950 (Sup. Ct., May 25, 1954), *dismissing (kikyaku)* Tōhō Co.'s appeal from the decision of the Tokyo High Ct., 3 Special Dept., Sept. 19, 1951.

Nihon Sekiyu Kabushiki Kaisha (Japan Petroleum Co.) v. FTC³³ is an illustration of market delineation based on distribution levels. The case involved petroleum sales by eleven refiners to the Self Defense Board. The Fair Trade Commission decided, and the Tokyo High Court affirmed, that there is a separate market for major bulk purchases which is distinct from the balance of the national market.

2. Substantial restraint of competition.

The Japanese law does not employ the "quantitative substantiality" premise. Substantial restraint must be determined by appraising economic impact of the indicated practice upon a "particular field of trade." The Tokyo High Court has said that "to restrict competition substantially means that the competition itself decreases, and that a particular entrepreneur or group of entrepreneurs can bring about a situation in which they can to a certain extent freely control the market according to their own will by controlling price, quality, quantity, or any other term."³⁴ The substantial restraint prohibited by the act is not limited to conduct which brings a new limiting condition into the market. Maintaining or reinforcing an existing position may also be a violation. A firm dominant in the soy sauce market³⁵ ordered its agents to refuse supply to retailers who deviated from the firm's announced prices. The Fair Trade Commission did not have to resort to the ponderous methodology of *Parke-Davis*³⁶ nor even the laborious search for concerted action so familiar since the *Dr. Miles* case.³⁷ It simply found that conduct of the firm brought about a substantial restraint in competition and was thus unlawful private monopolization.³⁸

³³ 7 Gyōsei jiken saibanreishū [hereafter cited Gyōsai reishū] (Tokyo High Ct., Nov. 9, 1956) 2849, *dismissing* (*kikyaku*) Japan Petroleum Co.'s appeal from the Nihon Sekiyu Kabushiki Kaisha (Japan Petroleum Co.) and 100 Others Case, 7 FTC DECISION REPORTS (FTC, Dec. 1, 1955) 70.

³⁴ Tōhō Kabushiki Kaisha (Tōhō Co.) v. FTC, 6 Kōtō saibansho minji hanreishū [hereafter cited Kōsai minshū] (Tokyo High Ct., Dec. 9, 1953) 873. One is reminded of the theory propounded in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), that effective influence over the market, by manipulation of the price dynamics, may be accomplished without market control.

³⁵ The firm was easily the largest single producer and a national price leader. Its output accounted for 14.08% of the national supply and 36.7% of the amount shipped into Tokyo.

³⁶ *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

³⁷ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

³⁸ *Noda Shōyu Kabushiki Kaisha Case*, *supra* note 24. "Private monopolization" prohibited by article 3 of the Japanese law is not the same as monopolization prohibited by section 2 of the Sherman Act. It is, rather, a substantial restraint occasioned by a single entrepreneur or group of entrepreneurs to control or eliminate other entrepreneurs. The market monopolized need not be the one in which the violator or violators trade. "Restraint of trade" is also a substantial restraint, but it is one imposed by agreement of the violators upon themselves.

3. Competition.

The Japanese law defines competition.³⁹ It will be noted that the entrepreneurs must be horizontally positioned. However, the horizontal relation may be potential in part. In *Tōhō Kabushiki Kaisha* (Tōhō Co.) v. *FTC*,⁴⁰ Tōhō was a vertically integrated producer-distributor of motion pictures while Shin-Tōhō was, at the time of the alleged unlawful restraint, a producer only. At a previous time Shin-Tōhō had also engaged in distribution but terminated this function because of labor disputes. The Tokyo High Court found the two firms in competition, as defined by the act, on the ground that Shin-Tōhō could readily re-enter the distribution field.⁴¹ On the other hand, an agreement between a group which published newspapers and a group which distributed the papers, by which agreement sales districts were allocated, was found not to be a contract between competitors.⁴² Even though the publisher sold papers to subscribers, it did not engage in distribution to readers' homes. The two groups were not, therefore, in competition despite the fact that both were entrepreneurs in the broadly defined newspaper market.

To be in competition the entrepreneurs⁴³ must not only occupy hori-

³⁹ Art. 2(4). "The term 'competition' as used in this Law shall mean situations in which two (2) or more entrepreneurs do or may, within the normal scope of their business activities and without undertaking any significant change in their business facilities or practices, engage in any one (1) of the following acts: Provided, that such act as mentioned in item (2) below shall not be included within the meaning of competition as provided for in Chapter IV.

(1) Supplying the same or similar goods or services to the same consumers or customers;

(2) Receiving supply of the same or similar goods or services from the same supplier."

(Chapter IV, excluded above, relates to stockholding, interlocking directorates, and mergers.)

⁴⁰ *Kōsai minshū* (Tokyo High Ct., Dec. 9, 1953) 873.

⁴¹ The United States has approached the problem of firms with unlike degrees of vertical integration in a different manner. Even in those instances where horizontal positioning is required, it is apparently not necessary that firms in the United States be totally alike—even potentially—so long as they are, at some level, in the required relation to each other. See, for example, *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), and *Esso Standard Oil Co. v. Secatore's, Inc.*, 246 F.2d 17 (1st Cir. 1957), which posed the problem in resale price maintenance cases where the exemption from antitrust coverage applies only to firms which are not horizontally positioned. Since the 1955 amendment to § 7 of the Clayton Act, the absence of horizontal relation of merging firms would seem to be of no unique significance. Perhaps the point of *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586 (1957), is that a horizontal relation was never necessary. Obviously there is no need to show such common level of distributive function in the usual Sherman §§ 1 or 2, Clayton § 3, FTCA § 5, or Robinson-Patman proceeding.

⁴² *Kabushiki Kaisha Asahi Shimbunsha* (Asahi Newspaper Co.) v. *FTC*, 4 *Gyōsai reishū* (Tokyo High Ct., March 9, 1953) 609.

⁴³ The word "entrepreneur" is also defined by article 2 (1) of the Japanese law to include natural and juridical persons who carry on a business enterprise.

zontal roles with reference to each other, but must also deal in the "same or similar goods or services." Predictably enough, this requirement has led to disputes about how much identity must exist for the items to be "similar."

The Fair Trade Commission once observed that "standard cotton yarn which is called spun cotton yarn . . . and non-standard cotton yarn which is called utility cotton yarn . . . are goods used in families and apparel factories and though there is indeed difference in material used and quality in a strict sense, consumers and users look upon them as similar goods."⁴⁴ Because of the essentially indiscriminating consumer acceptance, the Commission found the entrepreneurs to be competing in the sale of "similar" goods. In another case, bus and rail transportation firms which operated lines between the same points were found to be competitors.⁴⁵ Although not the same, the two forms of transportation were readily interchangeable.

The entrepreneurs must of course, as demonstrated by the first *Tōhō* case discussed above,⁴⁶ be in the same geographical market for competition to exist. This is not to say that a party cannot unlawfully restrain competition except in the field in which he is primarily engaged. For example a banking firm may, by exertion of financial control, substantially restrain competition between silk reeling concerns.⁴⁷ The competitive injury occurs at the horizontal level even though the economic leverage is exercised by a party in another line of endeavor.

In general the concepts of public interest, market, restraint, competition, and levels of functional organization will be familiar to the anti-trust lawyer of any nation. The variation in particulars has been suggested above.

⁴⁴ Teikoku Seishi Kabushiki Kaisha (Imperial Spinning Co.) Case, 2 FTC DECISION REPORTS (FTC, Oct. 10, 1950) 152. The U.S. cases furnish many illustrations of this problem. The modern classic is probably *United States v. E. I. DuPont de Nemours & Co. (The Cellophane Case)*, 351 U.S. 377 (1956). The question arises commonly in connection with the resale price maintenance provisions of the Miller-Tydings Amendment to § 1 of the Sherman Act and the McGuire Amendment to § 5(a) of the Federal Trade Commission Act, both of which use the language "commodities of the same general class." Of course the merger cases, under § 7 of the Clayton Act, have been a prolific source of cases which, in attempting to outline a market, explore the question of same or similar goods and services.

⁴⁵ Tosa Denki Tetsudō Kabushiki Kaisha (Tosa Electric Railway Co.) and 4 Others Case, 2 FTC DECISION REPORTS (FTC, May 23, 1950) 39.

⁴⁶ See p. 446 *supra*.

⁴⁷ Kabushiki Kaisha Saitama Ginkō (Saitama Bank Co.) and 17 Others Case, 2 FTC DECISION REPORTS (FTC, July 13, 1950) 74.

SUBSTANTIVE PROVISIONS

The major substantive provisions of the Antimonopoly Law can be arranged rather conveniently under five headings: private monopolization, unreasonable restraint of trade, unfair business practice, supplementary prohibitions related to the accumulation of corporate interests or control, and provisions concerning international transactions. Despite the bearing these groupings have upon each other, the most helpful progression will be to look at each division independently.

1. Private Monopolization.

The movement in postwar Japan from greater to less stringency in the control of anticompetitive practices has already been noted. The trend is readily observable in the area of private monopolization. It is also a simple task to identify the pressures which have prompted this relaxation.

Article 8 of the original act addressed itself to the problem of monopolization in a forthright fashion. If "undue substantial disparities in bargaining power" were found to exist, the Fair Trade Commission was either to order the offending entrepreneur to transfer a part of his business facilities to another firm, or to take other appropriate measures to rectify the situation.⁴⁸ This power was never invoked. Perhaps, had the article not been completely revised in 1953,⁴⁹ the corrective would have been used only when the accumulated bargaining power was employed in an "abusive" fashion, but it seems that this was not the original intent of the section. The authorization was to eliminate substantial disparities in bargaining power, a strikingly different thing from the suppression of monopolizing conduct. Whatever the future might have been, the businessmen of Japan saw in article 8 only cause for alarm and its early deletion was inevitable. The return of a comparable provision to the Antimonopoly Law now seems out of the question.

The removal of the old article 8 reduced the Japanese control over monopolization to a status more nearly comparable to that found in the United States. The prohibition remaining after the 1953 amendment is set out in the first phrase of article 3. The statement is simply that: "No entrepreneur shall effect private monopolization." The conduct forbidden is monopolization and not, as was true in the former article 8, the existence of monopoly power. The philosophy

⁴⁸ See note 23 *supra*.

