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THE 1997 DEREGULATION OF JAPAN'S HOLDING COMPANIES¹

Andrew H. Thorson[†] and Frank Siegfanz[‡]

Abstract: In 1947, Japan enacted the Act Concerning Prohibition of Monopolization and Maintenance of Fair Trade ("AMA"), known to some as the "Economic Constitution of Japan" because of its fundamental role in structuring Japan's economy. Among the most profound legislative provisions the 1947 AMA introduced to Japanese economic law are an absolute prohibition on pure holding companies and strict regulations upon stockholding by certain other types of companies. The legislature established these provisions as part of a plan to de-concentrate excessive economic power then wielded in the Japanese economy by large integrated enterprise complexes known as the *zaibatsu*. Fifty years later, in 1997, Japan enacted the Act for Partial Amendment of the AMA which eliminated the absolute prohibition on pure holding companies and relaxed regulations on stockholding by other types of companies. This Article discusses the 1997 AMA revisions and explores their historic legal, political, and economic significance, all of which have been a topic of great notoriety in Japan but thus far have received little comment from legal scholars in other nations.

I. INTRODUCTION

In addition to ordering the democratization of Japan, the Potsdam Declaration required the liquidation of the large Japanese enterprise complexes and holding companies known as *zaibatsu*. As part of the post-war policy of preventing the buildup of excessive concentrations of economic power, Japan enacted antitrust law provisions which banned pure holding companies and

¹ This Article does not consider either legislative activity or changes in Japanese Fair Trade Commission Guidelines or policies that occurred after December 1, 1997. The opinions herein are those of the authors, who bear sole responsibility for the content of this Article and the accuracy of its translations.

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which controlled stockholding by large-scale stock companies and companies engaged in financial business. Japanese antitrust law originally derived from foreign legal theory, projected upon Japan under the irregular circumstances of Japan's surrender in World War II.² The 1947 law under which the antitrust provisions were enacted, the Act Concerning Prohibition of Monopolization and Maintenance of Fair Trade³ ("AMA"), has remained Japan's most significant legislative action in the field of antitrust and competition policy since the beginning of the post-war era.⁴ The influence of the AMA upon Japanese industry has been so fundamental that scholars have referred to the AMA as the Economic Constitution of Japan.⁵

In the late 1990s, certain government bureaucrats, business leaders, and scholars led an effort to amend the AMA, charging that as enacted, prohibitions on holding companies and stockholding were broader than necessary to achieve their original purposes. They argued that the prohibitions obstructed important economic activities, including: 1) reform of Japan's financial markets, particularly the Japanese version of London's Big Bang;⁶ 2) flexibility in stock company management; 3) general structural reform; and 4) stimulation of Japan's economy in light of international competition.⁷ These supporters of the 1997 AMA revisions

² Under direct pressure from occupation authorities, the Japanese Fair Trade Commission aggressively enforced the Act Concerning Prohibition of Monopolization and Maintenance of Fair Trade, at first bringing 14 charges in 1949 and 60 charges in 1950. KENJI SANEKATA, *DOKUSENKINSHI-HŌ* 32 (1995).

³ See *Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuho ni kansuru Hōritsu* [Antimonopoly and Fair Trade Maintenance Act], Law No. 54 of 1947, translated in *Japanese Fair Trade Commission Homepage* (visited Apr. 24, 1999) <<http://www.jftc.admix.go.jp/e-page/act/amact.htm>> [hereinafter AMA].

⁴ Prior to the enactment of the AMA, Japan enacted the *Fusei Kyousou Boushi Ho* [Unfair Competition Prevention Law], Law No. 14 of 1934, translated in *EIBUN-HŌREI SHA*, 6 EHS L. BULL. SERIES, No. 6895. This law was prepared for Japan's participation in the Hague revised treaty of 1925 concerning the Industrial Property Protection Alliance Treaty. Some unfair methods of competition prescribed therein and perhaps under the AMA might also fall within Civil Code Article 709 prescribing civil illegal acts (*fuhō kōi*), an area of law roughly corresponding to torts in the common law. MINPŌ [CIVIL CODE] art. 709.

⁵ Kyoto University School of Economics Professor Masahiro Shimotani, member of the Japanese Fair Trade Commission Research Committee working with issues relating to the 1997 AMA deregulation stated that, "Article 9 of the Antimonopoly Law is like Article 9 of an economic constitution having the meaning, both declaratively and symbolically, of democratizing Japan's economy. If actually repealed it would constitute a declaration that enterprises won out." See Masahiro Shimotani, *Kabunushi no Kenrisokonau Osore* [Fear of Losing Shareholder Rights], *ASAHI SHIMBUN*, Feb. 25, 1997, at 9.

⁶ *Mochikabu Kaikin de Kaikaku ni Hazumi* [Stimulation of Reform by Repealing Bans on Stockholding], *NIHON KEIZAI SHIMBUN*, Mar. 3, 1997, at 7. One recent article estimated that, excluding financial companies, the release of the pure holding company ban would increase the number of companies listed on Japanese stock exchanges. *Mochikabugaisha Jishitsu Zenmen Kaikin ni* [Towards an Actual and Absolute Repeal of the Prohibition on Holding Companies], *NIHON KEIZAI SHIMBUN*, Feb. 25, 1997, at 1 [hereinafter *Repeal of the Prohibition on Holding Companies*].

⁷ *Ban on Holding Firms Likely to Be Lifted in January*, *DAILY YOMIURI*, Feb. 27, 1997, at 12

urgently pressed for deregulation in order to grant Japanese industries broader freedom to rationalize stock company structures, thereby increasing their competitiveness.⁸

The Ministry of International Trade and Industry's Research Committee on the Law of Enterprises ("MITI Research Committee") was one of many government-sponsored committees that reviewed the economic and legal issues related to the 1997 AMA revisions. In its 1995 working group report, the MITI Research Committee stated that "competition among enterprises does not end with inter-company competition; rather, it now also entails aspects of competition among systems which lie at the base of such enterprises' activities."⁹ By this statement, the MITI Research Committee recognized that the structure of an enterprise may affect its competitive strength. This shifting perception of competition in the global economy perhaps best explains the 1997 AMA revisions.

On June 18, 1997, the Act for Partial Amendment of the AMA was promulgated. Less than a year later, on December 17, 1997, the Act became effective.¹⁰ The Act eliminated the fifty-year old ban on pure holding companies¹¹ and confirmed, symbolically, the legitimate role of concentrations of economic power in Japan's economy. The 1997 AMA revisions and the accompanying revised Japanese Fair Trade Commission ("JFTC") guidelines significantly weakened bans on pure holding companies which previously had been absolute.¹² Additionally, the 1997 AMA revisions increased deregulation of stockholding activities by large-scale stock companies.¹³ By providing greater basic freedom in industrial organization, the 1997 AMA revisions liberated previously prohibited forms

[hereinafter *Ban Likely Lifted*].

⁸ It is claimed that changes are required to deal with the: 1) "hollowing-out" (the phenomenon of *kū-dō-ka*) of Japanese industries in the face of foreign competition; 2) necessity of fostering domestic competitiveness in an atmosphere of deregulation (*giseikanwa*); 3) necessity of creating a flexible environment for tactical managerial activities such as creating spin-offs (*bunshaka*) and the venture capital businesses controlled by pure holding companies. KIGYOHŌSEI KENKYUKAI, HOKOKU SHO [THE ENTERPRISE LAW RESEARCH COMMITTEE REPORT], JUNSUI MOCHIKABUGAISHA KISEI OYOBI DAIKIBŌ KAISHA NO KABUSHIKI HŌYU KISEI NO MINAOSHI NI MUKETE NO TEIGEN [PROPOSALS FOR THE REVIEW OF REGULATIONS ON STOCKHOLDING BY PURE HOLDING COMPANIES AND LARGE-SCALE STOCK COMPANIES] 103 (Feb. 22, 1995) [hereinafter MITI RESEARCH COMMITTEE].

⁹ *Id.* at 5. The MITI Research Committee's working group members included members from Toyota Motors, Osaka Gas, the Industrial Policy Division of the Economic Federation, Orix, Sony, Mitsubishi Chemical, and Daiei and scholars such as Masahiko Aoki of Stanford University and Professor Mitsuo Matsushita of Japan among others. *Id.* at 42.

¹⁰ With respect to financial holding companies, the Act will take effect on a date to be prescribed by a separate act. See AMA art. 116.

¹¹ See *infra* Part III.A.2 for a discussion on the meaning of the term pure holding company.

¹² AMA art. 9.

¹³ AMA art. 9-2.

of capital integration and deregulated Japan's complexes, groups, and companies in *keiretsu*¹⁴ relationships.

Not everybody in Japan welcomed the 1997 AMA revisions. Opponents of the revisions equated deregulation with an increase in both the size and entrenchment of economic concentrations of power. For these reasons, some Japanese urged the government not to proceed with deregulation for fear that lifting the prohibitions on pure holding companies and large-scale stock companies' stockholding activities could have far-reaching, unpredictable, and adverse economic and social effects.¹⁵

Although these changes in Japanese law were hotly debated within Japan, this historic overturning of an anti-monopoly policy evoked little interest or comment from Japan's trading partners. Part of the reason may be that as of 1997,¹⁶ no country with a major economy except Korea¹⁷ still possessed absolute prohibitions upon pure holding companies and large-scale stock companies.¹⁸

This Article details an historical event in Japanese economics and law, which has evoked little interest outside of Japan.¹⁹ Part II of this Article outlines the historic and current concentrations of economic power in Japan as well as the political process that led to the 1997 deregulation. Part III explains the basic AMA provisions and JFTC regulations that prescribe holding companies in Japan. Part IV discusses stock company governance in Japan and the overlap of governance and holding company concerns. Part

¹⁴ *Keiretsu* refers to the clustering of enterprises in the Japanese economy. See *infra* Part II.B. for further discussion of the meaning of this term.

¹⁵ Even MITI recognized the possibility that removing the ban could enable large businesses to acquire excessive economic power. *Trade Ministry Paper Urges Deregulation in Phases; Stance on Antimonopoly Law Shifts*, DAILY YOMIURI, Dec. 28, 1996, at 1.

¹⁶ In the United States, states once prohibited corporations from holding stocks. However, corporations can now be organized for the purpose of holding stock in other corporations and controlling their operations where state statutes permit incorporation for any lawful business or purpose and law permits corporations to own stocks of other corporations. 1A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 95 (perm. ed. rev. vol. 1993).

¹⁷ Korea has legislation that is compared to Japan's regulations in AMA Chapter IV. Takenori Takayama, *Kankoku Dokusenkinshi-hō ni okeru Mochikabugaisha Kisei* [Regulation of Holding Companies Under Korean Antitrust Law], 25 SHŌJI HŌMU 3, 235 (1996).

¹⁸ Several countries, however, have laws regulating security transactions in the banking industry. MITI RESEARCH COMMITTEE, *supra* note 8, at 11 (citing a study of U.S., U.K., German and French laws, as well as the laws of the several E.U. countries). See The Federal Bank Holding Company Act 12 U.S.C. §§. 1841-49 (prohibiting a bank holding company from acquiring ownership or control of a national bank, new or existing, without approval of the Federal Reserve Board); The Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 (regulating holding companies that control subsidiaries engaged in retail distribution of electricity or gas).

¹⁹ In order to accurately capture the related occurrences in Japan, and due to the fact that at the time of our research almost no up-to-date, detailed information was available on this topic in the English or German languages, we have chosen to rely heavily on sources in the Japanese language for this Article.

V explores related legal concerns under both the AMA and other fields of the law such as Japanese labor and tax laws. Finally, Part VI explores the effect of the 1997 deregulation on corporate governance in Japan.

II. BACKGROUND OF THE RECENT AMA DEREGULATION

A. *The History of Concentrations of Economic Power*

Since the beginning of the Meiji Era (1868 to 1911), Japan has undergone several periods of large-scale social and economic changes. In relation to AMA Chapter IV, this section focuses on the *zaibatsu* era, and major AMA amendments in 1949, 1953, and 1977. Throughout all the changes in Japan's economy, one common aspect is the prominent presence of government bureaucrats and concentrations of economic power in the private economy.

1. *Zaibatsu*

The word *zaibatsu* is well known even outside of Japan. *Zaibatsu*, the word, has no fixed meaning. The term first caught on with specialists in the fields of management and economics²⁰ after Aiza Yamaji's book, entitled *History of Financial Power in Japan (Nihon Kinken Shi)*, first employed the term at the end of the Meiji Era.²¹ Journalists later adopted the word in news articles at the beginning of the Showa Era.²²

In recent years *zaibatsu* has been defined as "a diversified structure of management established under the control and ownership of families and clans of rich men."²³ It has been said that: "The *zaibatsu* were centered on parent companies (holding companies) capitalized by families or clans, and were company groups managing diverse industries through companies (subsidiaries), which large-scale subsidiaries possessed oligopolistic positions in various industrial fields and were controlled by parent companies."²⁴ The *zaibatsu* began to crystallize during the era of the *Meiji Reformation*, although some of the families that controlled them have longer histories.

During the early Meiji Era, in addition to establishing measures to create institutions such as a unified currency and a banking system to

²⁰ HARUHIRO TAKEDA, *ZAIBATSU NO JIDAI [THE ZAIBATSU ERA]* 3-4 (1995).

²¹ *Id.*

²² *Id.* at 4. The Showa Era ran from 1926 to 1988.

²³ *Id.* at 5 (citing HIDEMASA MORIKAWA, *ZAIBATSU NO KEIEISHITEKI KENKYU* (1980)).

²⁴ *Id.* at 6 (citing SHIGEAKI YASUOKA, *ZAIBATSU NO KEIEISHI* (1990)).

finance industrial growth,²⁵ government bureaucrats planned, built, and financed certain industries which they determined were necessary for Japan's economic development. During the 1870s and 1880s, the Meiji Government supported industrial growth through measures such as the importation of machinery to sell at reduced terms and the provision of government loans to entrepreneurs.²⁶ The early Meiji Government also began modernization initiatives such as constructing railroads and telegraph systems, subsidizing shipping, and establishing government model enterprises such as coal mines, silk-spinning mills, and cotton-spinning factories.²⁷ The Meiji Government later shifted from state entrepreneurship to a policy of collaborating with private enterprises, favoring those capable of rapidly adopting new technologies and committed to Japan's goals of economic development and military strength.²⁸

While Meiji Government bureaucrats did not entrust industrial development to the free market,²⁹ the bureaucrats also realized they could not develop the economy alone.³⁰ On November 5, 1880, the Great Council of State of the early Meiji Government ordered government departments to sell enterprises under their jurisdictions.³¹ Many were sold on special terms to a chosen financial oligarchy.³² This chosen oligarchy of privately owned industrial enterprises included the Mitsui, Mitsubishi, Sumitomo, Yasuda, Furukawa, Okura, and Asano economic concerns, which became known as *zaibatsu*.

There are numerous examples of the business-government ties of the *zaibatsu*.³³ From 1875 to 1879, the Mitsubishi Company received loans

²⁵ W. Miles Fletcher III, *The Japan Spinners Association: Creating Industrial Policy in Meiji Japan*, 22 J. JAPANESE STUD. 49, 51 (1996).

²⁶ *Id.*

²⁷ *Id.* See also Yoshio Kanazawa, *The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power*, in LAW IN JAPAN, THE LEGAL ORDER IN A CHANGING SOCIETY 480, 481 (Arthur Taylor von Mehren ed., 1963).

²⁸ CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE 8 (1982).

²⁹ The most obvious pitfalls of the direct state operation of economic enterprises in this era included corruption, bureaucratic entrenchment, and ineffective monopolies. *Id.* at 23.

³⁰ "The side effects of its policies were inflation, trade deficits, corruption, and looming bankruptcy." *Id.* at 84.

³¹ *Id.* at 84-85. See also Kanazawa, *supra* note 27.