⁴⁹ Law No. 259, 1953.

expressed in 1945 by Judge Learned Hand⁵⁰ characterizes the approach in Japan well. The dominant firm which has had monopoly "thrust upon" it by purely technological or other objective factors not controlled by the firm, or which enjoys its position "by virtue of . . . superior skill, foresight, and industry" is not monopolizing, but when it acts to preserve or exploit this dominance by actions otherwise legal but not economically inevitable, a violation occurs. Inequity lies in abuse, not possession, of the power. At least this is what the limited experience under the Antimonopoly Law of Japan would seem to indicate.

The cases are few. During a 16-year period, July 1947 to July 1963, the Fair Trade Commission issued only five complaints alleging private monopolization. Two of these cases, the earliest in point of chronology, terminated in consent decrees.⁵¹ The two most recent complaints were, because of changes in the pertinent circumstances, simply dismissed without any decision.⁵² The fifth complaint (third in point of sequence) resulted in a contest and in interesting decisions by both the Commission and, on appeal, by the Tokyo High Court. The case was *Noda Shōyu Kabushiki Kaisha* (Noda Soy Sauce Co.),⁵³ and it merits scrutiny because of the insight provided relative to the structure of a typical segment of Japan's internal economy as well as to the law of monopolization.

Noda is the leading soy sauce producer in Japan. It accounts for 14.08 percent of the national production and is significantly larger than any other producer. As is the case with many parts of the Japanese economy, the soy sauce industry is essentially dualistic. There are literally thousands of producers, but only a handful are large enough to market their product outside the local area where it is produced. Soy sauce has three recognized grades: supreme, superior, and best. Price differentials are based upon the grade. In 1958 four firms produced a "supreme" grade. Their aggregate portion was nearly a quarter of the national output. In one market, the Kantō

⁵⁰ *United States v. Aluminum Co. of America*, 148 F.2d 416, 429-30 (2d Cir. 1945).

⁵¹ *Baishō Shisetsu Kompō Unyu Kumiai* (Preparation and Packing Facilities Transportation Association) Case, 1 FTC DECISION REPORTS (FTC, March 27, 1948) 10; and *Kabushiki Kaisha Saitama Ginkō* (Saitama Bank Co.) and 17 Others Case, *supra* note 47.

⁵² *Yukijirushi Nyūgyō Kabushiki Kaisha* (Snow Brand Dairy Co.) Case, 10 FTC DECISION REPORTS (FTC, Dec. 23, 1959) 44; and *Tōbu Tetsudō Kōnai Eigyojin Kumiai* (Tōbu Railway Concessionaires Association) and 21 Others Case, 11 FTC DECISION REPORTS (FTC, April 12, 1962) 146.

⁵³ 9 FTC DECISION REPORTS (FTC, Dec. 27, 1955) 57.

area,⁵⁴ the four "supreme" brands accounted for approximately 70 percent of the total soy sauce sold. Noda supplied 36.7 percent of the total volume; the other three "supreme" brands together comprised another 31.8 percent. The remaining share of the market was supplied by producers of inferior brands. Noda, obviously, enjoyed a dominant position.

Prices were, until 1950, established by price control. After abolition of control, Noda was recognized as the price leader and uniformity of price within the grades was normal. During the fall of 1953, some price disturbance occurred because of increased cost of raw materials. On December 25, Noda announced a new price and supplied its wholesalers with a price list to govern the sale of Noda's output at the wholesale, jobber, and retail levels. Two of the other three "supreme" brand producers adopted identical price changes later the same day and the third followed suit two days later. The question then was whether the retailers could be compelled to adhere to the prices announced.

Soy sauce in the Kantō area is distributed through a dozen wholesale agents, about thirty jobbers, and ultimately into the retail level of thousands of wine shops, food, and department stores. Although most of the retailers accepted the new prices at once, about a thousand did not. Noda acted quickly and decisively. By exerting pressure upon the wholesalers, and through them upon the entire line of distribution, dissident retailers were promptly brought to terms by threats to discontinue supply. As soon as the price on Noda's product was controlled, the other "supreme" brands, of economic necessity, were maintained at the same level. In utilizing its power to control price on its own output, Noda had also controlled "the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in a particular field of trade"⁵⁵ and effected "private monopolization."

2. Unreasonable Restraint of Trade.

After prohibiting private monopolization, article 3 continues by providing that no entrepreneur "shall undertake any unreasonable restraint of trade." The words, in themselves reminiscent of the rule of reason, are defined by the act⁵⁶ in a manner which could, if taken

⁵⁴ The area, supplied with soy sauce from the outside, consists of seven prefectures and Tokyo.

⁵⁵ The conduct defined as private monopolization in article 2(5).

⁵⁶ The definition set out by Article 2(6) is as follows: "The term 'unreasonable

literally, encompass the entire span of Sherman Act section 1 cases in the United States. Perhaps it was intended to do just that but, as will shortly be demonstrated, the decisions of the Tokyo High Court have restricted the provision to a much narrower scope.

Initially, that is in the Act of 1947, the objective was to classify concerted practices in restraint of trade into two types: (1) general restraints which had an *unreasonably* adverse impact upon competition in the specific line of commerce, and (2) specific restraints which, though perhaps less pervasive, were unlawful per se. The former conduct was to be governed by article 3; the latter by article 4. The last cited article, applicable to a list of concerted acts specifically defined,⁵⁷ made such conduct unlawful per se unless the consequences were negligible in the relevant market. General restraints, not within the defined per se group, were prohibited only when shown to be substantial. This projection of the Sherman Act pattern was of short duration. Article 4, and with it the classification of concerted activity unlawful per se, disappeared as a result of the 1953 amendments to the act. Control of concerted restraint thereafter rested solely upon article 3.

While the legislative process was eradicating article 4, the Commission and the judiciary were engaged in reducing article 3 to a level of relative impotence. The process started with the *Kabushiki Kaisha Asahi Shimbunsha* (Asahi Newspaper Co.) Case in 1953.⁵⁸ That case involved an agreement among the publishers of newspapers by which they allocated territories to their distributors. The Fair Trade Commission, reacting as a court in the United States would in such a case,⁵⁹ found the parties were engaged in an unlawful cartel. Upon appeal the decision was reversed. Starting with the article 2(6) definition requirement that the entrepreneurs "mutually restrict their business"

restraint of trade' . . . shall mean such business activities, by which any entrepreneur, by contract, agreement, or any other form, in conjunction with other entrepreneurs, mutually restrict their business activities to fix, maintain, or enhance prices, or to limit production, technology, products, facilities, or another party to trade, etc., or executes such activities, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade."

⁵⁷ The concerted activities made unlawful per se were:

- (1) Establishment, stabilization, or enhancement of prices.
- (2) Restrictions on volume of production or sales.
- (3) Restrictions on technology, products, markets, or customers.
- (4) Restrictions on construction or expansion of facilities, or on the adoption of new technology or methods for production.

⁵⁸ 3 FTC DECISION REPORTS (FTC, April 7, 1951) 4.

⁵⁹ The early case of *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) was based in part on market division. This conduct is generally regarded as being a per se violation of the Sherman Act.

the court held that the parties in concert, the publishers, had not placed restrictions upon *themselves*. The vertical restraints imposed upon dealers, "does not fall under a concerted activity, though it may form a private monopolization or unfair business practice."⁶⁰

Another decision by the Tokyo High Court later the same year made the same point again. The court said:

. . . unreasonable restraint of trade is formed where independent entrepreneurs in mutual competition jointly impose certain restrictions upon each other and thereby restrain their free business activities . . . if mutuality is lacking in the restriction, an unreasonable restraint of trade does not occur.⁶¹

Following true to form the court reversed the Commission's finding of an article 3 violation, and found, instead, an unfair business practice.

These two 1953 decisions make it abundantly clear that the unreasonable restraint prohibition of article 3 is limited to cases in which there are: (1) substantial restraints, (2) imposed by concerted action, (3) by parties in competition with each other, and (4) mutually applicable to all the competitors involved. Thus interpreted, article 3 bears little similarity to the Sherman Act prototype. The ineffectiveness of article 3 was soon to be made still more obvious. Another proceeding involving the newspaper industry, commenced during 1958 and only terminated this year, illustrates how crippling the "mutual restriction" limitation is to enforcement of the act.

Perhaps emboldened by their victory in the *Asahi Newspaper Co. Case*, or at least not feeling threatened by the Antimonopoly Law, the newspapers throughout Japan increased their prices substantially, uniformly, and—for all practical purposes—simultaneously. There was no question but that this pricing behavior was parallel and that the parties were conscious of that fact. Indeed, the Fair Trade Commission was able to obtain evidence of meetings at which representatives of the newspaper companies discussed prices. However, no specific

⁶⁰ The Fair Trade Commission in an earlier case, *Hokkaido Butter Kabushiki Kaisha (Hokkaido Butter Co.) and 8 Others*, 2 FTC DECISION REPORTS (FTC, Sept. 18, 1950) 103, had entered a consent decree against a dominant manufacturer which had entered a resale price maintenance contract with its wholesalers on the theory that a horizontal restraint between the latter violated the law. The different conclusion in the *Asahi* case three years later may highlight the trend toward more permissiveness.

The butter case also involved a vertical restraint. The suggestion in *Asahi* that this may be an unfair business practice is comparable to the accepted rule that section 5 of the Federal Trade Commission Act in the United States does not require a concert of action. Of course, there is no "mutual restriction" requirement in private monopolization. *Cf.* note 47 *supra*.

⁶¹ *Tōhō Kabushiki Kaisha (Tōhō Co.) v. FTC*, *supra* note 34.

proof of agreement relating to price was discovered. While an investigation of their conduct was in process, the newspaper companies, by letter to the Commission, denied the existence of an agreement to fix prices. The letter conceded the fact of price uniformity, but it was insisted that each company set its price independently. Persuaded that it lacked proof of mutual restrictions, the Fair Trade Commission discontinued the investigation without ever issuing a complaint.