³² "The relations that developed between the Meiji government and the private investors were not formal or official but, rather, personal and unofficial." JOHNSON, *supra* note 28, at 85. Common clan origins and strategic marriages cemented many of these relations, and consequential exchanges of political and economic favors were not unknown. *Id.*

³³ The Mitsui family is an early example of the business-government ties of the *zaibatsu*. The Mitsui family was chosen as one of those who would manage exchanges for the accounting department of the new government. In this position, the Mitsui family had control over a part of the national treasury. Its duties included disbursing and transferring the government's money. Government funds were therefore temporarily placed in Mitsui hands until the time of actual disbursement. During that time, such holdings

from the government, called "preparation funds" (*gyunbikin*), under government policies to increase industrial production.³⁴ Mitsui Bussan received similar loans under the policy of promoting exports.³⁵ Allegedly, the government did not require the repayment of all such money.³⁶ Additionally, Kihachiro Okura of the Okura *zaibatsu* was enriched, after establishing the *Okuragumi Shōkai* in 1873, by assisting in distributions for the invasion of Taiwan and the war in Southwest Asia.³⁷

It is important to understand that Japan had almost no factories at the start of the Meiji Era. Economic activity in the civil economy was relatively sparse. At that time, approximately seventy to eighty percent of the civilian population resided in farming communities and were employed in agriculture.³⁸ Approximately seventy percent of the national production consisted of agriculture. Combined with the textile industry, it accounted for more than eighty percent of national production.³⁹ The economy at this time was based largely upon land tax revenues received from farmers.⁴⁰ The government used such tax moneys to implement modernization policies and the tax money trickled down into the civil economy.⁴¹ For the above reasons, close ties to the government were an important tool of entrepreneurialism.

The distribution of the fruits of Japan's modernization were restricted to domestic entities, a policy accompanied by *seishō*.⁴² *Seishō* consists of business-government relations wherein politicians and business persons having special relations with the government receive special rights and advantages.⁴³ Although Japan badly needed foreign technology, know-how, and capital, the Meiji Government adopted a policy of shutting out foreign entrepreneurs with few exceptions.⁴⁴

Zaibatsu oligarchies crystallized over time into large, integrated complexes as the government induced them to enter areas of desired development and provided them with exclusive licenses, capital funding, and

were like loans without interest charges or security requirements. Government funds were allegedly diverted to other projects while in the hands of some consigned exchange managers. *Id.* at 19, 26.

³⁴ *Id.* at 23.

³⁵ *Id.*

³⁶ *Id.* at 23-25.

³⁷ *Id.* at 29.

³⁸ *Id.* at 19.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* *Seishō* is a combination of two characters: "government" and "commerce."

⁴³ KŌJEN 1415 (Iwanami 4th ed. 1993).

⁴⁴ TAKEDA, *supra* note 20, at 22.

other privileges. After the First World War, when Japan's economy made huge strides, industrialists headed by *zaibatsu* interests entered the political arena using political parties to promote their own interests.⁴⁵ Their activities became intertwined with the activities of the military-led government in wartime Japan.

Unlike Japan's current enterprise complexes and company groups, holding companies occupied the foremost position in the governance structure of *zaibatsu* combines. Enterprises under the control of *zaibatsu* holding companies directed affiliates in a pyramid formation.⁴⁶ *Zaibatsu* combines were also tied together by stockholding relations. Sales of the stock of leading holding companies were rare and group members held more than half of the stock.⁴⁷ In *zaibatsu* group firms, the holding companies were usually overwhelmingly the largest stockholders. With a very high concentration of stockholdings, such stockholders were able to exert control over other companies.⁴⁸ The *zaibatsu* and their leading holding companies drove the finance, heavy industry, and shipping at the heart of the Japanese economy under the organizational structure of holding companies.⁴⁹ Unlike current Japanese companies wherein stockholders are said to exercise less control, stockholders of the *zaibatsu* were relatively strong. This control allowed them to lead the *zaibatsu* group in a pyramid fashion.⁵⁰

After the 1920s, *zaibatsu* possession of dominating economic power spread to encompass finance, trading, and large-scale industries.⁵¹ From 1914 to 1929, the three *zaibatsu* of Mitsui, Mitsubishi, and Sumitomo possessed twenty-eight percent of the total assets of the top one hundred companies in Japan.⁵² In 1945, these three complexes possessed 22.9% of

⁴⁵ Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN, THE LEGAL ORDER IN A CHANGING SOCIETY*, *supra* note 27, at 5, 12.

⁴⁶ Hidetaka Kawakita, *Nihon no Kigyo Shudan—Kabushiki Hōyū Kōzō o Meguru Hataraki [Japan's Enterprise Groupings—Operating Around a Structure of Stockholding]*, 1104 *JURISUTO* 9, 10 (Jan. 1, 1997).

⁴⁷ *Id.*

⁴⁸ Tetsuji Okazaki, *The Japanese Firm Under the Wartime Planned Economy*, in *THE JAPANESE FIRM, THE SOURCES OF COMPETITIVE STRENGTH* 350, 352 (Masahiko Aoki & Ronald Dore eds., 1994).

⁴⁹ Some of the leading *zaibatsu* at this time included Mitsubishi Honsha Ltd., Mitsui Honsha, Ltd., Sumitomo Honsha Ltd., and Yasuda Hozensha (four holding companies of the family-owned *zaibatsu*), and Fuji Industrial Co., Ltd., a munitions *zaibatsu*. *Kiken Moodo ga Oikaze ni [Fearful Mood in the Tailwind]*, *ASAHI SHIMBUN*, Jan. 21, 1997, at 11 [hereinafter *Fearful Mood*].

⁵⁰ TAKEDA, *supra* note 20, at 3.

⁵¹ Kanazawa, *supra* note 27, at 482.

⁵² TAKEDA, *supra* note 20, at 1.

the total assets of all Japanese stock companies.⁵³ The *zaibatsu*, however, did not dominate all sectors of Japan's economy.⁵⁴

2. *Zaibatsu Liquidation and State-coordinated Regrouping*

The Potsdam Declaration, signed in 1945 at the end of the Second World War, required liquidation of the *zaibatsu* as one step to democratize Japan's economy.⁵⁵ Subsequent economic changes, however, led to the re-emergence of enterprise complexes and groups, which in some ways resemble the pre-Potsdam *zaibatsu*.

a. *Enactment of the AMA (1947)*

The Antimonopoly Act of 1947, the original version of the AMA, regulated concentrations of economic power more strictly than the current Chapter IV. Article 9 prohibited the establishment of pure holding companies and Article 11 prohibited finance enterprises from acquiring stock of competing companies conducting the same kind of business. Article 11 also prohibited finance enterprises with net assets exceeding ¥5 million from acquiring more than five percent of any company's stock. Additionally, an absolute ban under Article 10 prohibited enterprises outside of the finance business from acquiring stocks of other companies, although some exemptions were provided. These initial provisions allowed a non-financial stock company to hold the stock of another non-competing domestic company, with the following exceptions: 1) holdings which would result in substantive restrictions on competition in any particular market or between the respective stock companies and 2) securities transactions by methods of unjust competition.⁵⁶

⁵³ Eiji Takahashi, *Changes in the Japanese Enterprise Groups?* in *THE JAPANESE FIRM, THE SOURCES OF COMPETITIVE STRENGTH*, *supra* note 48, at 227, 228.

⁵⁴ Of the 60 largest mining and manufacturing firms by asset size, in 1935 only 10 were *zaibatsu*-related. The *zaibatsu* related firms were also a minority of leading firms in the mining and manufacturing industries. Okazaki, *supra* note 48.

⁵⁵ The Potsdam Declaration was signed on September 2, 1945. *LAWS, RULES AND REGULATIONS CONCERNING THE RECONSTRUCTION AND DEMOCRATIZATION OF JAPANESE ECONOMY 7* (Holding Company Liquidation Commission ed., 1949). The United States Initial Post-Surrender Policy for Japan, announced by the U.S. State Department on September 22, 1945, provided the policy of the Allied Forces Supreme Commander was "to favor a program for the dissolution of the large industrial and banking combinations which have exercised control over a great part of Japan's trade and industry." *Id.* at 9.

⁵⁶ Kawakita, *supra* note 46, at 11.

b. *Zaibatsu liquidation measures (1946 to 1951)*

During the U.S. Occupation of Japan, active measures to support democratization were taken under the watch of General Headquarters,⁵⁷ including: 1) destruction of the pyramid control structure of the *zaibatsu* through liquidation; 2) public dispositions of *zaibatsu*-owned stocks as the means of *zaibatsu* control; 3) reorganization of large monopolies under a program for de-concentrating excessive economic power; and 4) prohibition of private monopolies and unfair competition through anti-monopoly measures.⁵⁸ Interlocking relationships among the *zaibatsu* group members through personnel, share ownership, loans, and other contractual ties were also forbidden by the Imperial Order of 1946 Concerning the Restriction, Etcetera, of Securities Holdings by Companies.⁵⁹

From 1947 through 1951, Japan's government ordered stock auctions of *zaibatsu* holdings⁶⁰ under the watch of the Holding Company Liquidation Commission ("Liquidation Commission").⁶¹ In total, Japan's Finance Minister designated 1,200 companies and fifty-six members of *zaibatsu* families, which resulted in the freezing and transfer of such parties' assets to the Liquidation Commission for disposition.⁶² The *zaibatsu*, however, also apparently played an active role in organizing their own dissolution.⁶³

While the policies of General Headquarters certainly played an important role in the liquidation of the *zaibatsu*, there is a suggestion that

⁵⁷ No approval by the Japanese government of plans or proposals for dissolution or liquidation of any holding company, *zaibatsu* or concern, occurred without prior submission to General Headquarters. SCAP Memorandum Concerning Dissolution or Liquidation of Major Financial or Industrial Enterprises, Oct. 20, 1945, in LAWS, RULES AND REGULATIONS CONCERNING THE RECONSTRUCTION AND DEMOCRATIZATION OF JAPANESE ECONOMY, *supra* note 55, at 9. The Supreme Commander explicitly expressed his intent "to dissolve the private industrial, commercial, financial and agricultural combines in Japan, and to eliminate undesirable interlocking directorates and undesirable inter-corporate security ownership." SCAP Memorandum issued November 6, 1946 on the Dissolution of Holding Companies, para. 5.

⁵⁸ LAWS, RULES AND REGULATIONS CONCERNING THE RECONSTRUCTION AND DEMOCRATIZATION OF JAPANESE ECONOMY, *supra* note 55.

⁵⁹ Kanazawa, *supra* note 27, at 484, citing Imperial Order No. 567 of 1946.

⁶⁰ Holdings by financial institutions were not included in the mandatory auctions. Kawakita, *supra* note 46, at 10.

⁶¹ The Commission was established in August 1946. LAWS, RULES AND REGULATIONS CONCERNING THE RECONSTRUCTION AND DEMOCRATIZATION OF JAPANESE ECONOMY, *supra* note 55, at 10.

⁶² This occurred under the Holding Company Liquidation Commission Ordinance, Imperial Ordinance No. 233, 20 April 1946; as amended by Imperial Ordinance 567, 25 November 1946, Imperial Ordinance No. 592, 4 December 1946, Imperial Ordinance No. 21, 24 January 1947, Law No. 204, 18 December 1947, Law No. 2, 7 January 1948, Cabinet Order No. 240, 19 August 1948 Cabinet Order No. 361, 3 December 1946, translated in LAWS, RULES AND REGULATIONS CONCERNING THE RECONSTRUCTION AND DEMOCRATIZATION OF JAPANESE ECONOMY, *supra* note 55, at 38.

⁶³ Takahashi, *supra* note 53, at 228.

Japan's Ministry of Finance ("MOF") also desired liquidation of the *zaibatsu* in order to oust the *zaibatsu* oligarchy and strengthen MOF's control over national economic policy.⁶⁴ From the late 1930s, stockholders and their rights were already under attack for emphasizing stockholder profit interests over the concerns of the national economy, war, and labor interests.⁶⁵

Then Prime Minister Yoshida expressed strong displeasure and criticism at what was seen as the occupier's uncompromising policy of economic deconcentration.⁶⁶ Subsequent government backed efforts to establish city banks to head the new, or rebuilt, post-liquidation company groups calls into question whether the government of Japan in the early post-war era considered the importance of the liquidation measures to be the destruction of concentrations of economic power itself or simply the destruction of *zaibatsu* control of such power. As explained below, the ousting of the *zaibatsu* apparently has failed to greatly reduce concentrations of power to control enterprises in the economy.

c. *The 1949 Amendment*

The 1949 Amendment to the AMA⁶⁷ relaxed prohibitions on international contracts, foreign investments, and restrictions imposed by AMA Chapter IV. Under the 1949 Amendment, bans on acquiring other companies were reduced to controls on acquiring stocks and stockholdings that restrained competition. The 1949 Amendment prohibited direct and indirect acquisition as well as possession of stock or debentures in Japanese companies, if competition between companies, or competition in one field of business, would be substantially restrained.⁶⁸ In addition, acquisition and possession of stocks of a competing company were proscribed.⁶⁹ Scale limits were also amended to allow even Japan's largest finance enterprises to

⁶⁴ See generally Eamonn Fingleton, *Japan's Invisible Leviathan*, 74 FOREIGN AFF. 69 (1995).

⁶⁵ Okazaki, *supra* note 48.

The economic crisis that swept the country in the early 1930s impoverished the general population (especially farmers), but left the huge capital holdings of the *zaibatsu* intact, or even enlarged. As a result, the *zaibatsu* became targets of social resentment, and managers of the leading *zaibatsu* became subject to terrorist attack.

Masahiro Shimotani, *The History and Structure of Business Groups in Japan*, in BEYOND THE FIRM 5, 18 (Takao Shiga & Masahiro Shimotani eds., 1997).

⁶⁶ Alfred C. Oppler, LEGAL REFORM IN JAPAN, A PARTICIPANT LOOKS BACK 28 (1976).

⁶⁷ Shiteki Dokusen no Kinshi oyobi Kosei Torihiki no Kakuho ni Kansuro Kenshin Kosu [Amendment to the Antimonopoly and Fair Trade Maintenance Act] Law No. 214 of June 18, 1949.

⁶⁸ AMA art. 10(1).

⁶⁹ AMA art. 10(2).

hold up to five percent of the stock of other Japanese companies.⁷⁰ These changes in the AMA provisions were partially the result of a shift in U.S. policy towards Japan, which supported the shoring-up of Japan as an economic power in the region.⁷¹

d. 1953 Amendments (Enterprise Regrouping under a New Order)

Law No. 259, of September 1, 1953, was enacted under the full legislative power of Japan's government, which was regained after the peace treaty of San Francisco in 1951. The amendments relaxed restrictions under the AMA⁷² by increasing the maximum level of holdings of financial companies in non-financial companies from five to ten percent,⁷³ and by eliminating the prohibition of holding stock in competing companies.⁷⁴ The previous prohibition on stockholdings which could result in substantial restrictions on competition between the respective corporations⁷⁵ was also eliminated;⁷⁶ the AMA does, however, currently proscribe stockholding which substantially restrains competition in any particular field of trade.⁷⁷

Many large Japanese industries that increased production capacities to meet large U.S. war procurements suddenly faced less demand for their products when the Korean War ended in 1953. In order to restore the economy, the government of Japan adopted a policy of legislative deregulation to promote entrepreneurial efforts, including fewer restrictions on cooperative efforts.⁷⁸ In 1953, MITI's Industrial Rationalization Council called for the grouping of trading companies and manufacturers to concentrate scarce capital on then essential developmental projects.⁷⁹ MITI

⁷⁰ AMA art. 11(2).

⁷¹ This shift in U.S. policy followed the establishment of a communist regime in China. AKIRA SHŌDA, *KEIZAI HŌ* [ECONOMIC LAW] 104 (1992).

⁷² The new law, among other things: 1) deleted provisions prohibiting horizontal and vertical concerted activities for purposes of price fixing, maintaining or raising, including allocations of markets and products; 2) provided new exemptions allowing formation of "depression cartels" for depressed industries and "rationalization cartels" for improvement of an industry's efficiency; 3) created exemptions for resale price maintenance contracts on statutorily designated commodities; and 4) eased the test of illegality on mergers, business purchases, interlocking directorates, and stockholding from virtual prohibition to "substantial restraint of competition in a particular field of trade." Michiko Ariga, *Antimonopoly Regulations in General*, 5 *Doing Business In Japan* (MB) pt. IX, ch. 2, § 1.02(2)(b).

⁷³ AMA art. 11(1).

⁷⁴ AMA art. 10(2).

⁷⁵ AMA art. 10(1).

⁷⁶ Kawakita, *supra* note 46, at 11.

⁷⁷ AMA art. 10(1).

⁷⁸ Ariga, *supra* note 72, at § 1.02[2][a].