The docility of the Commission in this acceding to the "mutuality" doctrine drew sharp criticism from scholars⁶² and especially from consumers. An organized group of the latter even attempted to obtain a court order directing the Commission to investigate and make findings concerning the alleged unlawful conduct of the newspaper firms.⁶³ That attempt was not successful, nor was a later attempt to recover in a direct damage action.⁶⁴

Only one conclusion can be reached—except under circumstances of most flagrant abuse, concerted restraints are safely beyond the reach of article 3. Perhaps, as the court suggested in the cases above, such conduct may be prohibited as an unfair business practice. It is this portion of the Japanese law we will next examine.

3. Unfair Business Practices.

"No entrepreneur shall employ unfair business practices."⁶⁵ This is the third, and actually the last, major substantive prohibition of the Antimonopoly Law.

The amending legislation of 1953 changed the provisions dealing with unfair practices, as it did the prohibitions of private monopolization and concerted restraints, but with an important difference. It is at least arguable that "while the general direction of the amendments was toward easing of restrictions, an attempt was made to make up

⁶² C. D. Edwards, *Monopoly in Japan* (unpublished); IMAMURA, SHITEKI DOKUSEN KINSHIHO NO KENKYU (Essays on the Antimonopoly Law) 32-40 (1964).

⁶³ Zenkoku Shōhisha Dantai Rengō Kai (National Federation of Consumers' Organizations) v. FTC, 12 Gyōsai reishū (Tokyo High Ct., April 26, 1961) 933.

⁶⁴ The action was brought against the Yomiuri Newspaper Company to recover damages caused by illegal price fixing. The suit seems to have been brought under article 709 of the *Civil Code of Japan*, which is the general tort provision.

The U.S. lawyer, accustomed to treble damage litigation under section 4 of the Clayton Act, will wonder why the plaintiffs resorted to the general tort law. Japan's Antimonopoly Law does have, in article 25, a provision for "indemnification of damages to the person or party injured." This action is for single damages, not triple, as in the United States. Under article 26, the indemnification may not be claimed until a decision of the Commission has become final and conclusive.

⁶⁵ Art. 19. Prior to the amendment in 1953, the words used were identical to the opening phrase of § 5, Federal Trade Commission Act, viz.: "Unfair methods of competition."

for the lost ground by somewhat fortifying the regulation" dealing with unfair practices.⁶⁶ Whatever the intent may have been, it is true that the Commission became more actively engaged in this area after 1953.⁶⁷

The prewar trade customs of Japan furnished no precedent for "unfair competitive (or business) practices," and statutory definition was essential. Article 2, paragraph 7, set out in the margin below, provided six very broad and for the most part entirely novel categories within which specific acts could be designated as unfair.⁶⁸ Using its power to make designations,⁶⁹ the Commission has established two groups—"Generally Designated"⁷⁰ and "Specially Designated"⁷¹—of unfair trade business practices.

⁶⁶ Restrictive Trade Practice Specialists Study Team, Japan Productivity Center, *op. cit. supra* note 5, at 11.

⁶⁷ As of July 20, 1963, the FTC had issued 191 complaints. Of this number, 78 involved some form of unfair business practice. The shift is especially noticeable in comparing the activity of the Commission before and after the 1953 amendments. From 1947 through 1953 the Commission issued 82 decrees dealing with monopolization or restraints and only 11 involving unfair practices. From 1954 through 1960, there were as many decrees dealing with unfair practices as with article 3 problems—17 in each category.

For a chart showing type of decree and years issued, see Kanazawa, *The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power*, in *LAW IN JAPAN* 491 (von Mehren ed. 1963).

⁶⁸ "The term 'unfair business practices' as used in this Law shall mean such business practices as designated by the Fair Trade Commission out of those endangering fair competition and coming under any one of the following items:

1. To discriminate unjustly in the treatment of other entrepreneurs.
2. To deal at undue prices.
3. To induce or coerce unreasonably customers of a competitor to deal with oneself.
4. To undertake transactions with conditions which unjustly restrict the business activities of the other party.
5. To carry on transactions with another party by unjustly using one's bargaining position.
6. To unjustly interfere in a transaction between an entrepreneur who is in a competitive relationship within the country with oneself or is a company in which one is a shareholder or officer and the other party to the transaction; or where the said entrepreneur is a company, to induce, instigate, or coerce unjustly the company's shareholders or officers to do an act disadvantageous to the company."

⁶⁹ See art. 2(7) above. Article 71 further provides: "The Fair Trade Commission, desiring to designate specific business practices [as unfair] . . . shall hear the views of entrepreneurs . . . shall hold a public hearing . . . and thereupon shall make the designation after giving due consideration to the views disclosed."

Article 72 provides that "such designations . . . shall be made by notification."

⁷⁰ The "Generally Designated Unfair Business Practices" were established by FTC Notification No. 11 of 1953.

⁷¹ "Specially Designated Unfair Business Practices," issued pursuant to the procedure set forth in article 71, note 69 *supra*, are tailored to the individual problems of the specific industries to be affected. A rough analogy exists between these "designations" and the trade regulation rules and trade practice releases issued by the Federal Trade Commission in the United States. For a brief description of the U.S. pattern, see the statement by Chairman Paul R. Dixon in Van Cise, *Understanding the Anti-Trust Laws*, Practising Law Institute Monograph, 1963, at p. 216-17.

GENERALLY DESIGNATED UNFAIR BUSINESS PRACTICES

The Commission's 1953 notification designating general unfair practices encompasses the types of activity condemned in the United States under the Federal Trade Commission Act and Clayton Act, including much of the Robinson-Patman Act. The notification identified twelve categories, most of which will sound familiar to the American lawyer.

Item 1 deals with boycotts, direct and indirect.⁷² Discrimination in services, terms, or price are covered by items 2, 3, and 4 and follow a general Robinson-Patman pattern.⁷³ Paying an unduly high price or supplying at an unduly low price (*viz.*, dumping) are made unfair by item 5, and item 6 prohibits the use of economic advantage and disadvantage to induce or coerce, respectively, the customers of competitors. Exclusive dealing or unreasonable refusals to deal, item 7, and tying practices, item 8, have given rise to a number of cases.⁷⁴ The almost traditional use of a dominant position in the industry and financial power to control the conduct of other firms, even though they may not be competitors, is dealt with by items 9 and 10.⁷⁵ Direct interference in the affairs of a competitor⁷⁶ or indirect interference by inducing directors or shareholders to use their voting rights or stock transfer prerogative to the injury of the competitor, or to disclose his business secrets, are designated as unfair practices by items 11 and 12.

These twelve general designations apply to all activities within the Commission's jurisdiction. The practices specially designated are additional, not alternative, sets of regulations.

⁷² Tottori Seikashō Kumiai (Tottori Vegetable and Fruit Dealers Association) Case 9 FTC DECISION REPORTS (FTC, Feb. 25, 1958) 41, synopsis given (in English) in 1 FAIR TRADE (No. 4) 34 (1958).

⁷³ Hamanaka-mura Shuchuku Nōgyō Kyōdō Kumiai (Hamanaka Village Livestock-Agriculture Cooperative Association) Case, 8 FTC DECISION REPORTS (FTC, March 7, 1957) 54, translated into English in 1 FAIR TRADE (No. 2) 40 (1957).

⁷⁴ Chūkyō Lion Hamigaki Seizō Kabushiki Kaisha (Chūkyō Lion Toothpaste Manufacturing Co.) Case, 4 FTC DECISION REPORTS (FTC, March 7, 1953) 106; Kabushiki Kaisha Hokkaidō Shimbunsha (Hokkaido Newspaper Co.) Case, 5 FTC DECISION REPORTS (FTC, May 18, 1953) 5; Taishō Seiyaku Kabushiki Kaisha (Taishō Pharmaceutical Co.) Case, 7 FTC DECISION REPORTS (FTC, Dec. 10, 1955) 99. Earlier cases, on slightly different facts, had not found exclusive dealing an unfair business practice. The ambivalence of American treatment of the exclusive dealing problem can be seen by reading *Standard Oil of California and Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); and *United States v. White Motor Co.*, 372 U.S. 253 (1963).

⁷⁵ See text accompanying note 47 *supra*.

⁷⁶ Kabushiki Kaisha Mitsubishi Ginkō (Mitsubishi Bank Co.) Case, 9 FTC DECISION REPORTS (FTC, June 3, 1957) 1, translated into English in 1 FAIR TRADE (No. 4) 28 (1958).

SPECIALLY DESIGNATED UNFAIR BUSINESS PRACTICES

Exercise of the power to designate specific industrial practices as unfair has enabled the Commission both to eradicate certain evils and, by initiating trade conferences, to interest trade groups in effective self-policing. The establishment of fair business practice conferences has often followed specific designations by the Commission. Trade associations, serving the same useful functions they do in other nations,⁷⁷ also do some self-policing and are expressly prohibited from promoting any activities which will "cause entrepreneurs to [engage in] . . . unfair business practices."⁷⁸

Since 1953 the Commission has issued notifications of specifically designated unfair practices for thirteen industries. It will be remembered that these are precise applications, announced after special investigation and a set of hearings, of the categories broadly stated in article 2(7), the section defining unfair business practices. These designations make up an interestingly diversified mosaic and demonstrate the potential of the Fair Trade Commission for this sort of function.

Two of the early designations which dealt with soy sauce and paste⁷⁹ (and subsequent designations in other foodstuffs, rubber footwear, and the match industry) pertained to the use of gifts or entertainment to procure sales. Such conduct was found to be within the category of "unreasonably inducing customers of a competitor."

During 1954 the Commission designated as unfair a series of practices commonly used by department stores against wholesalers.⁸⁰ The stores had been using their dominance to obtain price concessions after goods had been delivered to them, returning goods which had not moved, demanding that the sellers furnish employees to serve at the stores, and employing similar maneuvers which will quickly conjure up memories for practitioners in the United States.⁸¹

⁷⁷ An excellent bibliography on trade associations can be found in OPPENHEIM, *FEDERAL ANTITRUST LAWS*, 131-32 (2nd ed. 1959). Trade associations and cartels have, of course, special significance in Japan. This aspect of the antitrust problem is discussed in greater detail below.

⁷⁸ Art. 8(1)v. The original article 8 which dealt with undue disparity in bargaining power was repealed. See notes 23 and 48 *supra*. The present article is new legislation.

⁷⁹ Specific Unfair Trade Practices in the Soy Sauce Industry, FTC Notification No. 12 of 1953; Specific Unfair Trade Practices in the Miso [fermented soy paste] Industry, FTC Notification No. 13 of 1953.