⁷⁹ JOHNSON, *supra* note 28, at 206.

also promoted a government policy for the introduction of AMA exceptions for certain cartels.⁸⁰

In this period, *zaibatsu* groups recombined,⁸¹ and new groups crystallized. The successor Mitsubishi companies, for example, had regrouped by the end of 1952.⁸² Government policies probably played an important role in the regrouping. The 1953 relaxation of restrictions on holding companies and governmental encouragement contributed to the 1960s establishment of six quasi-*zaibatsu*, or enterprise complexes. These new complexes included Mitsui, Mitsubishi, Sumitomo, Fuyo, Sanwa, and Dai-Ichi Kangyo (the "Big Six"). Of the Big Six, Mitsui, Mitsubishi, and Sumitomo are the most direct successors of the pre-war *zaibatsu*.

While holding companies directed the *zaibatsu*, large financial institutions such as city banks, under the influence of MOF, played an important role in the governance of the post-war Big Six enterprise complexes.

*e. 1977 Amendments*⁸³

After the 1953 amendments, a new oligopolistic structure arose in Japan's economy.⁸⁴ Numerous exceptions to the AMA had been established under new acts of law, and JFTC enforcement became passive.⁸⁵ Despite the sudden rise in consumer prices caused by price cartels during the mid-1960s, the government took the stance of protecting oligopolization as being necessary to strengthen Japan's international industrial competitiveness in an environment of free trade and capital movement.⁸⁶ This policy led to a number of large-scale mergers among former *zaibatsu* members such as the merger of Snow-Brand and Clover and the merger of the three Mitsubishi

⁸⁰ SUGAO OMURA ET AL., CHUKAI KEIZAI HŌ (JŌKAN) [COMMENTARY ON ECONOMIC LAW (1)] 15 (1985). Since 1925 Japanese law has supported cartels legally on several occasions notably, among others, 1) The Export Society Law, Law No. 27 of 1925 (authorizing trader cartels), 2) The Important Export Commodities Industrial Society Law, Law No. 28 of 1925, (permitting producer cartels), 3) The Trade Society Law, Law No. 74 of 1937 (permitting formation of export and import societies), 4) The National General Mobilization Law of 1938, Law No. 55 Of 1938, and 5) The Commerce and Industry Law, Law No. 53 of 1943. Kanazawa, *supra* note 27, at 482-84.

⁸¹ JOHNSON, *supra* note 28, at 174. These types of economic reversions to pre-World War II structures were matched by certain political reversions to pre-World War II institutions. As of 1952, approximately 40% of some 329 pre-World War II and wartime politicians banned from holding public offices were re-elected to the Diet. *Id.* at 46.

⁸² *Id.* at 205.

⁸³ Shiteki Dokusen no Kinshi oyobi Kosei Torihiki no Kakuhō no Ichibu Kaisai Suru [Partial Amendment to the Antimonopoly and Fair Trade Maintenance Act] Law No. 63 of June 3, 1977.

⁸⁴ OMURA ET AL., *supra* note 80, at 16.

⁸⁵ SHŌDA, *supra* note 71, at 110.

⁸⁶ OMURA ET AL., *supra* note 80, at 17.

Heavy Industries Corporations, which had been dissolved during the purging of the *zaibatsu*.⁸⁷ This trend peaked in 1968 with the Yawata-Fuji Merger Case wherein the number one and number two companies in the steel market joined together.⁸⁸ Three bank enterprise complexes were also founded during this period of relaxed regulation (Fuyo in January 1966, Sanwa in February 1967 and Dai-Ichi Kangin in January 1978).⁸⁹

In 1972, consumer prices rose extremely and suddenly, due to the strengthening oligopolization of markets. Despite the efforts of the JFTC to eliminate the causes of these "frenzy prices" and cartels, the JFTC could not succeed because of weaknesses in the AMA.⁹⁰ In 1977, in response to perceived excesses in cross-stockholdings, the AMA was again strengthened in order to control excessive concentrating of economic power. Article 9-2 was introduced in 1977 to provide for scale limitations upon stockholdings. Furthermore, the ten percent limitation imposed on finance holding companies in Article 11 returned to five percent, with the exception of ten percent for insurance companies.

B. *The Current State of Concentrations of Economic Power*

In order to clarify the economic environment, in which AMA Chapter IV has arisen as a control upon concentrations of economic power, it is helpful to conceptualize Japan's firm relationships by differentiating such relationships into three types. This section explains three characteristic ties found among Japanese enterprises: the Big Six enterprise complexes; company groups; and other business group relations, such as assembler-supplier relationships, which are transactional rather than capital based.⁹¹

Descriptions of the concentrations of economic power in Japan often loosely use expressions such as *keiretsu* and *zaibatsu*. As it is generally used, however, the term *keiretsu* provides only a vague term for categorizing enterprise clustering in Japan. Two *keiretsu* types, horizontal and vertical, are based upon subcontracting (*shitauke*) and distribution channels (*ryūtsu*). The Big Six enterprise complexes described below are sometimes said to belong to the horizontal-type of *keiretsu* because they extend to diverse

⁸⁷ SHŌDA, *supra* note 71, at 112.

⁸⁸ *Id.* at 121.

⁸⁹ KOSEI TORIHIKI I'INKAI [JAPANESE FAIR TRADE COMMISSION], KOSEI TORIHIKI I'INKAI NENJI KOKOKU DOKUSENKINSHI-HŌ HAKUSHO (HEISEI 7 NENPO) [JFTC ANNUAL REPORT ANTIMONOPOLY WHITEBOOK (1995 REPORT)] 141 (1996) [hereinafter JFTC ANNUAL REPORT].

⁹⁰ OMURA ET AL., *supra* note 80, at 17.

⁹¹ For a current English language explanation of these business-economic ties see Masahiro Shimotani, *supra* note 65.

business fields.⁹² The vertical-type typically consists of large makers, either taking capital interests in suppliers, or binding small subcontractors or distributors with long-term contracts. As explained below, with respect to business groups and supplier relationships, the vertical-type *keiretsu* does not necessarily involve *ownership* ties. Like the word *zaibatsu*, however, *keiretsu* apparently has no one universally accepted and fixed meaning. For example, it has been recently defined to include parent-subsidiary relationships and assembler-supplier relationships, but not to describe all inter-firm relations such as those of horizontal-type which do not include disparate power relationships.⁹³

1. *The Big Six Enterprise Complexes*

The Big Six (*Rokudai Kigyō Shūdan*) comprise a sector of Japan's economy with the highest concentration of stable cross-stock holdings,⁹⁴ horizontal affiliations embracing a plurality of markets, and large-scale economic resources. Mitsui, Mitsubishi, and the Sumitomo groups ("pre-WWII *zaibatsu* groups") center around companies which once belonged to the pre-World War II *zaibatsu*. Fuyo, Sanwa, and the Dai-Ichi Kangyo groups ("bank-centered groups") center around banks and are comprised of companies which are the bank's clients. Each group contains companies that are representative of Japan's various sectors, holds regular presidents' meetings, and maintains financial and social ties through strategies such as cross-stockholding and the dispatch of executives.⁹⁵

Membership in each of the Big Six enterprise complexes is determined in accordance with an enterprise's membership in one of the six president clubs (or councils) (*shacho-kai*). As of March 1993, the president clubs had a total membership of approximately 196 enterprises (Mitsui—twenty-six, Sumitomo—twenty, Fuyo—twenty-nine, Sanwa—forty-four, and Daiichi Kangin—forty-eight), with some enterprises having membership in more than one club.⁹⁶ A 1997 article put the number of member enterprises at 184, making the members of the Big Six account for .007% of

⁹² HIYOSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN* 323-27 (1994).

⁹³ Takao Shiba & Masahiro Shimotani, *Introduction*, in *BEYOND THE FIRM*, *supra* note 65, at 1.

⁹⁴ Many companies engage in the practice but only in lesser degrees. Kawakita, *supra* note 46, at 9. The protective form of stockholding found therein also extends beyond merely holding stock company shares within the group. *Id.* at 12.

⁹⁵ Fair Trade Commission, *The Outline of the Report on the Actual Conditions of the Six Major Corporate Groups*, 20 FTC/JAPAN VIEWS, Mar. 1995, at 27.

⁹⁶ JFTC ANNUAL REPORT, *supra* note 89, at 141. Data based on the end of March 1993.

Japan's legal entities.⁹⁷ Excluding finance enterprise members, these companies have been estimated in recent years to account for approximately 15.3% of the capital, 12.5% of the assets (excluding those of financial enterprises), and 13.8% of all sales in Japan.⁹⁸ If majority-owned subsidiaries are included, the percentage of entities related to the Big Six will reach 0.28%, with 19.3% of Japan's capital, 16.7% of its assets, and 18.4% of all sales.⁹⁹

In addition to the president clubs mentioned above, the Big Six are characterized by cross-stockholding relationships. Although these stockholder relations differ from group to group, each company generally holds stock in more than half of the members of the same group.¹⁰⁰ The intra-group stockholding ratio¹⁰¹ has been calculated at 21.64% in 1989, 22.31% in 1991, and 22.21% in 1992.¹⁰² About 80% of such cross-stockholding relations are reciprocal.¹⁰³

In 32.09% of member companies, excluding financial institutions, these cross-stockholding relations are backed by business relations.¹⁰⁴ In 1992, the ratios of sales to, and purchases from, members of the same group were 6.85% and 7.75%, respectively.¹⁰⁵ However, the combination of stockholding and business relationships was far more common among the pre-WWII *zaibatsu* groups than among the new bank-centered groups.¹⁰⁶

⁹⁷ Masahiro Shimotani, *Kigyō Shūdan, Kigyō Ground—Keiretsu [Enterprise Complexes, Company Groups Keiretsu]* 1104 JURISUTO 19 (Jan. 1997).

⁹⁸ *Id.*

⁹⁹ *Id.* at 20. A JFTC study of conditions in fiscal 1992 indicates the following percentages: 0.007% of companies, 19.29%—capital, 16.56%—total assets, and 18.37%—sales; and in 1989, 20.93%—capital, 17.68%—total assets, and 20.41%—sales. According to the JFTC study, the assets of the Big Six are as follows:

Collective Assets of the Big Six (yen in trillions)	Including Majority-owned Subsidiaries (yen in trillions)	
Mitsui	26.8063	35.5012
Mitsubishi	25.4920	31.6838
Sumitomo	15.3798	21.1659
Fuyo (Fuji)	26.6358	38.6966
Sanwa	32.9642	45.9475
Dai-Ichi Kangyo	44.3702	60.4573

Fair Trade Commission, *supra* note 95, at 41.

¹⁰⁰ *Id.*

¹⁰¹ The inter-group stockholding ration is the ratio of stock held by member companies of one group to the total outstanding number of outstanding stock shares of member companies.

¹⁰² *Id.*

¹⁰³ *Id.* at 31.

¹⁰⁴ *Id.* at 35, 37.

¹⁰⁵ *Id.* at 35.

¹⁰⁶ *Id.* at 37.

The Big Six are also known to engage in the dispatching of executives to other firms within the group. A 1994 report by the JFTC reported the number of dispatched executives as a percentage of total executives at 6.34% in 1989 and 5.83% in 1992.¹⁰⁷ The JFTC indicated that more than half of member companies receive such executives.¹⁰⁸ It is unclear, however, from such statistics whether these dispatched executives in fact hold influential positions.

Financial institutions possess some capacity to influence members of the Big Six, because intra-group finance institutions occupy important positions as creditors to member firms. In fiscal 1992, the ratio of intra-group borrowing from such institutions compared to borrowings from other sources rose from 17.48% in 1989 to 19.52% in 1992.¹⁰⁹

2. Other "Company Groups"

This section describes the typical conditions in Japan's company groups, as portrayed in recent articles within and without Japan, despite the possibility of significant deviations among company situations. Company groups, as one form of *keiretsu*, typically possess a vertical umbrella-like structure with a large parent enterprise at the top. Historically, company groups have been contrasted against the *zaibatsu* by the fact that the scope of their businesses tended to remain more closely connected with the parent's original business and industry.¹¹⁰ Their original appearance has been said to mark the Japanese economic landscape of the 1930s.¹¹¹

While economic realities greatly contributed to the formation of company groups, government policies also directly encouraged their development. For example, in 1940 the government introduced the "Subcontracting Factory System" to increase wartime industrial output and to forcibly align small and medium-sized enterprises with specific major companies.¹¹² The Matsushita Group maintained many of these relationships after the Second World War.¹¹³ The Toyota Group, on the other hand, continued relations with only a few of its wartime suppliers.¹¹⁴

¹⁰⁷ *Id.* at 34.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 40.

¹¹⁰ Shimotani, *supra* note 65, at 16.

¹¹¹ *Id.*

¹¹² *Id.* at 23.

¹¹³ *Id.*

¹¹⁴ Hirofumi Ueda, *The Subcontracting System and Business Groups: The Case of the Japanese Automotive Industry*, in *BEYOND THE FIRM*, *supra* note 65, at 215, 231.

Some groups formed from stock purchases and investment alliances (*shihonteikei*). In the mid-1960s, the automotive industry began to address the economic needs of its suppliers. By addressing its suppliers' need for improved financial conditions and assisting them in their efforts to improve productivity, the automotive industry fostered the formation of new capital ties with its suppliers. The threat of foreign and competing domestic makers investing in affiliated and non-affiliated suppliers encouraged companies such as Nissan, however, to protect their source of supplies and to bring firms with particularly important technology under the parent companies' umbrella, in order to strengthen their capital ties with their suppliers.¹¹⁵

Spin-offs (*bunshaka*) have contributed to the formation of new capital ties in some cases.¹¹⁶ The spin-off trend has resulted in the phenomenon that individual plants or divisions became separate legal entities, despite the fact that they remained solely dependent upon the parent company. In contrast to the situation in the United States and in Europe, where subsidiary companies frequently remain 100% wholly-owned by their parent companies, Japanese subsidiary companies are frequently publicly owned.¹¹⁷ This allows Japanese parent companies to expand their subsidiary base with less of their own capital required.

In 1995, the largest thirty groups boasted an aggregate of approximately 12,577 subsidiary and affiliated enterprises.¹¹⁸ A fiscal year 1995 JFTC study¹¹⁹ found an average of 419 subsidiaries¹²⁰ and related companies¹²¹ among the largest thirty parent companies, measured in gross assets. The largest group is C. Itoh & Co., with 1061 subsidiaries and related enterprises, followed by Hitachi with 1056.¹²² The numbers of related and subsidiary companies in other company groups include: Nissan with 700, Toshiba with 689, and Toyota with 335.¹²³ One study of the Matsushita Electric Group found that of its most important eighty-four domestic subsidiaries, thirty-two were 100% subsidiaries, two were 60% held subsidiaries, and seventeen were 50% held subsidiaries. Matsushita Electric Industrial Co. held less than a 50% share in the remaining thirty-

¹¹⁵ *Id.* at 230.

¹¹⁶ Such spin-offs of subsidiaries marked the post 1970s economy. Shimotani, *supra* note 97, at 17.

¹¹⁷ *Id.* at 18.

¹¹⁸ KŌSEI TORIHIKI I'INKAI [FAIR TRADE COMMISSION], HEISEI 7 NENDO—IPPAN SHUCHUDO CHOSA [1995 GENERAL INVESTIGATION OF DEGREE OF CONCENTRATION].

¹¹⁹ *Id.*

¹²⁰ Subsidiaries are companies in which the parent company holds greater than 50% of the stock.

¹²¹ "Related companies" are those in which the parent holds between 20% and 50%.

¹²² Shimotani, *supra* note 97, at 17.

¹²³ *Id.*

three companies.¹²⁴ At least nine of the eighty-four subsidiaries were registered on a stock exchange.¹²⁵ In 1991, Toyota Auto, Inc., by stockholding, controlled at least a 20% share in 193 companies.¹²⁶

It is important to examine the assets of the separate parent companies in contrast to the collective assets of the parents and subsidiaries when determining the economic power of company groups. The 1995 JFTC study¹²⁷ indicates the following:

Rank	Collective Assets of the Parent (yen in trillions)	Collective Assets Including Majority Owned Subsidiaries (yen in trillions)
1. Tokyo El. Power	12.8983	13.3240
2. NTT	10.8031	12.2246
3. Toyota	6.1817	9.6576
4. Hitachi	3.9047	8.9310
8. Nissan	3.4013	7.3281
11. C. Itoh & Co.	4.3010	6.4491
14. Toshiba	3.3798	5.3506

Tokyo Electric Power and Nippon Telegraph and Telephone Company ("NTT"), as former government-owned corporations, do not belong to any of the Big Six enterprise complexes, but the other corporations listed above belong to one or more of the Big Six enterprise complexes: Toyota to Mitsui; Hitachi to Fuyo, Sanwa, and Daiichi Kangin; Nissan to Fuyo; C. Itoh & Co to Dai-ichi Kangin; and Toshiba to Mitsui. Thus, the assets of each company group can be included in a calculation of the assets of the respective Big Six enterprise complexes.¹²⁸ With respect to capital scale, in 1992 the total assets of the groups of Mitsui, Mitsubishi, and Sumitomo, including subsidiaries, equaled ¥35.5012 trillion, ¥31.6838 trillion, and ¥21.1659 trillion, respectively.¹²⁹

Stockholders within company groups are typically stable cross-stockholders (*antei kabunushi*) and investment stockholders that hold large

¹²⁴ *Id.* at 18.

¹²⁵ *Id.*

¹²⁶ Takahashi, *supra* note 53, at 230.

¹²⁷ FAIR TRADE COMMISSION, *supra* note 118.

¹²⁸ This dual-level firm clustering and its historical development is explained in Shimotani, *supra* note 65.

¹²⁹ *Senhiki Aimai Mitsu no Kinshi Taishō [Ambiguous Lines Drawn, Three Prohibition Targets]*, ASAHI SHIMBUN, Feb. 12, 1997, at 9 [hereinafter *Ambiguous Lines Drawn*].

blocks of stocks.¹³⁰ For example, the twenty percent block holdings typically held by the top five stockholder blocks in the largest Japanese firms, are generally larger than institutional blocks in the largest twenty-four U.S. corporations.¹³¹

The extent of the control actually exercised by members over other members is difficult to quantify. Such control relations are also not necessarily unilateral because, while parent companies possess a control over subsidiaries, subsidiaries are also known to exercise their own de facto influence against parent companies in Japan, e.g., as suppliers of production units.¹³² It therefore is not accurate to portray such parent-subsidiary relations within groups as purely vertical relations governed entirely from the top-down.

3. *Business Groups and Supplier Relationships*

This last vertical-type of *keiretsu* typically consists of large makers that bind small subcontractors or distributors with long-term contracts. With respect to business groups and supplier relationships, such *keiretsu* do not necessarily involve *ownership* ties. Large makers, such as Toyota and Matsushita, are known to organize small subcontractors into "cooperation clubs." Such subcontractors often produce only for the demand of one maker, becoming a quasi-internal part of the maker's enterprise.¹³³

C. *Development of the 1997 AMA Revisions*

The Chapter IV provisions of the AMA have been the subject of several revisions. As explained above, the original Chapter IV contained provisions that were even more rigid than those existing immediately prior to the 1997 AMA revisions. These original rigidities in the AMA were relaxed because it was believed that restrictions hindered Japanese entrepreneurs' attempts to reactivate Japan's economy in the early post-war era.¹³⁴ Discussion of lifting the prohibition on holding companies in Article 9 also occurred several times prior to the 1990s, for example, in connection with the 1960s deregulation of capital and the 1980s rise of the yen.¹³⁵

¹³⁰ IYORI & UESUGI, *supra* note 92, at 184.

¹³¹ MARK ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 178 (1994).

¹³² *Id.*

¹³³ Shimotani, *supra* note 97, at 21.

¹³⁴ Ariga, *supra* note 72, § 1.02(2)(b).

¹³⁵ Masahiro Shimotani, "Mochikabukaisha Tengoku" *Nihon no Kakushin Tsukenai Kaikin Giron*

The traditional tri-partite power ring¹³⁶ which existed between the administrative bureaucracy (including MITI and the JFTC), the Liberal Democratic Party ("LDP"), and large Japanese business concerns, played an important role in forming the 1997 AMA revisions. The JFTC had a great deal of discretion in drafting the amendments. In Japan, bureaucratic control of drafting laws is common practice.¹³⁷ In the traditional pattern, cabinet bills originate in and are drafted by ministries, although in this case a great deal of the drafting was carried out by the JFTC, an independent agency. Then, the bills are passed to the LDP for approval and introduced to the Diet.¹³⁸ Usually, prior to introduction of such bills and before they are sent to the cabinet, the genuine deliberation on legislation takes place within and among ministries in deliberation councils (*shingikai*).¹³⁹

In the case of the 1997 AMA revisions, in addition to the LDP, the coalition of political party supporters of the deregulation included the New Party ("Pioneers") (*Sakigake*) and the Social Democratic Party ("SDP") (collectively the "LDP Coalition"). Based on themes similar to those heard in 1949 and 1953, the current revision movement, promoted by MITI, the LDP Coalition, and members of business concerns, asserted that bans on stockholding under Articles 9 and 9-2 prevented Japanese firms from

[*"Holding Company Heaven" Discussion of Lifting of the Prohibition Incompatible with Japan's Core*], ECONOMISUTO [WEEKLY ECONOMIST], Apr. 1, 1997, at 34, 35.

¹³⁶ It has been said that

[t]he central institutions—that is the bureaucracy, the LDP, and the larger business concerns—in turn maintain a kind of skewed triangular relationship with each other. The LDP's role is to legitimize the work of the bureaucracy while also making sure the bureaucracy's policies do not stray too far from what the public will tolerate.

JOHNSON, *supra* note 28, at 50.

¹³⁷ "The American-style tradition in which party leaders become deeply involved in administrative affairs and the drafting of legislation had never been well established in Japan in any case." *Id.* at 45. According to one source, 91% of all laws enacted by the Diet under the Meiji Constitution (1890—1947) originated in the executive branch and not in the Diet. The pattern has apparently been similar in postwar Diets. *Id.* at 47. In the 1997 regular session of the Diet, Diet members sponsored 45 bills, more than during any other year in the 1990s. Goro Hashimoto, *Signs of Evolution in Diet*, DAILY YOMIURI, June 18, 1997, at 6. Thirty of the 45 bills were drafted by opposition parties, the rest by the LDP. *Id.* All bills submitted by the opposition parties were killed and only one LDP bill passed, a law concerning organ transplants. *Id.*

¹³⁸ JOHNSON, *supra* note 28, at 47.

¹³⁹ Ken Duck, *Now that the Fog has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance*, 19 FORDHAM INT'L L.J. 1686, 1699-1700 (1996).

A kind of ministry-dominated quasi-deliberation occurs in the 246 (as of 1975) 'deliberation councils' (*shingikai*, *shinsakai*, *kyōgikai*, *chōsakai*, and *iinkai*, known collectively as *shingikai*) that are attached to the ministries. . . . To the extent that laws are scrutinized and discussed at all in Japan by persons outside the bureaucracy, it is done in the councils.

JOHNSON, *supra* note 28, at 47.

recovering from the failed "Bubble Economy," and further obstructed the effective rescue of failed financial institutions and the preparations for the planned Japan version of the Big Bang.¹⁴⁰ As late as mid-1996, disagreements within the LDP Coalition, regarding the basic "freedom of establishment" (*gensoku jiyū*) platform versus the JFTC and SDP's initial platform of "basic prohibition and partial repeal of the ban" (*ichibu kaikin, gensoku kinshi*), obstructed an earlier amendment.¹⁴¹ Opposition by both the SDP and the JFTC, however, centered on the terms of deregulation rather than any basic disagreement as to the necessity of deregulation.

By January of 1997, both MITI and the JFTC appeared committed to revising Chapter IV. Although the media widely publicized the broad explanation of the safety valve of "prohibition of enterprises possessing strength in a plurality of industrial fields,"¹⁴² neither the JFTC nor LDP Coalition unveiled any concrete plans for such prohibitions until after full support seemed destined to occur.¹⁴³ Even then, such details were left to be established by the JFTC Guidelines after amending legislation passed in the Diet.

An Intermediate Report of a JFTC Research Committee, released December 1995, indicates that the JFTC had a more conservative outlook with respect to deregulation under Chapter IV than did the LDP and MITI, who earlier proposed a blanket lifting of the ban on pure holding companies. In its report, the JFTC Research Committee appeared to favor upholding the ban while creating exceptions, such as for stockholding to support venture businesses and investments in new ventures.¹⁴⁴ JFTC support was clarified when on January 23, 1997, the JFTC Chairman Yasuchika Negoro expressed support for passing a deregulation bill, although not necessarily the LDP's bill.¹⁴⁵ With respect to MITI, a February 1995 MITI Research Committee report indicated early support of an outright removal on the pure holding company ban in Article 9.¹⁴⁶

¹⁴⁰ *Ban Likely Lifted*, *supra* note 7.

¹⁴¹ *Fearful Mood*, *supra* note 49.

¹⁴² *Mochikabukaisha Ruikei Gente Sezu Kaikin [Repeal of Prohibition Without Limits as to Type of Holding Company]*, ASAHI SHIMBUN, Jan. 18, 1997, at 2 [hereinafter *Repeal of Prohibition*].

¹⁴³ Promoters planned generally for clear guidelines (as to size of total assets, among other things.) which the JFTC would put forth. *Bill Being Drafted to Lift Holding Firm Ban*, DAILY YOMIURI, Jan. 18, 1997, at 12 [hereinafter *Bill to Lift Holding Firm Ban*].

¹⁴⁴ Akinori Yamada, *Keisei Kanwa Suishin Keikaku to Kyōsō Seisaku no Shinkyokuteki Tenkei ni Tusite [Positive Developments in the Proposed Deregulation of Competition Policy]*, 537 KŌSEI TORIHIKI, July 1995, at 6.

¹⁴⁵ *Id.*

¹⁴⁶ However, by late 1996, at least one document was released indicating that MITI supported only phasing out the ban on pure holding companies and the restrictions on big businesses' stockholding. The same document revealed concern within MITI that removal of the ban could enable big business to acquire

Bureaucratic, big business, and political interests seized the moment when in the later half of the 1990s the economic environment appeared ripe for change. Backed by dismal predictions with respect to a perceived long-term slowing in Japan's economy, increased deregulation, and a thinning-out of Japan's industrial bases, the proposal to eliminate the Article 9 ban moved quickly.¹⁴⁷ Other events, including the break-up and division of NTT¹⁴⁸ using a holding company structure, and plans for Japan's Big Bang provided concrete justifications for relaxing prohibitions in the AMA.¹⁴⁹ Promoters of deregulation pointed to the need to promote entrepreneurial efforts to diversify business and effectuate flexible corporate management strategies.¹⁵⁰

1. *The Reports of MITI and the JFTC*

a. *MITI Research Committee Report*

In February 1995, a MITI sponsored Research Committee ("MITI Research Committee") composed of representatives of large Japanese enterprises,¹⁵¹ scholars, and attorneys, published a written proposal and discussion of issues relating to the revision of Chapter IV of the AMA. The report found that the absence of current justifications for the blanket prohibitions in Articles 9 and 9-2 indicated the need for a basic review and abolishment.¹⁵² The MITI Research Committee viewed the ban on pure holding companies and the control of stockholdings by large-scale companies as unique among developed countries and a result of unique aspects of Japan's history. According to the MITI Research Committee, determining whether Chapter IV required revision necessitated an examination of the present economic situation in Japan and whether circumstances presently justified the retention of these provisions.¹⁵³

excessive economic power. *Trade Ministry Paper Urges Deregulation in Phases; Stance on Antimonopoly Law Shifts*, *supra* note 15.

¹⁴⁷ *Id.* See also *Repeal of Prohibition*, *supra* note 142.

¹⁴⁸ Nihon Denshin Denwa Kabushikigaisha-Hō No Ichibu o Kaisei Suru Hōritsu [The Act Partially Amending the Nippon Telegraph and Telephone Company Act], Law No. 98 of 2000. This Act specifically provides for the division of Nippon Telegraph and Telephone Company ("NTT") into four companies, the stock of which shall be held in total by NTT, a pure holding company.

¹⁴⁹ *Id.* *Fearful Mood*, *supra* note 49.

¹⁵⁰ *Bill to Lift Holding Firm Ban*, *supra* note 143; *Repeal of Prohibition*, *supra* note 142.

¹⁵¹ The MITI Research Committee included members from Toyota Motors, Osaka Gas, the Industrial Policy Division of the Economic Federation, Orix, Sony, Mitsubishi Chemical, Daiei and others. MITI RESEARCH COMMITTEE, *supra* note 8.

¹⁵² *Id.*

¹⁵³ *Id.* at 14.

The MITI Research Committee report began with the proposition that because Japan evolved to its present state as a democratic economy, control under the AMA no longer needed to extend beyond regulating substantial restraints on competition in particular fields of trade under other general AMA provisions.¹⁵⁴ The Committee adopted the position that to the extent doubt exists as to the continued existence of reasons for upholding such prohibitions, the repeal of Articles 9 and 9-2 should not be obstructed by arguments that the possible effects are unknown.¹⁵⁵ The report stressed the principle of protecting original freedom in economic activities and called for an examination of possible effects that could result from statutory revisions and deregulation.¹⁵⁶

The MITI Research Committee emphasized the following items in support of amending the total ban on pure holding companies in Article 9:

The holding company structure, via the establishment of subsidiaries, facilitates separation of general group management and management in separate fields of business activities thereby promoting better control, swifter and more efficient decision-making, and generally leaner businesses.

Establishment of subsidiaries could foster more appropriate working conditions by overcoming limitations on the future prospects of employees which are currently imposed in accordance with the specific division of the business in which they are engaged. Clearer separation by creating subsidiaries could strengthen employee morale by creating equal and clear promotion standards within different divisions, thereby avoiding class thinking among the employees at subsidiaries.

Use of the holding company structure can overcome obstacles in establishing new ventures which continue to exist despite the new JFTC Guidelines on Venture Capital.

Use of holding companies provides greater flexibility for re-organization of an enterprise group and promotes the progress of diversification.

¹⁵⁴ *Id.* at 31.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Until now, access by Japanese companies to the superior business know-how of foreign companies has been obstructed by controls on holding companies. Due to the ban, foreign investors refrained from certain investments in Japan.

By abolishing the pure holding companies ban, Japan can harmonize with standards of other developed nations.¹⁵⁷

The report mentions several conceivable adverse effects of deregulation, but it concludes that under the present circumstances in Japan adverse effects will not likely arise and should not obstruct revisions of Chapter IV and freedom in economic activity.

The MITI Research Committee concluded that because of the historical shift to a more democratic economy, there no longer existed any valid reasons for continuing the ban on pure holding companies. The MITI Research Committee particularly stressed the positive role holding companies could play in fostering new businesses and innovatively dealing with the following problems: 1) the hollowing-out of domestic enterprises in the face of cheap foreign competition (the phenomenon of *kūdōka*); 2) the need to respond to competition under conditions of domestic deregulation (*kiseikanwa*); and 3) the need to create a flexible environment for management to engage in tactical activities such as creating spin-offs (*bunshaka*) and venture capital businesses under the direction of pure holding companies. The MITI Research Committee appears to have concluded that in light of unclear reasons for continuing the restrictions and in consideration of the foreseeable positive economic effects of deregulation in this field, absolute prohibitions should be lifted. Furthermore, to the extent that concerns regarding injury to competition may exist, Article 10 can provide a sufficient safeguard against market restricting stockholding. The MITI Research Committee indicated that, because of Japan's recent experience with pure holding companies, legislation should temporarily (for five years) require holding companies to report to the JFTC.¹⁵⁸

b. Intermediate Report of the JFTC Research Committee

The Cabinet asked the JFTC to study the ban on pure holding companies in light of Chapter IV's role in protecting against the

¹⁵⁷ *Id.* at 31-39.