⁸⁰ Restrictive Trade Practice Specialists Study Team, Japan Productivity Center, *op. cit. supra* note 5, at 17.

⁸¹ *Elizabeth Arden, Inc. v. F.T.C.*, 156 F.2d 132 (2nd Cir. 1946); *Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945).

Control of the newspaper industry, unsuccessfully attempted under an article 3 theory of unreasonable restraint of trade,⁸² did lead to specific designation of unfair practices for that industry in 1955.⁸³ These designations accompanied a struggle which produced a temporary injunction issued by the courts and a consent decree issued by the Commission which found that a lottery to promote the sale of papers was unreasonable inducement or coercion of a competitor's customers.⁸⁴ The designation went further and dealt also with supplying excess papers to distributors and with discriminations in fixing prices and territories. The earlier court decisions had virtually invited the Commission to make such designations. Businessmen with a long tradition of cartels and trade associations can understand regulations, arrived at after discussion among the competitors, much more readily than they can the bizarre notion that concerted actions constitute an unreasonable restraint of trade. Nor, of course, does the presence of government at such a trade conference seem extraordinary to the Japanese.

Proceeding logically enough from newspaper publishers in 1955 to other publishers in 1956, the Commission designated as unfair a number of specific practices in the textbook industry.⁸⁵ The novel elements branded as unfair by this designation were the use of bribes to influence persons who selected books for schools and the making of statements which disparaged or injured the reputations of competitors, a problem in part analogous to that before the U.S. Supreme Court a few years later.⁸⁶

Shipping conferences have long been active in Japan, as elsewhere, and the specific designation issued for this industry in 1959 was intended to regulate existing conference activities.⁸⁷ Unreasonable refusals to admit to the conference, undue discrimination by shippers or area, retaliation for shipping on non-conference vessels, and the abusive use of exclusive contracts, fidelity rebates, deferred rebate

⁸² See text at notes 60 and 64, *supra*.

⁸³ Specific Unfair Trade Practices in the Newspaper Industry, FTC Notification No. 3 of 1955.

⁸⁴ *Kabushiki Kaisha Yomiuri Shimbunsha (Yomiuri Newspaper Co.) v. FTC*, 6 Gyōsai reishū (Tokyo High Ct., Nov. 5, 1955) supp. 3; consent decree by FTC on Dec. 8, 1955, 7 FTC DECISION REPORTS 96.

⁸⁵ Specific Unfair Trade Practices in the Textbook Business, FTC Notification No. 5 of 1956

⁸⁶ *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

⁸⁷ Specific Unfair Trade Practices in the Marine Transport Industry, FTC Notification No. 17 of 1959.

systems, or comparable practices are expressly governed in the notification. One detail, the permissible spread of tariff between contract and non-contract shippers, resulted in a Commission proceeding but was ultimately and amicably fixed at 9.5 percent.⁸⁸

The most recently issued specific designations deal with the bottling and canning industry and especially with the processing of meat.⁸⁹ Essentially the problem giving rise to these last designations involved labelling and misrepresentation matters; more precisely it was the picturing of cattle and use of the words "beef style" on cans of whale meat. The analogy to U.S. regulations concerning packaging, advertising, use of descriptive words for furs, wines, watches, cheese, and other products is so obvious to the American lawyer that citation of specific illustrations would surely be a work of supererogation.

It is worth noting, however, both for comparative purposes and as a suggestion of what the future may hold for the Japanese Fair Trade Commission, that additional legislative enactment has been used to correct and regulate trade problems. For example unwarranted delay in payment of subcontractors, who are completely dependent upon the disproportionately strong general contractors, led to "The Law To Prevent the Delay in Payment to Subcontractors." Although prior investigation and recommendations were aided by the Small and Medium Business Administration, the continuing administration of the new law was assigned to the Commission.⁹⁰ In the same fashion such matters as deceptive acts in relation to food labels might well be prohibited by specific legislation and assigned for enforcement to the Commission.⁹¹ The Fair Trade Commission has already demonstrated its capacity to handle the quasi-judicial and rulemaking powers in the entire area of unfair trade practices, and the progression to additional responsibilities would be a logical development.

4. Supplementary prohibitions.

The legislation and dissolutions compelled during the immediate

⁸⁸ *Kyokutō Unchin Dōmei (Far Eastern Freight Conference) Case*, 10 FTC DECISION REPORTS (FTC Dec. 23, 1959) 51. The hearings in the case were suspended for a lengthy period, actually until the conference acceded to the contract system proposed by the FTC, before the suspension was ordered. After the concession was obtained, the case was dismissed.

⁸⁹ *Specific Unfair Trade Practices in the Animal and Whale Meat, Etc., Canning Industry*, FTC Notification No. 1 of 1961.

⁹⁰ *Restrictive Trade Practice Specialists Study Team*, Japan Productivity Center, *op. cit. supra* note 5, at 17.

⁹¹ Japan has a Food Sanitation Law (*Shokuhin eiseihō*) (Law No. 233, 1947), in 8 EHS No. 8570, but it is presently applicable to public health matters only. There is no close counterpart to the pure food and drug provisions of the United States.

postwar days by the occupation forces⁹² were primarily designed to eliminate the oligopolistic structure which had dominated Japan's industry. In particular the unique Zaibatsu structure was marked for obliteration. The decentralization accomplished by these original acts was to be perpetrated by adoption of the Antimonopoly Law of 1947 and the Trade Association Law (*Jigyōsha dantaihō*) of 1948.⁹³ Both acts contained strong prohibitions in addition to the substantive provisions relating to private monopolization, unreasonable restraints, and unfair practices which have been reviewed above. The restrictions in original form, as has already been noted, were so stringent as to be almost punitive in effect. The agitation for reform, especially with reference to the prohibitions against cartels,⁹⁴ was immediate and vigorous.

On the other hand, the reasons for preventing a resurgence of dominant firms, especially in the prewar traditions, and an oligopolistic industrial society were also strong. The occupation authorities regarded the Zaibatsu as a prime engine of the military. Some Japanese businessmen and scholars were persuaded concerning the utility of the new laws, and a number of small- and medium-sized organizations regarded the dismemberment of the dominant firms as a rare opportunity to develop new stature in an economy which for centuries had been characterized by a dualistic structure—the very large and the very small, with few firms of intermediate size.

The struggle is not yet over, but the victory can be easily predicted. What were originally strong prohibitions against mergers and the acquisition of interests in competing firms or the formation of cartels have been reduced to provisions which are simply supplementary to the other substantive sections of the Antimonopoly Law. It is not necessary to review the course of amendment in detail.⁹⁵ The story is

⁹² See note 4 *supra*.

⁹³ Law No. 191 of 1948, effective July 29, 1948. This law, as substantially amended in August of 1952 and thereafter in September of 1953, was merged into the Antimonopoly Law where it now appears as article 8.

⁹⁴ "Restraint of competition by collusion of the competitors has always been and still is the favorite technique most frequently resorted to. Indeed, faith in the benefit of this way of regulating competition is so deep-rooted that the general run of businessmen appear simply unable to comprehend why its legality should be called into question. It is no wonder there exist so many laws whose main purpose is to free entrepreneurs, large and small, from the restrictions on forming a cartel and there is persistent clamour for further relaxation of this rule." Restrictive Trade Practice Specialists Study Team, Japan Productivity Center, *op. cit. supra* note 5, at 17. The foregoing quotation is from a statement *after* the drastic liberalization in control of cartel activity and trade associations had been accomplished!

⁹⁵ The first major amendment in 1949 made it possible for one corporation to own shares in another and for a person to serve as director for several firms, provided no

essentially understood when one appreciates the fact that the per se quality which originally characterized the several provisions—except for the still categorical prohibition of holding companies—is gone. All the provisions below, save the exception just mentioned, now incorporate the standard of “substantial restraint” as a prerequisite of illegality.

This does not mean that the supplemental provisions are unimportant but only that they are far less limiting than they once were. In actuality, several of the controls even now are sharper than those in the United States, and all remain factors of some magnitude. We will now look briefly at these provisions.⁹⁶

HOLDING COMPANIES

The Zaibatsu existed by means of holding companies. Article 9 states: “The establishment of a holding company shall be prohibited.” It is interesting that in all the clamor for modification of the anti-monopoly laws, there has been little or no call for the deletion of this provision.⁹⁷ As defined by the act, a holding company is one “whose principal business is to control the business activities of a company or companies in Japan by means of stockholding . . .”, and does not include holding of shares as an investment only.⁹⁸

Only one case has been initiated under article 9, and it was dismissed by condonation at the time of the peace treaty.⁹⁹

STOCKHOLDING

The person or company prohibited from owning a single share of a competitor's stock just fifteen years ago may now buy with impunity

substantial lessening of competition would result and no unfair trade practices were involved. Mergers and acquisitions were made possible, also, on the conditions that no unfair practices were used and that there was not substantial danger of monopoly or lessening of competition.

The separate Trade Association Law was amended in 1952 and again the next year when the most important relaxations of controls, and the first significant authorization for cartels formation, were adopted. Despite some attempts, no further amendments of importance have been made since 1953.

⁹⁶ Chapter IV of the Antimonopoly Law, composed of articles 9 through 18, deals with holding companies, intercorporate stockholding, interlocking directorates, mergers, and the authorization for sanctions to be imposed in the event of violation of these provisions. Chapter II, entitled “Private Monopolization and Unreasonable Restraint of Trade,” contains another supplementary provision dealing with international agreements which will be considered separately.

⁹⁷ Kanazawa, *supra* note 67, at 487, citing Ashino, *Experimenting With Antitrust Law in Japan*, 3 JAPANESE ANNUAL OF INT'L L. 31, 35-39 (1959).

⁹⁸ A predictable circumstance in light of the express provision for such holding in § 7 of the Clayton Act.

⁹⁹ FAIR TRADE COMMISSION, KOSEI TORIHIKI IINKAI NENJI HOKOKU (FTC annual report) [for 1950] 84.

unless the acquisition would result in a substantial restraint of competition or unless the acquisition involves an unfair business practice.¹⁰⁰

An application of the stockholding limitation was made in 1957 when Nihon Gakki Seizō Kabushiki Kaisha, which then produced 54% of the pianos, 64% of the organs, and 28% of the harmonicas—in each case being the first-ranking producer in Japan—acquired, in the name of a third firm, 24.5% of the outstanding shares of one of its major competitors. The competitor, Kawai Gakki Szisakusho, produced 16%, 13%, and 7% of the instruments named above. The acquisition, which would have given Nihon Gakki 70%, 77%, and 35% of the total national production for these instruments, was held to involve a substantial restraint of competition. The surprise to the American lawyer will not be in the finding of restraint but in the recommendation, which was ultimately assented to, that the respondent dispose of *all but 300,000* of the 772,500 shares of the Kawai Gakki stock it had acquired.¹⁰¹

Financial institutions, separately provided for by article 11 of the act, may not own in excess of one-tenth (originally one-twentieth) of the stock of other companies unless the permission of the Fair Trade Commission is first procured. Permission for such ownership is limited to circumstances set forth in the article and is to be granted only after the Commission has consulted with the Minister of Finance.¹⁰²

Although the earlier firm controls over intercompany loans and shareholding are now gone,¹⁰³ there is still remaining a series of filing requirements. Companies, other than financial, with assets over a hundred million yen must report their shareholdings to the Commission annually. Foreign companies, which are exempted from reporting their shareholdings but which must file reports, are all assumed to have assets in excess of the amount indicated. Persons and firms other than companies must report, within 30 days of acquisition, holdings in excess of

¹⁰⁰ Article 10 sets out the rule for companies, other than financial concerns, and article 14 applies to persons, natural or juridical, other than companies. It is interesting to notice that both sections expressly prohibit, when a substantial restraint would be caused, either the acquisition *or owning* of shares. This goes beyond the Clayton § 7 prohibition against *acquiring* shares but of course not beyond the interpretation of that section in *United States v. E. I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957).

¹⁰¹ Nihon Gakki Seizō Kabushiki Kaisha (Japan Musical Instrument Manufacturing Co.) Case, 8 FTC DECISION REPORTS (FTC, Jan. 30, 1957) 51, translated into English in 1 FAIR TRADE (No. 2) 32 (1957).

¹⁰² Kabushiki Kaisha Daiwa Ginkō (Daiwa Bank Co.) Case, 10 FTC DECISION REPORTS (FTC, June 26, 1961) 36.

¹⁰³ Articles 10, 11, and 12 were repealed by Law No. 214 of 1949. The current articles 10 and 11, discussed above, are new and much milder sections. There is no article 12 in the present Antimonopoly Law.

10% of the shares of each of two or more companies which are in competition.

INTERLOCKING DIRECTORATES

Section 8 of the Clayton Act pertains basically to financial institutions and the directors, officers, and employees in that profession.¹⁰⁴ Article 13 of the Antimonopoly Law of Japan has never been so narrow. At one time it prohibited, in all cases, a person from being an officer in competing companies. Today interlocking directorates, in the absence of certain unfair business practices, are permitted unless a substantial restraint of competition may be occasioned. One holding a position in competing companies must report that fact to the Commission, however, within 30 days of accepting the dual position if either firm has assets in excess of one hundred million yen.

MERGERS

The antimerger provisions of Japan were surely shaped by the frustrations experienced in the United States with the 1914 Clayton Act provisions.¹⁰⁵ The first limitations on mergers were such that firms could unite only after obtaining permission from the Fair Trade Commission, and that consent could not be given when any of several circumstances existed.¹⁰⁶ Even after the inevitable amendments,¹⁰⁷ the restrictions imposed by the Antimonopoly Law are—at least in the book—more confining than the U.S. counterparts. Article 15 prohibits merger if a substantial restraint of competition will be caused or if the acquisition has been effected by unfair business practices. Article

¹⁰⁴ Clayton § 8 also prohibits interlocking directorates when nonbanking corporations are competitors, have assets in excess of a million dollars, and are so positioned to each other that an elimination of competition would violate the antitrust laws. The section has been used very little. Judicial discussion can be found in *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), and *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953).

¹⁰⁵ By 1947 when the Japanese antimerger provisions were implemented, U.S. corporations had learned to avoid Clayton § 7 by transferring assets rather than simply acquiring stock; *Swift & Co. v. FTC*, 272 U.S. 554 (1926); judicial interpretation had deprived the section of most of its intended effect; *International Shoe Co. v. FTC*, 280 U.S. 291 (1930); *Temple Anthracite Coal Co. v. FTC*, 51 F.2d 565 (3rd Cir., 1931); and Congress was preparing for amendment of the section. See: Federal Trade Commission, *The Present Trend of Corporate Mergers and Acquisitions*, S. Doc. No. 17, 80th Cong., 1st Sess. (1947), and the payoff case, designed to take the Sherman Act out of effective use in control of concentration, was already on its way to the Supreme Court; *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

¹⁰⁶ Permission for merger could not be given if (1) the proposed merger was not needed for rationalization of production, supply, or management; (2) a substantial disparity in bargaining power would result; (3) a substantial restraint in competition would be caused; or (4) unfair methods of competition (later unfair business practices) had been used to coerce the merger.

¹⁰⁷ Amendments were made in 1949 and 1953.

16 makes the same tests applicable to acquiring an interest in a competing firm by partial absorption of its business or its fixed assets, taking a lease of its business or being entrusted with its management, or contracting with it for joint profit and loss ventures.

The considerable—and accelerating—volume of mergers since 1947¹⁰⁸ has been composed primarily of small organizations.¹⁰⁹ The astonishing thing is that, except for the Tōhō case discussed above, the Commission has issued no complaints.¹¹⁰ Nor is it any longer true that the mergers involve only companies of modest size or importance.

Since the 1953 relaxation of the antimerger provisions, the Fair Trade Commission has given particular attention to above sixty mergers because of their special circumstances. Some of these involved firms which had been divided as a result of the SCAP Memorandum Concerning Dissolution of Holding Companies,¹¹¹ and others involved merger of companies organized by former officers in a dissolved *Zaibatsu*.¹¹² The successful merger of the Ishikawajima Heavy Industries Co. and Harima Shipbuilding Co. in 1960, which created the second-ranking firm in new ship construction, was tolerated because the largest firm, Mitsubishi Shipbuilding and Engineering Co., had 16.04% of the market against the combined 10.12% for the merged organization.¹¹³

¹⁰⁸ From 1947 through March 1963, there were 6,355 mergers. Until 1958, the annual average was roughly 300, but there has been a continuing and rapid increase since then: 400 in 1959 and 1960, 590 in 1961, 715 in 1962, and approximately 900 in 1963.

¹⁰⁹ "Of the 5,640 cases up to 1961, the number of cases where the post-merger amount of capital stock exceeding 1,000 million yen is only 80. It may be said, therefore, that almost all of the past mergers have been effected among smaller enterprises." TRADE BULLETIN CORPORATION (Tokyo), MERGERS AND CARTELS IN JAPAN 8 (Japan Industries series ed. 1964).

¹¹⁰ There were three other contemplated mergers in which the Fair Trade Commission gave an informal opinion indicating that it would issue a complaint if the parties persisted in their plans. Each of these proposed mergers involved companies with a large share of the market and which ranked high in relative standing. The merger proposals were withdrawn before formal action was taken.

¹¹¹ SCAPIN 244, Nov. 6, 1945. The first such revival of a company which had been divided in the immediate postwar era brought together the Yukijirushi Nyūgyō Kabushiki Kaisha (Snow Brand Milk Products Co.) and Clover Dairy Co. This merger, which was severely criticized in Imamura, *Dokusen kinshi seisaku no yukue* (The direction of the antimonopoly policy), SHŌJI HŌMU KENKYŪ (No. 144) 3 (1959), and Yazawa, *Dokusen kinshihō kaisei ni tsuite* (on the amendment of the Antimonopoly Law), KEIZAIHO (No. 1) 37, 41 (1958), resulted in a postmerger share of 57.7% of the nation's butter supply, 75% of the cheese supply, and 76.2% of the milk collections in Hokkaido.

Another reunification of a formerly divided firm involved the Teikoku Sen-i Co. and Chūō Sen-i Co., producers of flax yarn and fibers. After merger the firm produced 56.8% of the national supply and was the top ranking firm.

¹¹² The establishment of the trading firms of Mitsui Bussan Co. and Mitsubishi Shōji Co. are both instances involving such former *Zaibatsu* relationships. Immediately after the war, persons prominent in *Zaibatsu* associations were forbidden to hold offices in the organization's companies. Law for the Elimination of *Zaibatsu* Family Control (*Zaibatsu dōzoku shihairiyoku haijōhō*) (Law No. 2, 1948).

¹¹³ An argument which did not work for Bethlehem's attempt to acquire Youngstown

The most dramatic instance may well be the case of three Mitsubishi heavy industries, also a single firm in prewar days, which filed notice of their intention to merge in December of 1963. A public hearing to elicit opinions from competitors, related industrial companies, customers, or other persons produced no strong objections to the reunification. As has just been mentioned, Mitsubishi ranked first in shipbuilding, and the merging firms were also dominant in the production of machines for making paper pulp. The merger was allowed without challenge. Shipbuilding was regarded as a matter of international competition from which Mitsubishi could not exclude competitors. It was further reasoned that paper pulp production was depressed and the market needed strengthening, and the merged organization would not dominate any other industry. However, as a condition, the Fair Trade Commission did require the merging companies to dispose of one of their two patent licenses for production of paper-pulp machines so that another firm could enter this market more readily.

Deliberations of the Commission in relation to merger proposals are not published, but some generalizations concerning the criteria employed can be deduced from the mergers permitted. Former Commission Chairman Yokota stated in the Diet in 1953 that a merger which would give the resulting firm over 30% of the market is at the danger point of a substantial restraint. This was not intended as a hard-and-fast rule, of course, but mergers with a lesser share of market have experienced no problems. Mergers involving larger shares have produced additional standards. These include some old acquaintances for American lawyers—the failing company, regulated industry, and cross-elasticity theories—and some essentially rule-of-reason questions: viz., is there strong domestic or foreign competition; how difficult is entry into the relevant line of commerce; and is the resulting firm still weaker than its competitors?¹¹⁴ One is tempted to agree with a recently published statement that it “does not seem that the regulation of mergers

Sheet & Tube Co. in the case of *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

¹¹⁴ The statements that market shares are “the primary index of market power” and “one of the most important factors to be considered” but every merger is unique and “only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger” were first written by Mr. Chief Justice Warren in *Brown Shoe Co. v. United States*, 370 U. S. 294, 343 (1962), and not by a Japanese judge. Still those sentiments express the approach taken under the Japanese law, saving only the obvious willingness of the Fair Trade Commission to reach a different conclusion from the “commercial realities” than a U.S. court would reach. The markets of Japan and her industrial needs are simply not those of the United States.

by the Fair Trade Commission has so far proved a large hindrance to business activities,"¹¹⁵ but there is another part to the story which has not yet been told.