¹⁵⁸ *Id.* at 125.

accumulation of excessive economic control over companies, particularly in light of issues relating to *keiretsu*, enterprise groups, and enterprise complexes.¹⁵⁹ At the JFTC's request, a twenty-two person¹⁶⁰ research committee ("JFTC Research Committee")¹⁶¹ was established to research the provisions of Chapter IV in light of the deregulation movement and harmonization of the Organization for Economic Co-Operation and Development ("OECD") member-state laws.¹⁶² A JFTC Research Committee report was drafted under the backdrop of the prior MITI Research Committee report and the Administrative Reform Committee's December 14, 1995 report to the Prime Minister, which stated that the ban on pure holding companies and regulation of stockholding by large-scale stock companies should be abolished.¹⁶³

This JFTC report, while taking a more cautious approach than that of the MITI Research Committee report, hypothesized that Japan's economy could benefit from pure holding companies. For example, in the financial sector, holding companies could provide a risk prevention mechanism between related subsidiaries and could perform the function of a fire-wall separating different fields of business such as banking, insurance, and brokering.¹⁶⁴ Also, like the MITI Research Committee, the JFTC Research Committee found that it might suffice to control only the ill effects of holding companies, rather than banning pure holding companies per se, for example, by prohibiting the illegal exercise of excessive control of other companies under general AMA provisions.¹⁶⁵

i. Consideration of arguments in support of deregulation

The JFTC Research Committee considered, among other issues 1) international harmonization, 2) overseas utilization of holding companies and their strategic value, 3) benefits in employee management, and 4) cost-cutting.¹⁶⁶ First, with respect to international harmonization, the report

¹⁵⁹ The JFTC Research Committee included 13 scholars, four participants from the mass media, four from industry, and one representative from a consumer organization. DOKUSENKINSHI-HŌ DAI 4 SHŌ KAISEI MONDAI KENKYUKAI [RESEARCH COMMITTEE ON THE ISSUE OF AMENDING CHAPTER 4 OF THE ANTIMONOPOLY LAW], CHUKAN HŌKOKUSHO [INTERMEDIATE REPORT] 6 (Dec. 27, 1995) [hereinafter JFTC RESEARCH COMMITTEE].

¹⁶⁰ *Id.* at 4.

¹⁶¹ See IYORI & UESUGI, *supra* note 92, at 323-27.

¹⁶² JFTC RESEARCH COMMITTEE, *supra* note 159, at 1.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 21.

¹⁶⁵ *Id.* at 14.

¹⁶⁶ *Id.* at 12-16.

found that harmonization in and of itself cannot be a sufficient reason for deregulation.¹⁶⁷ Although the JFTC Research Committee found that, with the exception of Korea, Japan's regulations in Chapter IV are unique, it also determined it necessary to consider Japan's particular economic situation. According to the JFTC Research Committee, regulations in Articles 9-2 and 11 reflect the recognition of high levels of concentration in Japan's economy, and therefore required an inquiry as to whether such regulations are still essential in Japan.¹⁶⁸

Second, the report specifically examined the circumstances behind the use of pure holding company structures outside of Japan.¹⁶⁹ The Committee found such holding companies have usually been established simply in an *ad hoc* process which reflects the historical growth and branching out of particular companies, or for reasons such as taking advantage of specific domestic legal regulations or reducing tax costs through consolidated taxation.¹⁷⁰ Looking at the above reasons, the JFTC Research Committee recognized that the existence of holding companies outside of Japan cannot be attributed solely to their strategic usefulness as a means of increasing competitiveness,¹⁷¹ and therefore the existence of foreign pure holding companies overseas, in and of itself, did not necessarily have considerable merit.

Third, with regard to employee management, the JFTC Research Committee noted that within the existing legal system and permitted structures of corporate organizations Japanese companies can already achieve separation of general group management from specific management activities and from general human resource management.¹⁷² According to the JFTC Research Committee report, companies can create such corporate infrastructures by establishing clear internal rules and providing for broader rights of a parent company to transfer employees to subsidiaries.¹⁷³

¹⁶⁷ *Id.* at 16.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 15. U.S. examples of pure holding companies which have been noted in Japan include: 1) General Industry: Mobil Corp., Amoco Corp., CIGNA Corp., and Anheuser-Busch Co., Inc.; 2) Public Utilities: Bellsouth Corp. and Bell Atlantic Corp.; 3) Bank Holding Companies: Citicorp, BankAmerica Corp, NationsBank Corp., and Chemical Banking Corp. *Setsuritsu wa Jiyu, Tsukaiwake ga Susumu Beikoku no Mochikabu Kaisha* [Establishment is Free, the U.S.'s Holding Companies Are Advancing], 75 *ECONOMISUTO* [WEEKLY ECONOMIST] Apr. 1, 1997, at 50-51 [hereinafter *US Holding Companies Are Advancing*].

¹⁷⁰ JFTC RESEARCH COMMITTEE, *supra* note 159, at 15.

¹⁷¹ *Id.* at 14 -15.

¹⁷² *Id.* at 14.

¹⁷³ *Id.*

Therefore, employee management, in and of itself, did not require deregulation under Articles 9 and 9-2.

Fourth, with regard to industry claims that the establishment of holding companies could generally reduce production costs and that the ban on pure holding companies itself is an unwarranted limitation on the freedom to choose organizational forms, the report indicates that such cost reductions alone could not justify lifting the general ban on pure holding companies.

ii. *Examination of the purpose of AMA Chapter IV*

The JFTC Research Committee report concluded that the decision of whether the regulation of pure holding companies and large-scale company stockholding should be lifted should be made according to the purpose of the AMA.¹⁷⁴ The JFTC Research Committee approached this issue from two perspectives. First, it considered whether, in light of the purposes of the law, the present provisions are excessive and whether some uses of holding companies do not offend the purposes of the AMA.¹⁷⁵ Second, provided certain merits of pure holding companies do exist, it considered whether such merits could be achieved by methods which do not raise concerns about excessive holding company control over firms and excessive concentration of firms.¹⁷⁶ In contrast to the MITI Research Committee, the JFTC Research Committee concluded that controlling only the ill-effects of pure holding companies on concrete markets will neither prevent excessive control over other firms nor protect against excessive concentrations of firms.¹⁷⁷ According to the report, only provisions such as those in Articles 9, 9-2, and 11 of the AMA can adequately address such issues.¹⁷⁸

The JFTC Research Committee determined that large domestic Japanese companies would strengthen, and the number of such companies would increase, upon lifting the prohibition on pure holding companies. For this reason, the JFTC Research Committee report indicated the necessity of

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 16.

¹⁷⁷ The report dismissed the idea that excessive intra-group trading in corporate groups or *keiretsu* could be dealt with by establishing specific limits upon such intra-group trading levels because of difficulties in determining correct levels, and because such a restriction would prove more restrictive than the present provisions of AMA Article 9 and 9-2. Furthermore, there was discussion in the report that treating control of trade within a corporate group or a *keiretsu* as an unfair trade practice fails to address the real issue, which is the existence of excessive concentration in and of itself. *Id.* at 17.

¹⁷⁸ *Id.* at 16.

preventative regulations.¹⁷⁹ Further, the report concluded that financial companies' function of controlling other companies necessitated separation of financial companies from other companies under Article 11.¹⁸⁰

While not adopting the principle of absolute freedom of establishment, in its report the JFTC Research Committee determined that any holding company which has not attained an excessive level of concentrated economic power does not offend the purposes of Chapter IV of the AMA.¹⁸¹ Because of the difficulties of establishing a specific level of size, below which holding companies should be generally admitted by law, the JFTC Research Committee called for establishing a prior notification system, to control excessive concentrations of economic power before such excesses arise and to monitor developments closely.¹⁸² The JFTC Research Committee also specifically determined that spin-offs, venture capital, and financial holding companies comprised categories in which beneficial uses of pure holding companies could arise and should be deregulated.¹⁸³ While the JFTC Research Committee noted that company growth resulting from pure spin-offs of internal divisions of a company into separate firms did not transgress the purposes of the AMA, it concluded that the JFTC should check new acquisitions and the purchase of stock via a prior notification system, or impose a duty to attain permission to engage in such activities in certain circumstances.¹⁸⁴

In addition to spin-offs of existing company divisions, the JFTC Research Committee found that holding companies employed in the sector of venture capital posed no strong threat to the purposes of the AMA and that as of the report date no domestic problems with excessive concentration via venture capital had arisen.¹⁸⁵ The JFTC Research Committee pointed out, however, that if under government plans to increase such activities, foreign investment, technology transfers, and consulting businesses become more active, stock acquisitions could increase; thus, notification systems should be introduced to prepare for attendant problems arising in this sector.

The JFTC Research Committee recognized the possibility that holding companies could stimulate competition. For example, by allowing holding companies within finance industries, new entrants may appear in banking, brokering, and insurance, thereby increasing competition because under

¹⁷⁹ *Id.* at 17-18.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 16.

¹⁸² *Id.* at 18-19.

¹⁸³ *Id.* at 19-22.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

normal circumstances the risk of failures would not extend beyond separate legal entities to the entire group.¹⁸⁶ Although Article 11 prohibits companies in the finance business from owning more than five percent of another company, or ten percent in the case of insurance companies, the JFTC can authorize larger stockholdings by financial companies in certain cases.¹⁸⁷ Still, the JFTC Research Committee's position as stated in the report was that as long as Article 11 remained in effect, financial pure holding companies would not hinder the purposes of the AMA.¹⁸⁸

The report concludes that deregulation warranted a policy of caution. With respect to spin-offs of companies, however, it was not reasonable to set scale limits such as under Article 11.¹⁸⁹ The report concludes that the JFTC should police and establish legal conditions to check the establishment of financial holding companies.¹⁹⁰

iii. Suggestions of the JFTC Research Committee

The JFTC Research Committee concluded that pure holding companies, as far as the JFTC can take measures to monitor them, do not obstruct the purposes of the AMA in the following circumstances: 1) holding companies of less than a certain scale; 2) holding companies resulting from pure spin-offs of divisions of companies; 3) venture capital holding companies; and 4) financial holding companies.¹⁹¹ The JFTC Research Committee concluded that the ban on pure holding companies should not be fully repealed. Rather, new legislation should provide measures to 1) legalize pure holding companies not offensive to the purpose of the ban on pure holding companies and control of stockholding by large-scale stock companies, and 2) introduce financial holding companies.¹⁹²

The JFTC Research Committee also called for new monitoring measures. Such suggested monitoring measures consist of prior notification and authorization systems in cases of increasing the number of controlled companies.¹⁹³ In relation to such matters, the report suggested that the JFTC should publish guidelines to establish its official views. Further, it was

¹⁸⁶ In addition, according to the JFTC Research Committee report, holding companies can assist subsidiaries in cases of financial difficulty. *Id.*

¹⁸⁷ AMA art. 11(1).

¹⁸⁸ *Id.* at 21.

¹⁸⁹ *Id.* at 22.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 24.

¹⁹³ *Id.* at 23.

concluded that protection of investors and parties trading with members of corporate groups requires enhanced disclosure obligations, such as disclosure of corporate group member identities and intra-group relations, not only for investor protection but also to create transparency with respect to intra-group trading relations.¹⁹⁴ The JFTC Research Committee suggested the JFTC's responsibility for the collection and publication of such data.¹⁹⁵

2. Major Negotiating Points among the JFTC, MITI, and LDP Coalition Members

After consultations with the LDP Coalition in 1996, the JFTC published its draft AMA revision on January 29, 1997.¹⁹⁶ On March 11, 1997 the LDP Coalition's proposed legislation, based upon the JFTC draft, was settled upon in a cabinet meeting and proposed to the Parliament.¹⁹⁷ Few, if any, significant differences appear to exist between the JFTC draft and the version finally submitted by the LDP to the Diet. Discussions among MITI, the JFTC and members of the LDP Coalition did, however, apparently lead to some stricter provisions in the adopted version than the JFTC and MITI had initially proposed, in regards to reporting requirements and upper-limit scale provisions.

The JFTC proposed that pure holding companies, together with their subsidiaries, having net assets exceeding ¥500 billion would have to receive the permission of the JFTC and must report at the end of every year to the JFTC. The final LDP Coalition draft allows company groups with ¥300 billion or less in assets to establish holding companies without making submissions to the JFT; those with more than ¥300 billion in assets would have to report to the JFTC at the end of the first financial period after formation and every year thereafter.¹⁹⁸

¹⁹⁴ The report noted the importance of maintaining transparency with respect to activities of the Big Six corporate complexes and the *keiretsu*, especially from the point of view of opening Japan's markets. *Id.* at 22.

¹⁹⁵ *Id.* at 23.

¹⁹⁶ *Mochikabugaisha ni Kakawaru Dokusenkinshi-hō Kaiseian no Kosshi* [Essentials of the Amendment-Draft of the Antimonopoly Law concerning Holding Companies] (on file with the authors).

¹⁹⁷ *Kōsei Iji e 3 Kadai [JFTC Support on Three Issues]*, ASAHI SHIMBUN, Mar. 11, 1997, at 14 [hereinafter *JFTC Support*]. See also *Mochikabu Kaisha Kinshi o Hakaru Dokusen Kinshi Hōkaiseian [The Draft Amendment to Antimonopoly Law Prohibitions Designed to Prohibit Holding Companies]*, 1452 SHŪJI HŌMU 2 (1997).

¹⁹⁸ *Ban Likely Lifted*, *supra* note 7; *Kigyokeitai Ichidan to Tayo ni [Enterprise Tie-ups, In One Step and Numerous]*, NIHON KEIZAI SHIMBUN, Feb. 26, 1997 at 1 [hereinafter *Enterprise Tie-ups*]. This reporting plan apparently had its roots in prior LDP proposals. *Bill to Lift Holding Firm Ban*, *supra* note 143.

It was apparently during discussion with the LDP Coalition that the ¥20 trillion limit proposed by the JFTC as an overall scale control on pure holding company group size was reduced to a limit of ¥15 trillion in the JFTC's new guidelines.¹⁹⁹ MITI originally suggested that the limit on total holding company assets should be set at around ¥21 trillion (roughly equivalent to that of the Sumitomo Group) in order to prohibit the Big Six from transforming into large holding company structures.²⁰⁰ The plan delivered by the LDP Coalition in February 1997, however, provided for strict review by the JFTC of holding companies with total assets exceeding ¥15 trillion without an outright ban.²⁰¹

III. HOLDING COMPANIES UNDER AMA ARTICLES 9, 9-2, AND 11

The 1997 revisions of AMA Articles 9 and 9-2 are the most significant to date. The revisions eliminated the unilateral ban on holding companies, although Articles 9 and 9-2 restrict the size and power of holding companies. Article 11 had not been revised at the time this Article was prepared; nevertheless, it is included in this section as an important control on financial holding companies in Japan.

A. Article 9 Pure Holding Companies (*Junsui-Mochikabugaisha*)

1. Current Article 9

Article 9 no longer prescribes pure holding companies (*junsui-mochikabugaisha*) by form as did prior Article 9.²⁰² Article 9 now applies to

¹⁹⁹ *Enterprise Tie-ups*, *supra* note 198.

²⁰⁰ *Ambiguous Lines Drawn*, *supra* note 129.

²⁰¹ *Enterprise Tie-ups*, *supra* note 198. The Social Democratic Party, one member of the LDP Coalition, fearing large-scale company groups, initially proposed a ¥10 trillion limit while the LDP and the *Shinto Sakigake* originally backed a limit of ¥20 trillion. *Mochikabugaisha Rainen ni Gensoku Jiyūka* [*Holding Companies Fundamentally Deregulated Next Year*], NIHON KEIZAI SHIMBUN, Feb. 25, 1997 at 1. It appears that the LDP Coalition parties settled on the ¥15 trillion amount in compromise. This ¥15 trillion limit is a little bit above the collective assets of the Tokyo EI. Power Group, the biggest company group with ¥13.3240 trillion in assets. See *supra* note 127 and accompanying table.

²⁰² Following is the authors' translation of AMA Article 9, as amended by Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuho ni kansuru Hōritsu no Ichibu o Kaisei suru Hō [Act for Partial Amendment of the AMA], Law 807 of June 18, 1997:

1. A holding company that may cause an excessive concentration of economic power shall not be established.

2. A company (foreign companies included; hereinafter the same) shall not become a holding company which may cause an excessive concentration of economic power.

any form of enterprise and prohibits the establishment or transformation into a "holding company which becomes an excessive concentration of economic power," as generally outlined in section 5 of Article 9. Article 9 is now based upon a principle of freedom of establishment except in cases of excessive economic power.²⁰³ Section 5 leaves significant discretionary power to the JFTC to establish standards under which holding companies shall be deemed to violate AMA policy in Article 1, Chapter IV, which prohibits excessive economic control developing in specific industries.²⁰⁴ The standard expressed in Article 9 reflects the fundamental purpose of the AMA, to "promote the democratic and healthy development of the national economy" by "preventing the excessive concentration of economic power."²⁰⁵

New JFTC guidelines not finalized at the time of the drafting of this Article are expected to provide generally for three categories of holding companies deemed "excessive concentrations of power" under Article 9.²⁰⁶

3. A holding company under this Article and the following Articles means a company with respect to which the ratio of the acquisition cost of stocks (when there is a different value attached separately to the final balance sheet, then such value; hereinafter the same) of subsidiary companies (meaning a domestic company in which a company owns stock exceeding 50% of the total amount of issued and outstanding stock (including shares owned by company members; hereinafter the same)) to the aggregate amount that the company's total assets (as calculated under JFTC Rules; this term also applies to section six herein) exceeds 50%.