Companies wishing to merge need no longer obtain the prior approval of the Fair Trade Commission, but they must report their intention to merge to the Commission. Merger may not be accomplished until 30 days after such notification because the Company Registration Office of the Ministry of Justice will not accept merger registrations unless the receipt of notice by the Commission and lapse of the proper waiting period is shown.¹¹⁶ With assent of the applicants, the Commission may extend the waiting period for another 60 days to permit further investigation. There is also a program for informal advance clearances in operation, and in practice companies contemplating merger usually make informal application for this guidance from the Commission. Just as with the informal advance clearance in the United States, the Fair Trade Commission is not bound by informal opinions.¹¹⁷ The informal clearance, advance reporting, and waiting period procedures have been almost as effective.

At least some businessmen must believe that the Commission still exercises a checkrein on mergers because the agitation for still more relaxation of merger controls has continued. A bill to except mergers in specific industries such as steel, petro-chemical, and automobile manufacturing from the Antimonopoly Law was introduced in the 1963 Diet.¹¹⁸ Opposition to the proposal was voiced not only in Japan but also internationally.¹¹⁹ The Fair Trade Commission vigorously opposed the proposed law, arguing that any allowances needed for rationalization, economy of scale, or advancement in technology, could be met without exempting the industries from the Antimonopoly Law. The opposition was directed especially to the portions of the law which would have applied coercion for the establishment of cooperation among enterprises, banks, and government. The Commission took the position

¹¹⁵ TRADE BULLETIN CORPORATION, *op. cit. supra* note 109, at 16-17.

¹¹⁶ The advance approval requirement probably dates back to the recommendations of the Temporary National Economic Commission in the United States. Efforts to amend the Clayton Act to provide for premerger notification have failed. See: *Hearings Before Antitrust Subcommittee No. 5 of the House Committee on the Judiciary*, 84th Cong., 2nd Sess. (1956), and H. R. REP. No. 486, 85th Cong., 1st Sess. (1957). Much less has the United States ever had a premerger consent requirement.

¹¹⁷ For a description of the U.S. pattern, see HOUSE COMMITTEE ON THE JUDICIARY ANTITRUST SUBCOMMITTEE No. 5, INTERIM REPORT ON CORPORATE AND BANK MERGERS, 84th Cong., 1st Sess. (Comm. Print 1955).

¹¹⁸ Specific Industries Promotion Extraordinary Measures Bill (*Tokutei sangyō shinkōhō an*).

¹¹⁹ Banks, *Japan: Open Door with a Catch*, Fortune, July, 1963, p. 135.

that not even tax concessions should be used as bait to induce the merger of independent companies. The 1963 Diet adjourned before taking action on the bill; it was reintroduced in the 1964 session but was not acted upon.

TRADE ASSOCIATIONS

As explained briefly above, the separate Trade Association Law of 1948, in much diluted form, became article 8 of the Antimonopoly Law in 1953. The article is supplementary to the article 3 prohibitions against unreasonable restraint of trade. Agreements by competing companies to fix prices or allocate customers are dealt with as article 3 matters, not as trade association problems governed by article 8.

The Antimonopoly Law regulates entrepreneurs only, and a trade association which is not engaged in an entrepreneurial activity does not come under the prohibitions set forth in the act.

Basically article 8 does two things. It prohibits a trade association from certain activities,¹²⁰ and it requires the filing of a report with the Commission within 30 days of any formation or dissolution of an association and a report of a change in purpose of the association following the year in which the change is made.

At the close of 1963, there were 18,381 reported trade associations in existence. The Commission rendered 34 decisions finding violations by trade associations between May 1953, and July 1963, but in no case did it order dissolution of an association as it might have done under authority provided in the Antimonopoly Law.

5. International agreement or contract.

The Antimonopoly Law still has a provision, in article 6, prohibiting an entrepreneur from entering into an international agreement or contract which would violate the act's provision relating to unreasonable restraints of trade or unfair business practices. It is further required that a copy of all international agreements or contracts be filed with the Commission within 30 days "from the day of its conclusion." These are the vestiges of the 1947 law requiring prior approval of all international arrangements.

The easing of the law resulted first from the need of expediting the entry of foreign capital into Japan and later as a means of helping

¹²⁰ The activities prohibited are: (1) substantially restricting competition in any particular field of trade, (2) entering international agreements which restrain trade, (3) limiting entry or the number of entrepreneurs in any field, (4) unduly limiting the function of member entrepreneurs, or (5) causing members to engage in unfair business practices.

Japan reestablish its own foreign markets in an orderly fashion. In actual operation the provision in the Antimonopoly Law has only minor importance in international transactions. Since the Ministry of International Trade and Industry (MITI) was given power to exempt groups from the Antimonopoly Law,¹²¹ the occurrence of cartels has become commonplace. Perhaps the purpose of prohibiting private international cartels was never appreciated by the Japanese. One commentator saw the original provision as nothing short of a "total renunciation" of Japan's international trade activities.¹²²

All of the cases asserting violation of article 6 were concluded prior to 1953. The reason for this is largely historical. The SCAPIN of 1945 which ordered the enactment of the Antimonopoly Law also ordered the Japanese Government that "it would immediately take steps as are necessary effectually to terminate and prohibit Japanese participation in private international cartels or other restrictive private international contracts or arrangements." In compliance, the Government ordered a filing of all international agreements¹²³ and the Fair Trade Commission was required to process the reports. The result was the issuance of complaints, all of which were concluded by consent decrees without resort to formal hearings.

The major problem has involved patent licensing contracts. License arrangements frequently contain restrictive terms prohibiting the Japanese licensee from obtaining similar technological assistance from the licensor's competitors or tying accessories or raw materials to the patent license. Such license restrictions were, at various times, regarded as unfair business practices as well as violations of article 3 (and originally article 4) prohibitions against concerted restraints. Protests that the Japanese entrepreneur was the victim, not the perpetrator, of the unfair business practice and that the restraints were not "mutual" as required under Japanese law led only to the present amendment which, oddly enough, makes the culpability of the entrepreneur certain even under circumstances of unilateral coercion. The obvious need to obtain foreign know-how was another prime factor in hastening exemptions from this article.

¹²¹ Under the Export-Import Transactions Law (*Yushutsusanyū torihikihō*) (Law No. 299, 1952, title changed by Law No. 188, 1953) in 5 EHS No. 5560, exporters and importers, domestic firms preparing goods for export, and dealers in such goods may under some circumstances be authorized by MITI to agree upon prices, quantity and quality restrictions, and similar matters. At one time the FTC had to concur in such arrangements. Now only a filing with MITI is required although that Ministry is still expected to consult with the Commission concerning the formation of such cartels.

¹²² ISHII, *DOKUSEN KINSHIHO* (Antimonopoly Law) 164 (1947).

¹²³ Imperial Ordinance No. 33 of 1946, issued Jan. 23, 1946.

Also there are laws requiring that international transactions which involve payment in foreign currency, as many patent commissions do require, await formation until prior approval from a Council on Foreign Capital has been obtained.¹²⁴ To avoid the embarrassment of attack by the Fair Trade Commission after approval under these laws had been obtained, a system of advance informal clearance was worked out. The practical effect was to exempt, at least temporarily, such transactions from the Antimonopoly Law. Should the foreign currency provisions be abolished, these international agreements involving restrictive or unfair business practices could be placed in jeopardy under article 6.

However, there seems little concern over this possibility. According to a recent survey by MITI it was disclosed that most of the 1,134 international patent licensing contracts made between 1950 and 1960 involved export restrictions. Exports are entirely prohibited in 15.7% of these agreements, and only 14.8% permit export to North America.¹²⁵

EXEMPTIONS

There are many segments of the Japanese economy excluded entirely from the private monopolization and cartel—but not the unfair business practices—provisions of the Antimonopoly Law. More liberalization is often urged. It would be simple to decry the ballooning tendency of the exempting provision and predict an imminent return to the cartelized structure of prewar Japan. Dispassionate comparison, however, might demonstrate that the comparative degree of commitment to a free competitive economy in Japan and the United States is not as disparate as one might at first assume.¹²⁶

As repeatedly demonstrated in the preceding pages, the amendments made in the years since 1947 have typically moved from prohibitions

¹²⁴ Foreign Exchange and Foreign Trade Control Law (*Gaikoku kawase oyobi gaikoku bōeki kanrihō*) (Law No. 228, 1949) in 5 EHS No. 5010; Law Concerning Foreign Investment (*Gaishi ni kansuru hōritsu*) (Law No. 163, 1950) in 5 EHS No. 5410.

¹²⁵ MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, *GAIKOKU GIJITSU DONYU NO GENSHO TO MONDAI TEN* (The present status of introduction of foreign technology and its problems) (1962). See also Tanaka, *Comments on Selected Japanese Law Bearing on United States Trade With and Investment in Japan*, 7 PATENT, TRADEMARK, AND COPYRIGHT JOURNAL OF RESEARCH AND EDUCATION 418 (Winter 1963-64).

¹²⁶ “[T]here are large segments of the nation’s business where deference to the competitive way of life is today taken at best and where the rigors of the marketplace have been greatly mollified by the cushion of a complex structure of public controls. Taken in conjunction with other factors, this means that... only a relatively small fraction of the country’s goods and services... [fall] even remotely within the potential purview of antitrust.” Walden, *Antitrust in the Positive State*, 42 TEXAS L. REV. 603-04 (1964). “Hence, it is estimated that 70 percent of all goods and services purchased by consumers are exempt from antitrust prohibitions.” Wilson, *Antitrust Policy*

of unrealistic rigor, either never the law in the United States or no longer so, to rules of "reason" and "substantial restraint" comparable to current Sherman and Clayton Act applications. The parallel is not perfect of course, but deviations tend as frequently to more stringent (e.g., prior reporting, total prohibition of holding companies, specific and detailed unfair business practices, etc.) as to less militant anti-monopoly policy. So it is, in general, with exclusions from coverage. An American comparison within the genus, if not the species, can be found for almost every exemption from the Japanese law.

Some classification of the exemptions is required for understanding. From the beginning certain cooperatives, regulated industries, and "natural" monopolies were exempted.¹²⁷ Additional specific exemptions were made, by provisions in the Antimonopoly Law itself, as part of the 1953 amendment.¹²⁸ These 1953 amendments made possible depression and rationalization cartels and resale price maintenance contracts, all subject to conditions which will be discussed below. A third group of exemptions has been made by statutes outside the Antimonopoly Law.¹²⁹ This last category, which now includes about forty special laws permitting exemptions, presents the most obvious hazard to the continued vitality of "antitrust" enforcement in Japan.¹³⁰

DEPRESSION AND RATIONALIZATION CARTELS

In 1953, the Fair Trade Commission was authorized to "validate" the formation of two types of cartels when applicants could demonstrate the existence of certain conditions. For both kinds of cartel activity the Antimonopoly Law provides "positive" and "negative" criteria to be met. It is also required that the Commission shall "consult beforehand with the competent minister" when approval is to be given.¹³¹

The "positive" conditions which must be shown before an anti-

and Constitutional Theory, 46 CORNELL L. Q. 505, 511 (1961). These statements refer to the economy of the United States, not that of Japan.

¹²⁷ See text and notes 26-28 *supra*.

¹²⁸ Chapter VI, which includes articles 21 through 24, sets out the exemptions.

¹²⁹ A rather complete picture of exemptions from the Antimonopoly Law can be found in 1 FAIR TRADE (No. 3) 32-37 (1958) and in Iyori, *Cartels in Japan*, *The Oriental Economist*, Jan., 1964, pp. 25-29.

¹³⁰ It would be superficial to state the problem in terms of whether "competition" will continue to exist in Japan. Some segments of the Japanese economy have always been fiercely competitive and will probably stay that way. Antitrust, after all, involves some ordering of economic forces even aside from the strictly regulatory measures embodied in such laws as the Robinson-Patman Act and Federal Trade Commission Acts of the United States.

¹³¹ Article 24-3 authorizes "concerted activity against depression" and Article 24-4 authorizes "concerted activity for enterprise rationalization."

depression cartel will be approved are that (1) the fall of prices of a given commodity below the average cost of production has brought about a situation in which "there exists the probability of endangering the continuation of enterprise on the part of the majority of said entrepreneurs," and (2) it is not likely that the danger can be overcome by a rationalization cartel.

Given such a set of circumstances the parties may, by agreement, curtail production and sale of the commodity. If this is unavailing, the cartel may fix the price.

There are "negative" conditions—the actions may not go beyond what is necessary to control the "positive" danger; the interests of consumers or related entrepreneurs must not be unduly jeopardized; there must be no unjust discrimination; and cartel membership must be open and voluntary.

Taken together, these are difficult conditions to meet and it is not surprising that few depression cartels have been formed. The greatest number to exist at one time, during the rather general recession of 1959, was five.¹³² Only one such cartel existed as of March 1963.

Rationalization cartels are, as will be noted from the discussion above, a lesser form of restraint than the depression arrangements. They may be validated to facilitate the improvement of technology in the relevant industry; the utilization or purchase of by-products, waste or scrap; the sharing of transport; or "any other enterprise rationalization." The "negative" criteria are those applied to depression cartels plus the additional requirement that if production is allocated there must not be an undue concentration in any one member.

The "enterprise rationalization" device has been used more often than has that of "concerted activity against depression," but still with surprising infrequency.¹³³

CARTELS UNDER SPECIAL EXEMPTIONS

A substantial number of the special exemptions from the Antimonopoly Law apply to industries which are government regulated in most nations.¹³⁴ The exemption for small cooperatives, similar to the Capper-

¹³² The commodities covered by the depression cartels of 1959 were linen yarn, yeast, sheet celluloid, vinyl chloride resin, and hard vinyl chloride tube. The only 1963 depression cartel involved electrode carbon.

¹³³ At the end of March 1963, rationalization cartels existed for eight commodities, namely: spun cotton and viscose yarns, margarine and shortening, synthetic dyes, steel scrap, spun rayon yarn, linen yarn, automobile tires, and polynogic cotton.

¹³⁴ Interesting comparisons relative to the degree of antitrust exemption provided can be drawn between such pairs of legislative acts as:

Volstead Act in part,¹³⁵ has already been mentioned. These exemptions will quickly be understood. The queries arise concerning exclusions in other areas.

The depression which followed the Korean conflict spurred the first special legislative exemptions. The synthetic textile industry, over-extended in response to abnormal war demands and at the urging of the Ministry of International Trade and Industry (MITI), had restricted production by agreement. In 1952 this concerted action was legalized by legislation.¹³⁶ The same crisis produced significant exclusions for commodities involved in export or being produced for export.¹³⁷ Enactment of the last-mentioned exemption was doubly aided by the United States, first by the existence of a comparable exemption, the Webb-Pomerene Export Trading Act,¹³⁸ and secondly by the American desire to protect its domestic producers by obtaining voluntary quotas regulating the price and flow of Japanese goods to the States.¹³⁹ These have been significant exemptions. Of the 1,002 cartels in existence on March 31, 1963, ninety percent were in connection with medium and small business or foreign trade.¹⁴⁰

Some of the exemptions granted by special laws are essentially depression cartels in the nature of those discussed above but with less stringent criteria.¹⁴¹ Others establish cartels for the rationalization of

(1) Law Concerning the Organization for Computation of Casualty Insurance Premium Rates (*Songai hoken ryōritsu sanshutsu dantai ni kansuru hōritsu*) (Law No. 193, 1948) and the Insurance Antitrust Moratorium Act, 59 Stat. 34, as amended, July 25, 1947, 61 Stat. 448, 15 U.S.C. § 1013;

(2) Marine Transportation Law (*Kaijō unsōhō*) (Law No. 187, 1949) in 2 EHS No. 2260 and American Shipping Act of 1916, Ch. 451, 39 Stat. 728, as amended, 45 U.S.C. §§ 801-42 (1958);

(3) Aviation Law (*Kōkūhō*) (Law No. 231, 1952) and Civil Aeronautics Act, 52 Stat. 793, 49 U.S.C. § 494 (1938).

¹³⁵ 42 Stat. 388 (1922), 7 U.S.C. § 292 (1958).

¹³⁶ Law Concerning Temporary Measures for the Stabilization of Medium and Small Enterprises (*Tokutei chūshō-kigyō no antei ni kansuru rinji sochihō*) (Law No. 294, 1952). This act was repealed and replaced by the current Law Concerning the Organization of Medium and Small Enterprise Organizations (*Chūshō-kigyō dantai no soshiki ni kansuru hōritsu*) (Law No. 185, 1957) in 6 EHS No. 6760.

¹³⁷ Export Transactions Law (*Yushutsu torihikihō*) (Law No. 299, 1952), amended and renamed the Export-Import Transactions Law (*Yushutsunyū torihikihō*) (Law No. 188, 1953), in 5 EHS No. 5560.

¹³⁸ Ch. 50, 40 Stat. 516 (1918), 15 U.S.C. §§ 61-65 (1958).

¹³⁹ See the discussion headed "Export Quotas and the Law" at 502-05, Kanazawa, *supra* note 67.

¹⁴⁰ Iyori, *supra* note 129. Of the 1002 cartels known as of March 1963, 591 were formed under the Law Concerning the Organization of Medium and Small Enterprise Organizations and 194 were formed under the Export-Import Transactions Law. The balance of the 90% referred to in the text statement were formed under other special acts. In 1962, 42.4% of Japan's total exports were affected by export cartels.

¹⁴¹ Coal Mining Industry Rationalization Extraordinary Measures Law (*Sekitan kōgyō gōrika rinji sochihō*) (Law No. 156, 1955), which involves curtailment of

the specific industries.¹⁴² Typically these cartels are validated by MITI which no longer needs—though it did at an earlier date—the concurrence of the Fair Trade Commission.

There are of course other specific exemption acts which cannot be detailed here. Some are under attack, for example those in services such as laundry, barbering, and beauty shops,¹⁴³ because of the correlation which has been observed between cartelization and increased cost to the consumers. However, most of the exemptions seem certain to remain. The question is not now one of repeal but rather whether there will be more.

CARTELIZATION BY "RECOMMENDATION"

Without specific legal basis, there has developed yet another cartel-like phenomenon in Japan. Upon the "suggestion" of a government agency, quotas for production may be allocated within an industry or prices may be fixed at a recommended level. This evasion of the Antimonopoly Law has been used to accomplish production control in such key industries as textiles, steel, paper, and sugar. The resulting public criticism, combined with a general improvement of business conditions, has apparently stemmed this practice, however, and these cartels-by-suggestion are now disappearing.

ENFORCEMENT OF CARTEL OPERATIONS

Unlike the situation before 1947, the formation of a cartel is normally left to the discretion of independent entrepreneurs (for some public utilities the Government may order the establishment), and joining or leaving is usually optional.¹⁴⁴ But not always. Although it has never

production only, and Small Boat Marine Transportation Association Law (*Kogatasen kaiun kumiai-hō*) (Law No. 162, 1957), permitting price fixing only.

¹⁴² Law Concerning the Preservation of Liquor Tax and Liquor Industry Societies, Etc. (*Shuzei no hozon oyobi shurui-gyō kumiai-tō ni kansuru hōritsu*) (Law No. 7, 1953) referring to quality, facilities for production, and methods of business transactions; Machinery Industry Promotion Extraordinary Measures Law (*Kikai kōgyō shinkō rinji sochūhō*) (Law No. 154, 1956), dealing with quantity and facility limitations; and Electronics Industry Promotion Extraordinary Measures Law (*Denshi kōgyō shinkō rinji sochūhō*) (Law No. 171, 1957), relating to quality standardization only.