4. A domestic company, with respect to which such company and one or two or more subsidiaries, or with respect to which a subsidiary of one or two or more of the applicable company's subsidiaries own stock exceeding 50% of the total number of issued and outstanding stock by the company, is deemed a subsidiary of the applicable company, and this Article's provisions shall apply thereto.

5. In section one and section two, excessive concentration of economic power means the collective scale of a domestic company's business, the business activities of which a holding company and its subsidiaries and other holding companies control by stock ownership, is remarkably large, the company extends to a considerable number of business fields, and through the company's financial transactions it has the capacity for remarkably great influence against other entrepreneurs; or by possession of powerful positions in a considerable number of mutually related fields of the businesses of such companies a large influence extends to the national economy and the progress of fairness and free competition becomes obstructed.

(Sections six and seven regarding reporting requirements are omitted.)

²⁰³ *Bill to Lift Holding Firm Ban, supra* note 143.

²⁰⁴ *Id.*

²⁰⁵ AMA art. 1.

²⁰⁶ See KŌSEI TORIHIKI I'NKAJI JIMU SŌKYOKU [GENERAL SECRETARIAT, JAPANESE FAIR TRADE COMMISSION], JIGYŌSHIHAIKYOKU GA KADŌ NI SHŪCHU SURUKOTO TO NARU KABUSHIKIGAISHA NO KANGAEKATA (GEN'AN) [(DRAFT) INTERPRETATIONS OF HOLDING COMPANIES WHICH CONSTITUTE AN EXCESSIVE CONCENTRATION OF ECONOMIC POWER AND DRAFT AMENDMENT OF ADMINISTRATIVE PROCEDURE STANDARDS FOR THE AUTHORIZATION OF STOCKHOLDING BY FINANCIAL COMPANIES] (July 9, 1997) (*tentative translation translated in Japanese Fair Trade Commission Homepage* (visited May 4, 1999) <http://www.jftc.admix.go.jp/e-page/f_home.htm> [hereinafter JFTC GENERAL SECRETARIAT].

First, the guidelines ("Proposed Article 9 Guidelines") will provide some form of prohibition on "holding company groups"²⁰⁷ comprised of more than ¥15 trillion in total assets, and owning at least five subsidiaries with total assets exceeding ¥300 billion in each of five or more "principal business areas."²⁰⁸ This provision prescribes holding companies by size, reflecting a historical policy of preventing the resurgence of so-called *zaibatsu*-like company groups that possess an excessive concentration of economic power. The ¥15 trillion provision prohibits a situation wherein any of the largest six enterprise complexes in Japan organize as a pure holding company, but does not prescribe other important company groups.²⁰⁹

Second, the Proposed Article 9 Guidelines will prohibit holding companies from owning stock in financial institutions with total assets exceeding ¥15 trillion together, and any non-financial company or company not engaged in business closely related thereto²¹⁰ with total assets exceeding ¥300 billion. This rule reflects a policy of preventing Japan's commercial banks from controlling industries through holding company control of leading general firms within a company group.

With regard to this second issue, the JFTC clearly had Japan's city banks in mind. As of 1997, Tokyo-Mitsubishi, the largest of Japan's city banks, possessed collective assets of ¥73.39 trillion, while others such as the then Hokkaido Takushoku possessed assets in the order of only ¥1.1 trillion.²¹¹ As of February 1997, issues remained as to whether restrictions should bind the smaller city banks and insurance companies that hold large-scale assets.²¹² Larger banks voiced opposition to the proposed limit under the guidelines on collective assets of ¥15 trillion that might preclude them from enjoying the benefits of the new laws.²¹³

²⁰⁷ Holding company groups will likely be defined as consisting of the holding company, subsidiaries (companies in which greater than 50% of the stock is directly or indirectly owned by the holding company), and subsidiaries substantially controlled by such holding company (companies in which the holding company owns 25% of the stock directly or indirectly and in which the holding company is a major stockholder). *Id.*

²⁰⁸ Business fields from among the three digit classifications of the Japan Standard Industrial Classification, in which shipment volume exceeds ¥600 billion. *Id.*

²⁰⁹ See discussion *supra*, Part II.B.

²¹⁰ Examples of a company that is not engaged in business closely related thereto include a credit guarantee business, venture capital business, and leasing business.

²¹¹ *Ambiguous Lines Drawn*, *supra* note 129. Hokkaido Takushoku declared insolvency in November 1997.

²¹² *Id.*

²¹³ *Firms Call for Consolidated Taxation*, DAILY YOMIURI, Feb. 27, 1997, at 13 (citing Shunsaku Hashimoto, Chairman of the Federation of Bankers Associations and Sakura Bank President who noted the "issue should be discussed not only from a domestic but a global perspective.") [hereinafter *Call for Consolidated Taxation*].

Third, the JFTC is expected to take action against holding companies that own at least five companies (three if the industries have strong influences on the economy and have an extremely vast scale) in separate principal fields of business, if each company possesses a substantial position (market share of not less than ten percent or ranking among top three companies) in its respective field, and such fields are interrelated.²¹⁴ The JFTC indicated that automotive industries and their suppliers of metal, tires, and glass comprise classic examples of firms that may fall within this category.²¹⁵ Issues remain with respect to defining which firms mutually exist in related fields. In addition, it is unclear how to deal with fluctuations in such categorizations over time.

2. Prior Article 9 and Pure Holding Companies (*Junsui-Mochikabugaisha*)

Immediately prior to the 1997 deregulation, Article 9 prohibited the establishment²¹⁶ or operation²¹⁷ of pure holding companies in Japan. The AMA distinguished pure holding companies from "enterprising or business" holding companies²¹⁸ (*jigyō-mochikabugaisha*), which the Article 9 ban did not prescribe. Pure holding companies included "companies whose principal business is to control business activities of a company or companies in Japan."²¹⁹ In contrast, an enterprising holding company's "principal business" does not consist of such controlling activities.

The AMA did not provide what "principal business" or "control of business activities" meant and no cases on these topics exist. A great deal of discretion was therefore left to the JFTC. Theoretically, however, there were at least three possible cases wherein Article 9 did not apply: first, when the holding company held stocks (including cases wherein it held a majority of stocks or shares of companies), but such holdings did not lead to control of the business activities of such companies; second, when a holding company controlled the business of other companies, but because of its other businesses the requirement of "principal business" was not met; and third,

²¹⁴ Interrelatedness refers to trade relations among different fields of goods or services that complement or substitute for one another. See JFTC GENERAL SECRETARIAT, *supra* note 206.

²¹⁵ *Ambiguous Lines Drawn*, *supra* note 129.

²¹⁶ AMA art. 9(1).

²¹⁷ AMA art. 9(2).

²¹⁸ This term has also been translated as "operating holding company." Shimotani, *supra* note 65, at 8. Toyota, Matsushita, and Sony are examples of holding companies in this category. *Id.*

²¹⁹ AMA art. 9(3).

when the principal business of the Japanese holding company was to control business activities of a company or companies not registered in Japan.

The test of "principal business" was apparently a matter of form over substance. Prior to the 1997 deregulation, some enterprising holding companies apparently were able to avoid Article 9 by engaging in additional businesses such as real estate management.²²⁰ Generally speaking, pure holding companies prohibited by Article 9 consisted of holding companies wherein the total value of stockholdings of subsidiaries in which fifty percent or more of the stock was held exceeded fifty percent of the gross assets of such holding company. When the total value of stock owned exceeded fifty percent, the company was highly likely to be a "holding company."²²¹ If such circumstances did not exist, the company (excluding those in the finance business) could still constitute an enterprising holding company subject to Article 9-2.²²² In determining the "principal business" of a holding company, one contrasts the percentage of the total value of stock owned to the total asset value on the company's balance sheet; the nature and scale of operations other than stockholding also receive consideration.²²³

In 1994, the JFTC issued Venture Capital Guidelines²²⁴ which provided the standards for applying prior Article 9 to "small-sized companies, marketing the results of their own research and developments."²²⁵ In accordance with Chapter 1 of the Guidelines, "control of the business activities" referred to cases wherein the stockholding ratio of the "holding company": 1) exceeded fifty percent of the stocks of a subsidiary; 2) was twenty-five to fifty percent and additionally there was no obvious possibility that such business was controlled by the holding company through relations with other investors; or 3) was between ten and twenty-five percent and accompanied by an obvious possibility that the business was controlled through relations with another investor. Those standards for small-sized venture business companies became generally accepted standards for applying Article 9 to all enterprises.²²⁶

²²⁰ IYORI & UESUGI, *supra* note 92, at 178 n.1.

²²¹ *Id.* at 177.

²²² OMURA ET AL., *supra* note 80, at 410.

²²³ *Id.*

²²⁴ See KŌSEI TORIHIKI IINKAI [FAIR TRADE COMMISSION STAFF OFFICE], BENCHYA KYAPITARU NI TAISURU DOKUSENKINSHI-HŌ DAI 9 JYŌ NO KITEI NO UNYŌ NI TSUITE NO KANGAEKATA [INTERPRETATIONS OF THE APPLICATION OF THE PROVISIONS OF ARTICLE 9 OF THE ANTIMONOPOLY ACT WITH RESPECT TO VENTURE CAPITAL FIRMS] (Aug. 23, 1994).

²²⁵ OMURA ET AL., *supra* note 80, at 410.

²²⁶ JFTC RESEARCH COMMITTEE, *supra* note 159.

The JFTC determined whether foreign companies fell within Article 9 not by the law of the place of establishment, but under the laws of Japan.²²⁷ A foreign enterprise holding company controlled by a pure holding company was able to control several Japanese companies through stockholding when such companies belonged to the same or related field of business as the enterprise holding company.²²⁸ A foreign pure holding company without the control of a domestic Japanese company as its principal business, or which directed only one domestic Japanese company, also did not fall within the prohibition.²²⁹

As of 1995, no examples of JFTC actions existed with respect to AMA Article 9, despite the possession of discretionary power to file a suit in order to invalidate a pure holding company's establishment under AMA Article 18.²³⁰ In cases of Article 9(2) violations, the JFTC could have ordered a modification of corporate articles or the liquidation of shares, etc., as necessary to halt illegal activity.²³¹ Violations of Article 9(1) or (2) could have resulted in up to one year of penal servitude and a fine of up to ¥2 million.²³²

Although prior Article 9 provided per se restraints on pure holding companies, its fundamental policy rationale was similar to that which lies beneath current Article 9. According to the JFTC, the purposes of banning the establishment of pure holding companies included: 1) preventing the revival of *zaibatsu*; 2) providing a beforehand measure for preventing concentration of controlling power; and 3) preventing closure and in-transparencies in Japan's markets.²³³ It has been recognized in Japan that the possible ill effects of holding companies include: 1) pure holding companies, are not directly exposed to competition in the marketplace due to the fact that they are not conducting a business; 2) excessive control by holding companies hinders the demonstration of the free entrepreneur spirit on the base of self-responsibility; and 3) powerful holding companies could increase the danger of monopolization, restraints on competition, and unfair trade methods.²³⁴ Issue three, above, was introduced as the result of the

²²⁷ MITI RESEARCH COMMITTEE, *supra* note 8, at 5.

²²⁸ Hiyoshi Iyori, *Stockholding and Interlocking Directorates*, 5 *Doing Business In Japan* (MB), pt. IX, ch. 4, § 4.02 (1998).

²²⁹ Kazuyuki Funahashi, *Dokusenkinshi-hō ni yoru Gappei Kabushikihōyūsei no Kaisetsu—Shingaidorain Kiseijirei Todoke Tetsuzuki o Chūshin ni tsuite* [Explanation of the Regulations of Mergers and Stockholding Under the Antimonopoly Act—Concerning Mainly the New Guidelines, Cases and the Reporting System], 169 (Bessatsu) JURISUTO 136 (1995).

²³⁰ MITI RESEARCH COMMITTEE, *supra* note 8, at 6.

²³¹ AMA arts. 17-2(2), 18.

²³² AMA art. 91; Iyori, *supra* note 228, § 4.02.

²³³ Funahashi, *supra* note 229, at 135.

²³⁴ *Id.*

Final Report of the Japan-U.S. Structural Impediments Initiative Talks ("SII").²³⁵ The report included a Basic Recognition on *Keiretsu* Relationships, which stated that:

Certain aspects of economic rationality of *keiretsu* relationships notwithstanding, there is a view that certain aspects of *keiretsu* relationships also promote preferential group trade, negatively affect foreign direct investment in Japan, and may give rise to anti-competitive business practices. In order to address this concern, the Government of Japan intends to make *keiretsu* more open and transparent and to take necessary steps toward that end.²³⁶

There is some doubt cast as to whether pre-deregulation Article 9 actually reduced concentrations of economic power. On the basis of data from the end of March 1993, the JFTC stated that paid-in capital of Japan's largest six enterprise complexes (excluding insurance companies) was 18.5% of the total of Japan's industries, compared to 24.5% in the case of the four pre-World War II *zaibatsu*.²³⁷ However, by interpreting the definition of corporate complexes more widely, the scale of the pre and post-war groupings may be nearly the same.²³⁸

B. *Article 9-2 Enterprising/Business Holding Companies (Jigyō-Mochikabugaisha)*

1. *Current Article 9-2*

Article 9-2 restricts the total amount of stockholdings by certain large-scale companies in Japan.²³⁹ It applies to any stock-company except

²³⁵ Final Report of the Japan-U.S. Structural Impediments Initiative Talks, May 22, 1991, translated in part in IYORI & UESUGI, *supra* note 92, app. I.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Following is the authors' unofficial translation of AMA Article 9-2, added by Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuho ni kansuru Hōritsu no Ichibu o Kaisei suru Hōritsu [Act for Partial Amendment of the AMA], Law 807 of June 18, 1997:

A stock company (excluding stock companies which are holding companies) engaged in businesses other than finance businesses (meaning banking, trust banking, insurance, mutual financing and securities businesses; the same hereinafter) and whose capital exceeds ¥35 billion or whose amount of net assets (this term refers to the aggregate amount arrived at by deducting the total liabilities from the total assets listed in the latest balance sheet and by adding, if any, the

1) those whose business is banking, trust banking, insurance, mutual financing or securities business, and 2) those falling under the definition of "holding company" in Article 9 above. Generally, Article 9-2 holding companies are enterprising/business holding companies (*jigyō mochikabugaisha*). It cannot be said, however, that Article 9-2 prescribes all types of such holding companies. Like its German "mother-system," the Japanese legal system differentiates between four different types of companies: 1) partnership companies (*gōmei kaisha*), 2) limited partnerships (*gōshi kaisha*), 3) limited liability companies (*yūgen kaisha*), and 4) stock companies (sometimes referred to as corporations) (*kabushiki kaisha*). Article 9 applies to any form of company, but Article 9-2 applies only to holding companies in the form of a stock company. With respect to domestic subsidiaries, Article 9-2 does not refer to any specific form of stock company, as long as they are "domestic companies." According to the JFTC, Article 482 of the Commercial Code²⁴⁰ applies. Under Article 482, a company established in a foreign country will be treated as a domestic company if its main purpose is to establish a head office or do its principal business in Japan.²⁴¹

The 1997 AMA revisions relaxed the regulation of stockholding by large companies by significantly raising the benchmarks for determining what size of company, measured by capital and net assets, should be subject to regulation as a holding company under the AMA. The current version of Article 9-2 generally prohibits prescribed stock companies whose capital equals or exceeds ¥35 billion or whose net assets equal or exceed ¥140 billion from acquiring or owning stock in domestic companies in excess of the larger of either such amounts. Prior versions of Article 9-2 as well as certain exceptions are discussed below.

amount by which, after the final day of the fiscal year relating to such balance sheet, the net assets increased as a result of an issuance of new stock in accordance with the provisions of Section 280-2 of the Commercial Code (Act No. 48 of 1899), as a result of an issuance of new stock by the exercise of new stock subscriptions attached to company debt having new stock subscription rights, or as a result of a merger or the conversion of company bonds into stock (hereinafter the same) exceeds ¥140 billion, in cases wherein the aggregate amount of the total acquisition price of its acquired or owned stock in domestic stock companies becomes an amount exceeding the amount corresponding to the greater of the amount of its own capital amount or the amount corresponding to its net assets amount, whichever amount is greater (hereinafter the "standard amount"), shall not acquire or own stock in domestic stock companies exceeding the applicable standard amount. However, acquisition and ownership of the applicable stock listed in the following are not limited.

(Items 1 through 10 listing exceptions are omitted.)

²⁴⁰ Shōhō [Commercial Code], Law No. 48 of Mar. 9, 1899.

²⁴¹ Funahashi, *supra* note 229, at 116.

2. *History and Purpose of Article 9-2*

Prior to the recent amendment, the statutory language of Article 9-2 generally prohibited stock companies (excluding those in the finance industry) with capital equal to or exceeding ¥10 billion, or net assets equal to or exceeding ¥30 billion, from stockholding in domestic Japanese companies when the total acquisition cost of such holdings exceeded the greater of such company's capital or net assets. On April 26, 1995, Article 10 of Cabinet Ordinance No. 185²⁴² increased these numbers to ¥35 billion and ¥140 billion.²⁴³ The revised terms of the Cabinet Ordinance were not found in the AMA itself; even after the revision by the Cabinet Ordinance, the statutory language in publications of the Act remained ¥10 billion and ¥30 billion. The 1997 AMA revisions to Article 9-2 approved the prior Cabinet Order and transferred its terms into the statute itself.

Exceptions provided for in Article 9-2(1)(i)-(ix) include, among others:

- 1) [A]cquisitions or holdings of stock of a company in Japan which has been prescribed by Cabinet Ordinance and which has been invested in by a juridical person established by the government, or a local public authority, or a juridical person established under a special law whose total amount of capital is owned by the government or whose liabilities may be contractually guaranteed by the government;²⁴⁴
- 2) Acquisitions or stockholdings of stock of certain companies whose business is to contribute to the needed funding of industrial development or economic development requiring large sums of funds difficult to procure by ordinary means and prescribed by Article 9 of the Cabinet Ordinance;²⁴⁵

²⁴² Shitekidokusen no Kinshi Oyobi Kōseitōrihiki no Kakuhō ni Kansuru Hōritsu Shikkōrei [Enforcement Order on the Law Concerning Private Monopolies and Maintenance of Fair Trade] [hereinafter Cabinet Ordinance].

²⁴³ This increase was permitted by AMA Article 9-2(9).

²⁴⁴ Translation from IYORI & UESUGI, *supra* note 220, at 397. Article 8 of the Cabinet Ordinance lists the Osaka, Tokyo and Nagoya Middle and Small Firm Investment Training Company and makes a general exception for all companies with a public investment exceeding or equal to 25%. Cabinet Ordinance, *supra* note 242. Among the 115 companies listed therein other than those once dealing with large infrastructural projects such as the Kansai International Airport, the list includes 29 companies involved in the oil business (mainly those in the business of foreign exploration or storing). Funahashi, *supra* note 229, at 210-11.

²⁴⁵ The Cabinet Ordinance lists 16 different related industries including: nuclear power development; ocean exploration; satellites and rockets for launching satellites; oil and gas exploration; oil reserves and oil

- 3) Companies which have as their exclusive business the management of overseas enterprises, or certain foreign loans or investments;²⁴⁶
- 4) Companies falling within exceptions two and three, above, which are designated by cabinet order;²⁴⁷
- 5) Acquisitions of stock in a stock company spin-off becoming a 100% subsidiary of the original company, provided stock is not held for more than two years from acquisition;
- 6) Acquisitions and holdings of joint ventures with foreign companies in which joint funding is necessary and in accordance with permission of the JFTC;
- 7) Acquisitions or new stockholding received by the stockholder in the form of stock dividends, etc., provided such stock is not held for more than two years from acquisition;
- 8) Stock acquisitions received in an accord and satisfaction or as the exercise of security rights, provided such stock is not held for more than two years from acquisition; and
- 9) Certain acquisitions of stock for unavoidable reasons, if the JFTC grants permission for such acquisition.²⁴⁸

In addition to the specific exceptions above, supplementary provisions under the AMA provided a ten-year grace period for holdings in excess of the standard amounts owned by enterprise holding companies engaged in securities marketing and the underwriting of initial public offerings.²⁴⁹ As of February 1981, only seven of the 308 companies subject to these regulations

pipelines in accordance with relevant laws; computers; development of aircraft or parts for aircraft; joint electric power projects; long-distance heating and cooling; non-iron metal reserve; harbor developments; distribution businesses; pollution protection businesses; and regional development.

²⁴⁶ Among the 53 exemptions granted in this category, the overwhelming number of grants went to exploration of natural resources. Funahashi, *supra* note 229, at 212.

²⁴⁷ One example of a company fitting this description is Mitsui Sekiyu Kaihatsu, K.K., one of Japan's largest oil exploration companies.

²⁴⁸ AMA art. 9-2; *see also* Iyori, *supra* note 228, § 4.03.

²⁴⁹ MITI RESEARCH COMMITTEE, *supra* note 8, at 7.

fell into the exempted category.²⁵⁰ This exemption required prescribed companies to liquidate excessive holdings within ten years.

The main purpose behind the 1977 legislation which introduced AMA Article 9-2 was to revitalize the economy by preventing concentrations of excessive control over other firms through stockholdings and cross-stockholdings.²⁵¹ In order to promote free and fair competition, market mechanisms have to work sufficiently, and in particular: 1) newcomers should be able to freely access markets; 2) every entrepreneur should be able to freely and independently choose trade partners; 3) every entrepreneur should be able to make free and independent decisions concerning price and other trade terms; and 4) competition should be conducted through fair methods. It was felt that excessive concentration of the kind prescribed by Article 9-2 hindered these goals.²⁵²

By restricting stockholdings covering many fields of business, the AMA sought to prevent: 1) firm structures based on enormous firm assets under which the value of stocks held exceeds the value of the holder's own capital, thereby allowing for the control of a large number of firms with little capital; 2) substantial restraint of competition as a result of the comprehensive business capacity of firms linked by stockholding; and 3) the formation of corporate groups, and the problems of obstructed competition by economic power, trade obstructions to competitors by abuse of stockholder's rights, and the use of unfair business practices in preferential group trading.²⁵³

C. *Article 11 Finance Holding Companies (Kin'yū Mochikabugaisha)*²⁵⁴

Although the AMA provides no definition of a finance holding company (*kin'yū mochikabugaisha*), under Article 9-2, all finance enterprises conducting a business²⁵⁵ ("finance holding companies") are subject to Article 11. Article 11 provides strict limitations upon stockholdings by insurance companies and other finance companies, excluding cases excepted under the statute or guidelines. Generally, insurance companies cannot hold more than ten percent of the issued and

²⁵⁰ Iyori, *supra* note 228, § 4.02.

²⁵¹ Funahashi, *supra* note 229, at 114.

²⁵² *Id.* The promotion of free and fair competition is the main purpose of the AMA.

²⁵³ *Id.* at 115.

²⁵⁴ As of December 1, 1997, Article 11 limitations were under review. Legislative action in December 1997 was expected to raise these limits effective some time in 1998.

²⁵⁵ The Article 9-2 definition of finance business includes banking, trust banking, insurance, mutual financing, and securities businesses.

outstanding stock of another company. Article 11 limits other finance companies to five percent. Because of numerous exceptions, however, the actual practical scope of limitations which Article 11 imposes is not clear.

Article 11(1) provides that the above percentage limitations shall not apply to 1) cases already approved by the Fair Trade Commission; 2) holdings in the form of trust property; or 3) cases of stockholding as a result of enforcement of a mortgage, *etc.*, or acquisition by a security company. Under Article 11(2), exceptions one and two, above, are limited to one year with the JFTC's approval. Article 11(1) also indicates that the JFTC can freely grant additional approvals.

Article 11 itself provides almost no clear standards to govern the JFTC in the exercise of its broad discretionary power to grant exceptions. Guidelines established by the JFTC, discussed below, reveal that the apparently strict percentage limitations of Article 11 are riddled with exceptions.

1. Article 11 Guidelines

The JFTC issued the Administrative Procedure Standards for Authorization of Stockholding by Financial Companies ("Guidelines")²⁵⁶ to specify areas in which financial companies, due to the nature of their business or in order to safeguard their claims, require stockholding exceeding the Article 11 limits which do not invite an excessive concentration of economic power.

a. Article 1 exemptions

The Guidelines exempt three types of stockholdings upon prior JFTC approval: 1) applicant company stockholdings in companies which perform "business subordinate to the essential business of the applicant company"; 2) stockholdings by applicant companies "for the purpose of entering into an area of financial business other than that in which the applicant is currently engaged"; and 3) stocks held by foreign applicant companies "for the purpose of engaging in Japan in the same financial business actually

²⁵⁶ KŌSEI TORIHIKI I'INKAI [JFTC], KIN'YU GAISHA NO KABUSHIKIHOYŪ NO NINKA NI KANSURU JIMUSHORIKIJUN [STANDARDS FOR AUTHORIZATION OF STOCKHOLDINGS BY FINANCE COMPANIES] (Dec. 8, 1997) (*tentative translation*) translated in *Japanese Fair Trade Commission Homepage* (visited May 4, 1999) <http://www.jftc.admix.go.jp/e-page/f_home.htm> [hereinafter ARTICLE 11 GUIDELINES]. The guidelines were issued by the Economic Affairs Bureau on June 20, 1994, and last revised on May 13, 1996.

operated in the country in accordance with whose law the applicant company is established.”²⁵⁷ As explained below, draft revisions issued by the JFTC in July 1997 indicate that items one and two, above, may be eliminated.

i. “Business subordinate to essential business of applicant company”

The Guidelines exempt holdings and acquisitions in “businesses subordinate to the essential business of the applicant company.”²⁵⁸ In principal such businesses should be newly established companies, wholly-owned by the applicant company, and their business activities should be directed towards the applicant company or its wholly-owned subsidiaries. These companies shall also hold no stock in any other domestic company without prior JFTC approval.²⁵⁹

Businesses “subordinate to the essential business of the applicant company” consist of fifteen types of businesses, including among others, some real estate, computer, handling of documentation, printing and binding, dispatching of workers, educational training of staff and officers, advertising, automobile maintenance, teller machine maintenance, information services, and businesses concerned with the purchase of real estate at auction.²⁶⁰ Special provisions are provided for banks and insurance companies; however, these appear to be subject to revision under the proposed JFTC guidelines which relate to the 1997 AMA revisions.

As mentioned above, the business activities of the issuing company should be directed toward the applicant or a company in which the applicant company owns 100% of the stock.²⁶¹ Business with such companies generally should constitute ninety percent of the revenues of the issuing company.²⁶² This percentage requirement aims to ensure that the business of the held company closely relates to the business of the finance holding company. Under Appendix 2 of the Guidelines, however, the ninety percent

²⁵⁷ AMA Article 1 provides that “the applicant company, the stock issuing company, and companies in Japan which are controlled by the applicant company because of the applicant company’s holding of their stock shall not constitute an excessive concentration of economic power,” and that “the applicant company and the stock issuing company shall not have the effect of substantially restraining competition in any particular field of trade.” AMA art 1.

²⁵⁸ See ARTICLE 11 GUIDELINES, *supra* note 256, art. 1(1)(i).

²⁵⁹ *Id.* art. 1(1)(i)(g).

²⁶⁰ *Id.* app. 1.

²⁶¹ Under the proposed JFTC guidelines which relate to the 1997 AMA revisions, this number will be lowered to 50%.

²⁶² Under the proposed JFTC guidelines which relate to the 1997 AMA revisions, this number will also be lowered to 50%.

of revenue requirement was reduced²⁶³ to as low as twenty-five percent in certain fields, and under the proposed JFTC guidelines which relate to the 1997 AMA revisions it was totally eliminated with respect to 1) "business concerned with the acquisition, ownership, leasing, maintenance and management of real estate"; 2) certain business concerned with the purchase of secured real estate at auction, etc.; and 3) for banks and "business involved in the examination and classification of cash, checks and notes."

ii. *Stockholding for the purpose of entering into a new area of financial business*

Under the Guidelines, a securities company can establish a bank or trust bank, but not another security trade company, as a subsidiary.²⁶⁴ A bank can establish a trust bank or a security trade subsidiary, but not a subsidiary in the banking business. Trust banks in Japan have the function of a trust and a bank at the same time, therefore they can only establish a subsidiary in the security trade. Over fifty percent of the stocks of the subsidiary have to be owned by the finance institution²⁶⁵ and the subsidiary must be newly established.²⁶⁶ These exemptions correspond to the Finance System Reform Law (*Kin'yūseido Kaikaku Hō*) of 1993, which allows banks²⁶⁷ and securities companies²⁶⁸ to establish over fifty-percent-owned subsidiaries in other fields of the finance business.

Beginning with the 1993 establishment of the Finance System Reform Law until January 31, 1995, the JFTC approved finance companies' holdings in twenty-three subsidiaries.²⁶⁹ These cases include the takeover of the majority of Cosmo Securities' shares (59.66%) by Daiwa Bank in 1993, and 68.82% of Japan Trust Bank by Mitsubishi Bank in 1994.²⁷⁰ Both cases deviated from the "new establishment" rule under the Guidelines, Article

²⁶³ Banks have been partially released from this requirement since a 1996 revision enabling banks to charge fees for collecting and delivering cash from big supermarkets. However, banks were not permitted to compete with companies providing other related businesses such as guard services. Sadaaki Suwazono, "*Kin'yu Gaisha no Kabushikihoyu no Ninka ni Kansuru Jimushōrikijun no Kaisei no Gaiyō* [Outline of the Amendment of the "Standards for Authorization of Stockholdings by Finance Companies"], KŌSEITORIHAKI [FAIR TRADE], Aug. 1996, at 71, 72.

²⁶⁴ See ARTICLE 11 GUIDELINES, *supra* note 256, art. 1(1)(2).

²⁶⁵ *Id.* art. 1(1)(2)(a).

²⁶⁶ *Id.* art. 1(1)(2)(b).

²⁶⁷ Ginko Hō [Bank Law], Law No. 59 of June 1, 1981, art. 16(2).

²⁶⁸ Shōken Torihiki Hō [Securities Exchange Law], Law No. 25 of April 13, 1948, art. 43(2).

²⁶⁹ Funahashi, *supra* note 229, at 216. The twenty-three subsidiaries consisted of 15 securities companies and eight trust banks. *Id.*

²⁷⁰ *Id.*

I(1)(2)(b).²⁷¹ The JFTC explained the Cosmo Securities' case as an exception to the rule, necessary in order to keep one competitive unit in an oligopolistic securities market,²⁷² however, the JFTC did not apparently clarify its rationale in the Japan Trust Bank-Mitsubishi Bank case.

Similar deregulation has occurred in the insurance industry. The Insurance Business Law of 1995²⁷³ allows life insurance companies and damage insurance companies to have mutual access to each other's markets via the establishment of more than fifty percent-owned subsidiaries. In order to accommodate these changes in the Insurance Business Law, the JFTC also introduced insurance business exemptions through its guidelines.²⁷⁴

It should be noted that the 1997 proposed revisions to the Article 11 Guidelines eliminate the above provisions and replace them with an exception for "companies engaged in businesses which are almost equivalent to the essential business of financial companies,²⁷⁵ or a holding company²⁷⁶ which has such companies as subsidiaries."²⁷⁷ Proposed Article (I)(1)(2)(a) and (b), respectively provide the following limitations: 1) that "the group of the applicant company, stock issuing company and companies in Japan shall not constitute an excessive concentration of economic power due to the applicant company's holding of their stocks" and 2) that "applicant company's and issuing company's stockholdings shall not have the effect of substantially restraining competition in any particular field of trade."

iii. Stockholding "for the purpose of engaging in the business of finance in Japan"

In the case of foreign finance companies applying for approval under the Article 11 Guidelines, the JFTC first distinguishes whether the applicant is a "finance" company, to which this guideline is applicable, or a non-finance company controlled by AMA Article 9-2. A foreign finance company is a

²⁷¹ See ARTICLE 11 GUIDELINES, *supra* note 256, art. 1(1)(2)(d).

²⁷² Funahashi, *supra* note 229, at 127.

²⁷³ Hoken-gyō Hō [Insurance Business Law], Law No. 105 of June 7, 1995, art. 106.

²⁷⁴ Suwazono, *supra* note 263, at 73-74.