¹⁴³ These cartels are formed under the Environment Sanitation Proper Management Law (1952). There were, in March of 1963, 274 such agreements involving 29 categories of business.

¹⁴⁴ In prewar Japan, under the Law Concerning the Control of Important Industries (*Jūyō sangyō no tōsei ni kansuru hōritsu*) (Law No. 40, 1931), compliance with cartel practices could be required of nonmembers. Later in the National General Mobilization Law (*Kokka sōdōinhō*) (Law No. 55, 1938), the power was enlarged to permit the Government to establish company "control agencies" in almost all areas of commerce and industry.

happened, the Government could in some instances order outsiders to join cartels and could prohibit secession.¹⁴⁵ It is also possible for "outsiders" to be ordered to comply with the limitations established by members of the cartel or, in the case of goods for export, to market only through a Government-approved syndicate.¹⁴⁶ Failure to obey regulation in these instances may be punished with a fine or an order to suspend operations.¹⁴⁷

RESALE PRICE MAINTENANCE CONTRACTS

Article 24-2 of the Antimonopoly Law provides an exemption somewhat like that of the Miller-Tydings¹⁴⁸ and McGuire¹⁴⁹ exemptions in the United States. More precisely, the Japanese exemptions are comparable to what remains of the American legislation after the long series of federal and state decisions which have virtually eliminated the non-signer provisions,¹⁵⁰ as Japan's exemption has never applied beyond individual, vertical agreements.¹⁵¹

The commodities which may be exempted, in addition to the requirements of being branded, in open competition, etc., must be specifically designated by the Fair Trade Commission. Furthermore, the making of resale price maintenance agreements must be reported to the Commission within 30 days of execution.

Despite frequent requests the Commission has, with very few exceptions, refused to designate commodities as being eligible for price maintenance contracts.¹⁵²

PROCEDURE

Enforcement of the Antimonopoly Law is the responsibility of the Fair Trade Commission. Following the basic pattern of the Federal

¹⁴⁵ Art. 55, Law Concerning the Organization of Medium and Small Enterprise Organizations, see note 136 *supra*.

¹⁴⁶ TRADE BULLETIN CORPORATION, *op. cit. supra* note 109, at A26-A28.

¹⁴⁷ There is some question as to the constitutional validity of compulsory membership or sanctions in these cases. See generally, Kanazawa, *supra* note 67, at 499-500.

¹⁴⁸ Miller-Tydings Amendment to § 1 of the Sherman Act, 26 Stat. 209 (1890), as amended by Public Act 314, 75th Cong., Aug. 17, 1937, 15 U.S.C. 1.

¹⁴⁹ McGuire Amendment (to § 5(a) of the Federal Trade Commission Act), Act of July 14, 1952, Public Law 542, 82nd Cong., 2nd Sess.

¹⁵⁰ For examples, see: Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), and Remington Arms Co. v. Skaggs, 55 Wn.2d 1, 345 P.2d 1085 (1959).

¹⁵¹ There is some argument about this point. See IMAMURA, KOKUSEN KINSHIHO (Antimonopoly Law) 170 (52 HORITSUGAKU ZENSHU (Complete Collection on the Law) ed. 1961).

¹⁵² As of 1964, the only products which had been designated were cosmetics, hair dye, toothpaste, soap for family use, liquor, candies, drugs, cameras, and ready-made T-shirts. Contrast the situation in the United States where virtually all properly marked goods in free and open competition could be marketed under price agreements.

Trade Commission in the United States, the Japanese Commission receives complaints, conducts investigations, and hears cases. Available to it either directly or indirectly, and in addition to purely informal adjustments, are most of the familiar sanctions.

If investigation indicates that a violation has probably occurred, the Commission may "recommend the party . . . take suitable measures" and, if the recommendation is accepted, a decision based upon the recommendation may be issued.¹⁵³ The Commission may, alternatively to the recommendation procedure, issue a complaint¹⁵⁴ to which the respondent may at once respond with an admission and plan for eradication of the offense¹⁵⁵ or make denial. In either investigation or preparation for trial, the Commission has adequate powers to compel the production of records, the giving of testimony, and the general submission of evidence,¹⁵⁶ and must upon demand assist the respondent in obtaining such evidence.¹⁵⁷ The Commission may utilize a hearing examiner¹⁵⁸ and review his decision, or it may, as in actual practice it does in all significant disputes, hear the case and make the initial decision itself.¹⁵⁹

If the Commission believes the matter to be urgent, it may obtain a preliminary injunction from the Tokyo High Court¹⁶⁰ and has, in fact, done so on several occasions. The act also has provisions permitting, if the Commission approves, the intervention of interested third parties or public bodies.¹⁶¹

When the Commission finds a violation it has, depending upon the type of case involved, a battery of possible weapons to use in rectifying the situation.¹⁶²

¹⁵³ Art. 48.

¹⁵⁴ Art. 49.

¹⁵⁵ Art. 53-3. The Commission may reject the proposed plan or issue a decree based upon it.

¹⁵⁶ Art. 46. This article is another illustration of the fact that the Japanese Antimonopoly Law had features not then existing in the United States. The Antitrust Civil Process Act, 15 U.S.C.A. §§ 1311-14 (1962), did not become law until Sept. 19, 1962.

¹⁵⁷ Art. 52.

¹⁵⁸ Art. 51-2.

¹⁵⁹ Art. 54. The result of a hearing under this article will be a dismissal or the issuance of what would, in the United States, be an "equitable" or civil order to cease and desist, divest, transfer assets, or do similar acts.

¹⁶⁰ Art. 67.

¹⁶¹ Arts. 59 and 60. But there is no express provision for intervention of private parties as a matter of right.

¹⁶² For private monopolization, the Commission may order the offender to cease and desist, to file reports, to transfer a part of his business, or to do other acts necessary to remedy the abuse. Arts. 7 and 20. In addition to the cease and desist and reporting orders, an order of dissolution may be entered when a trade association violation is found. Art. 8-2. Cases involving improper stockholding, interlocking directorates, acquisitions, or mergers may give rise to orders to dispose of shares or assets, resign from an office, or nullify a merger. Arts. 8 and 17-2.

Respondents may appeal a decision of the Commission to the Tokyo High Court, which has exclusive appellate jurisdiction of antimonopoly cases.¹⁶³ If certain problems such as constitutionality are involved, a further appeal may be taken to the Supreme Court.¹⁶⁴ Facts found by the Commission, "if supported by substantial evidence," are binding upon the Court.¹⁶⁵

The law does authorize an award of damages to a private party if the Commission has first issued a decision finding a violation¹⁶⁶ although, except for one out-of-court settlement,¹⁶⁷ there have apparently been no awards made.

Violations of the prohibitions of the act, except unfair business practices, may subject the offender to criminal penalty.¹⁶⁸ Private monopolization and unreasonable restraint violations could, in theory, result in a fine and imprisonment. The Commission would initiate the proceedings by filing a complaint with the Procurator General.¹⁶⁹ However, in 16 years experience under the act, only three indictments have been brought, and all of these were during the occupation period. Only one, after appeal to the Supreme Court, resulted in a fine.¹⁷⁰

CONCLUSION

The amendments to Japan's Antimonopoly Law have been numerous. The important amendments came immediately after the war and the peace treaty, however, and the trend seems now to have abated. Proposals for major changes were rejected in 1958. The Specific Industries

¹⁶³ Art. 85. The reason for granting exclusive jurisdiction to one court is found in the novelty of both the Antimonopoly Law and the concept of an independent commission. It was also hoped that the use of a single appellate court would produce a uniform and consistent line of decisions.

There have been eight appeals taken to this date. In five cases the Commission's decision was affirmed. In the other three its decision was partially modified.

¹⁶⁴ Art. 88.

¹⁶⁵ Art. 80.

¹⁶⁶ Arts. 25, 26, 84, and 85. The liability in such a case is said by the act to be "absolute," and the violator is not to be excused by "showing the non-existence of wilfulness or negligence on his part."

¹⁶⁷ *Kabushiki Kaisha Kosaka Yakkyoku (Kosaka Medicine Co.) v. Taishō Seiyaku Kabushiki Kaisha (Taishō Pharmaceutical Co.)* 9 FTC DECISION REPORTS (Tokyo High Ct., Feb. 19, 1958) 162.

¹⁶⁸ Arts. 89-95. Violation of a cease and desist order may be punished by a criminal penalty even if the order is directed at an unfair business practice.

¹⁶⁹ Art. 96.

¹⁷⁰ The criminal cases were *Japan v. Yamaichi Shōken Kabushiki Kaisha (Yamaichi Securities Co.)* (Tokyo High Ct., Dec. 28, 1951) (unreported), in which the prosecution was withdrawn; *Japan v. Ōkawa Gōmei Kaisha (Ōkawa Partnership in Commendam Co.)* (Tokyo High Ct., May 12, 1952) (unreported), dismissed at the time of the Peace Treaty; and *Japan v. Nōrin Renraku Kyōgikai (Agriculture and Forestry Liaison Conference)* (Tokyo High Ct., April 27, 1951, and Sup. Ct., Dec. 5, 1961) (both unreported). The last case resulted in a fine of ¥10,000—less than \$28.00.

Promotion Extraordinary Measures Bill¹⁷¹ (designed in part to ease the restrictions on rationalization cartels) introduced into the Diet in 1963 and again in 1964 has failed to attract the support needed for enactment. These developments are significant indications of what the future may hold.

It must also be remembered that many of the former amendments were virtually inevitable in light of the unrealistic provisions of the original act. As now amended, the Japanese law is seldom more permissive of restraints, and at points is more restrictive, than is the law of the United States.

Perhaps the most interesting point is the new attitude of the Japanese businessmen and others affected by the act. Most of the initial hostility and suspicion of the act, certainly normal reactions to a completely novel law with its genesis in the mandate of the occupation forces, has disappeared. Today the Antimonopoly Law is better understood, and there has developed with the understanding an appreciation of the contributions which free competition can make to the economy of Japan. Much of Japan's success in developing her postwar reconstruction is credited, by the Japanese, to the policies of the act, and many persons look optimistically to the law as a means of combatting rising prices.

Under the circumstances it appears reasonable to assume that no further important inroads will be made and that the Antimonopoly Law is in Japan to stay.

¹⁷¹ *Supra* note 118.