²⁷⁵ Attachment 2 of the proposed JFTC guidelines which relate to the 1997 AMA revisions lists three categories of such businesses: 1) "businesses which can actually be performed by financial companies;" 2) business activities naturally deriving from business activities that can be actually performed by financial companies or which can facilitate common use of management resources with such business activities; and 3) "business activities in which transactions are similar to financial transactions in form." See JFTC GENERAL SECRETARIAT, *supra* note 206.

²⁷⁶ "Holding companies" refers to holding companies under AMA Article 9.

²⁷⁷ "Subsidiaries" refers to subsidiaries under AMA Article 9.

company dealing in a broad area of loans and deposits with special approval to do finance business under a home country statute. In the case of the United States, commercial banks and mutual saving banks are included.²⁷⁸ The problem is that finance businesses in foreign countries are often part of a larger holding, or control many other companies through holdings.

The criteria for approval under the Article 11 Guidelines are: 1) holding of over fifty percent of the stocks of the subsidiary; 2) that such subsidiaries principally be newly established; and, 3) the sum of stockholdings by the foreign finance company and the subsidiary of a domestic company must be below five percent (in the case of an insurance company, ten percent), as required by Article 11.²⁷⁹ Since 1985, the JFTC has granted approvals to eighteen foreign finance companies.²⁸⁰ This special exemption for foreign finance companies does not appear in the proposed draft Article 11 Guidelines, as released on July 9, 1997, by the JFTC.

b. Additional exemptions

In addition to the above, Article 11 is subject to the following broad exceptions under the Article 11 Guidelines.

i. "Such cases for which the prior approval of the JFTC is obtained"

AMA Article 11(1) establishes a broad discretionary provision prescribed under the Guidelines.²⁸¹ The Guidelines provide that applications not falling into the above exceptions may be examined on a case-by-case basis taking into account: 1) the indispensability of the stockholding concerned for the applicant company; 2) the existence or absence and, if existent, the extent of the likelihood of an increase in the economic power of the applicant company due to such stockholding; and 3) the impact on competition in the market wherein the stock issuing company operates.

ii. Holdings as a result of enforcement of liens, etc., or by a securities company in the course of its business

AMA Article 11(1)(1) and (2) and AMA Article 11(2) together provide that the five and ten percent limitations shall temporarily not apply

²⁷⁸ Funahashi, *supra* note 229, at 131.

²⁷⁹ *Id.*

²⁸⁰ Funahashi, *supra* note 229, at 217.

²⁸¹ ARTICLE 11 GUIDELINES, *supra* note 256, art. 2(2).

to acquisitions or holdings in the following cases, upon the authorization of the JFTC received within one year of such acquisition: 1) as a result of enforcement of a lien, pledge, mortgage, or of payment in kind; 2) by a company engaged in securities holding in the course of its business; and 3) in the form of trust property of a pecuniary or security trust, provided that the beneficiary of such trust property can exercise voting rights or issue instructions therefor.

Article 2(2) of the Article 11 Guidelines provides that the JFTC shall examine applications for such exemptions on a case-by-case basis taking into account: 1) the reason for the difficulty of disposing the held stock; 2) the existence or absence, and if existing, then the extent of the likelihood of an increase of economic power due to such holding; and 3) the impact on competition in the market wherein the stock issuing company operates. Article II(3) provides that exemptions should not exceed one year.

2. *Purpose of Article 11*

The strict limitations on stockholding under Article 11 aim to prevent the formation of a concentration of controlling power by finance holdings, and to prevent the revival of *zaibatsu*-like company groups and complexes centered around financial holding companies. The Article 11 restriction on limiting holdings of stock is much stricter than that under AMA Articles 9 and 9-2, due to the fact that financial enterprises are thought to have the power to control other companies through loans. That controlling power is strengthened by stockholdings. Stockholding by finance companies might also lead to the situation wherein a finance enterprise may discriminate against unrelated companies and provide advantages to companies under its own umbrella. This can suppress the business activities of other companies, infringe upon fair and free competition, and have an ill effect on the whole economy. Compared to other finance companies, the relationship between other business companies and insurance companies is principally indirect; therefore, such control is relatively less problematic.

Changes in AMA Article 9 have raised concerns relating to holding companies which hold stock in banks but which do not carry out finance business themselves ("bank holding companies"). Bank holding companies do not carry out a finance business; therefore, they do not fall within the scope of the Article 11 prohibitions. By establishing pure holding companies which control both banks and non-financial companies, however, city banks (assuming they have control over the holding company) may accomplish the same realization of power to control other industries in the

economy as they would in the absence of Article 11. The Ministry of Finance in late 1997 had suggested percentage limitations on bank holding companies, although Article 9 Guidelines also prohibit holding companies from stock ownership in financial institutions having total assets exceeding ¥15 trillion together with ownership of any non-financial company or company not engaged in business closely related thereto (credit guarantee business, venture capital business, leasing business, etc.) with total assets exceeding ¥300 billion.²⁸²

IV. DEREGULATION UNDER THE AMA AND STOCK COMPANY GOVERNANCE IN JAPAN

This section examines current issues related to Chapter IV of the AMA, and the role of these provisions in the mix of corporate governance mechanisms in the modern economy. Concurrent with the resurgence of interest in using holding companies in Japan, the issue of company governance has recently gained interest in economics literature, among scholars, and in the general media. Governance consists of the relationships among the elements that determine the direction and performance of companies. In the United States, it has been said that the primary participants in corporate governance include the government, directors, and stockholders.²⁸³ This section provides a brief discussion of the typically noted participants in Japanese stock company governance, including government bureaucracies, employees, managers, auditors, directors, stockholders, and main banks. The purpose of this section is to discuss the typical Japanese *style* of governance and raise comparative issues with respect to several means for directing excessive concentrations of power to control industries, not to argue that Japan would be better off adopting foreign methods of governance.

As a matter of "law in book" the legal aspects of Japan's stock company governance structure has many points in common with those of the United States and European countries. However, studies of "law in action" uncover greater degrees of differences. One commonly noted observance is that Japanese governance does not depend upon legal coercion to the same extent as governance in the United States. This creates a gap between the actual norms in Japanese governance and the type of governance which foreign observers of Japan might initially expect with respect to the control

²⁸² *Government to Limit Shares of Holding Companies*, DAILY YOMIURI, Sept. 17, 1997, at 1.

²⁸³ ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 1 (1995).

and direction of large concentrations of the power to control industries. Although the role of law in Japanese governance may differ from its role in foreign countries, it still has an important function.

The possible effects of excessive concentrations, noted in current discussions in Japan with respect to the changes which took place in 1997 included: 1) political abuse of economic power; 2) restraints on competition; 3) illegal dumping; and 4) abuses by corporate groups and *keiretsu* groups²⁸⁴ of reciprocal trades and long-term trading relationships.²⁸⁵ At stake in relation to deregulation under AMA Chapter IV is whether Japanese governance, both within individual companies and among members of groups, is sufficiently effective to direct and control the complexes and groups legally and efficiently. In examining the possible growth of economic power among complexes, groups, and *keiretsu* formations under such deregulation, the issue of governance requires careful consideration. Japan's economy and the global economy might benefit from larger, more efficient company groups directed by pure holding and enterprise holding companies in Japan. Companies having the power to influence international markets and dominate domestic markets, however, require effective control to ensure that management adheres to proper and efficient business procedures as well as established legal standards.

Supporters of deregulation, including MITI and certain large enterprises, have strongly asserted the prospective governance-related benefits of holding companies in the economy. These benefits include: 1) facilitation of mergers and acquisitions by allowing companies to add member firms which operate independently with different personnel and salary systems; 2) facilitation of the formation of spin-off companies and new venture capital companies;²⁸⁶ and 3) provision of a means for dividing strategic group management from operational management.²⁸⁷

The bureaucratic promoters of the 1997 AMA revisions and those civilians who appear to have most directly influenced the legislation focused on structural issues of importance to bureaucrats and to large firms by crafting an internationally competitive structure (or size) for Japan's

²⁸⁴ In a case ongoing at the time this paper was prepared, the United States implicated vertical integration structures between manufacturers Fuji Photo Film Co. and Konica Corp., and their down-stream independent distributors in sales distribution as the cause of unfair competition in the Photo Film Co. and Konica Corp. According to the U.S. position, Fuji's ties with down-line distribution channels ties Fuji in directly (via computer) to access distributor information such as inventory, sales data, etc. *U.S. Slams Hashimoto on Distribution*, DAILY YOMIURI, at 12.

²⁸⁵ See MITI RESEARCH COMMITTEE, *supra* note 8, at 9-10.

²⁸⁶ *Ban Likely Lifted*, *supra* note 7.

²⁸⁷ MITI RESEARCH COMMITTEE, *supra* note 8, at 21.

industries in the twenty-first century. In some circles in Japan there may be the feeling that, with respect to the AMA deregulation of holding companies, the chicken has come before the egg. This is because AMA deregulations were not preceded by any actualized revolutionary retrofitting of stock company governance. There is a call to promote new corporate governance mechanisms and strengthen others as a means to control concentrations of economic power wielded by the Big Six and other company groups, as well as deal with other problems in the economy.

It may be argued that the introduction of more market force mechanisms and other types of deregulation may be as much or more helpful than the 1997 AMA revisions in guiding Japan's economy into the twenty-first century. Such market force factors include private and public aspects, such as the introduction of mechanisms to introduce further external and non-bureaucratic civilian checks upon activities of company groups. Promoters of the new AMA regulations appear less interested, or are perhaps less able, to quickly change the status quo in governance with respect to such issues.

Possible governance issues to be raised with respect to deregulating holding companies include: 1) the inadequacy of rights of parent company stockholders in subsidiary management decisions; 2) adequacy of rights of parent company stockholders to disclosure by subsidiary management;²⁸⁸ 3) possible inadequate attention to stockholders and dividends; and 4) possibly less than optimal relationships existing between company groups, bureaucrats, and member firms.

A. Governance Gains and Deregulation under the AMA

Governance gains credited as deriving from increased employment of pure holding company structures include the realization of effective company structures through diversification, internationalization, and actualization of smoother personnel and labor management, in the advancement of increased restructuring and development of new enterprises.²⁸⁹ Yet, the prospect of the 1997 AMA revisions creating any significant tangible national economic efficiencies in Japan's economy is only hypothetical. No convincing, tangible proof exists of links between holding company deregulation and gains in economic efficiency in the national economy. Further, the institutional costs of holding companies

²⁸⁸ *Ban Likely Lifted*, *supra* note 7.

²⁸⁹ MITI RESEARCH COMMITTEE, *supra* note 8, at 21-22.

themselves must be considered. Holding companies receive dividends for controlling efforts; in turn, they declare and disburse dividends after subtracting operating costs. Any alleged economic gains from such controlling and possibly related subsidiary selection enjoyed by stockholders of the holding company or subsidiaries must exceed the total of operating costs and the additional taxes paid upon holding company income. Additionally, social monitoring costs, such as the possibility of JFTC operating costs, must be considered.

Although Japan's relational governance and company group relations have been hypothesized to have contributed to Japan's enormous economic achievements, factors other than *keiretsu* efficiencies might equally account for Japan's success, including an educated, motivated, and low-wage work force, national savings rates, and tax policies.²⁹⁰ Governance gains under the pure-holding company system or the current regime may simply not be significant. Also, in Japan, even with significant AMA Chapter IV deregulation, there may be practical obstructions to expected gains relating to governance, as discussed below.

1. *Spin-offs*

Governance gains expected from spin-offs include both general operational benefits relating to strategic planning, and motivational gains relating to personnel. With regard to the former, possible gains include: 1) the strategic group management in pure holding companies can make bolder and swifter decisions when separated from operational management; 2) pure holding companies can more objectively observe subsidiary operations than enterprising parent companies who focus more on their own operations than on those of subsidiaries; 3) the efficiency of each subsidiary company will be strengthened because holding companies will demand high returns on investment equally from each subsidiary; and 4) new business divisions can be spun-off as venture enterprises.²⁹¹ With specific regard to operational management, the following gains have been suggested: 1) by the limitation of management's authority and transfer of stockholder rights to the parent stockholding company, the role of management will be clarified and the objective standards of return on investment and business operations can be activated; 2) management can become more expert with regard to the separate fields boosting

²⁹⁰ Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When Do Institutions Matter?*, 74 WASH. U. L.Q. 327, 328-29 (1996).

²⁹¹ MITI RESEARCH COMMITTEE, *supra* note 8, at 21-22.

rationalization of management; and 3) restrictive horizontal relationships among departments may be reduced by the creation of independent companies.²⁹²

It has also been suggested that by the division of operations and strategic personnel more employees from operations can be appointed as officers, which may strengthen morale. Additionally, officer's responsibilities will be clarified.²⁹³ It has also been argued that the feeling of a hierarchy and superiority among subsidiaries, which is difficult to avoid, can be alleviated with pure holding companies, because all operations subsidiaries will be equally under the direction of the controlling holding company.²⁹⁴

Some doubt as to the significance of such alleged gains is cast in light of the fact that many leading Japanese companies, such as trading companies Mitsubishi Corp., Sumitomo Corp., and Itochu Trading, already introduced, or were in the process of introducing, a "sub-unit" or "division company" system, in which a company allocates capital to individual departments which settle their accounts separately.²⁹⁵ Some employees at such companies indicate that such sub-units function freely and that people in other departments actually function like employees from other firms.²⁹⁶

Furthermore, venture company spin-offs were not categorically forbidden under prior laws if the parent was not a pure holding company. Because even the prior ban on pure holding companies did not forbid enterprising holding companies which engage in business enterprises in addition to holding stock from creating spin-offs, the possibility of an immediate tangible, positive impact upon venture businesses from the new deregulation of pure holding companies is questionable. Vested interests in company groups might obstruct new ventures under the umbrella of a pure holding company. For example, in December 1970, Sumitomo Light Metal Corporation decided to enter the aluminum smelting industry. Members of the president club of the Sumitomo Group attempted to persuade Sumitomo Light Metal Corporation to drop the venture because Sumitomo Chemicals, Inc. had vested interests in the aluminum market.²⁹⁷ MITI, allegedly fearing excess production capacity, mediated the dispute

²⁹² *Id.* at 22.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Call for Consolidated Taxation*, *supra* note 213.

²⁹⁶ *Id.*

²⁹⁷ Takahashi, *supra* note 53, at 232.

in which Sumitomo Chemical agreed to cooperate in exchange for shares in the venture.²⁹⁸

Whether or not the 1997 AMA revisions result in increased efficiency in governance and more venture enterprises, proponents of stock holding deregulation need to consider additional means to encourage new ventures, such as market mechanisms and creating an atmosphere which better entices direct foreign investment. Whereas 111 new biotechnology firms were established in the United States between 1973 and 1983, a 1987 study found that the biotechnology industry in Japan was comprised only of firms entering from established positions in related fields, despite the government targeting the industry for growth.²⁹⁹ It may not be sufficient to depend upon existing enterprises and government promotions to devise twenty-first century target industries and venture businesses. Promotion of private schemes to create greater open access to venture capital and appeal to direct foreign investment may provide a more effective impetus for the needed venture enterprises than the deregulation of holding companies.

2. *Mergers*

While mergers and spin-offs provide rational reasons to expect benefits from the 1997 AMA revisions, there are also reasons for skepticism as to the level of such gains. First, such gains may not be tangible. Second, as discussed herein, Japan has been said to possess a capital and managerial environment which is resistant to mergers and acquisitions, although the government apparently has been able to convince companies to merge in the past. Almost all mergers and acquisitions in Japan have been friendly takeovers.³⁰⁰

If the pessimistic view discussed above proves valid in the late 1990s, then it does not seem likely that the 1997 AMA revisions will propel a rapid shift to an open market for capital control in Japan. The view that Japan's capital market is lacking in mergers is often accompanied by indications that about seventy percent of the issued and outstanding stock of Japan's stock companies is held by other companies

²⁹⁸ *Id.* at 233.

²⁹⁹ Daniel L. Okimoto & Gary R. Saxonhouse, *Technology and the Future of the Economy*, in 1 THE POLITICAL ECONOMY OF JAPAN: THE DOMESTIC TRANSFORMATION 385, 401 (Kozo Yamamura & Yasukichi Yasuba eds., 1987).

³⁰⁰ *Urge to Merge Overcoming Long Aversion*, NIKKEI WEEKLY, Dec. 15, 1997, at 21 [hereinafter *Overcoming Long Aversion*].

which typically have rarely sold their stock,³⁰¹ and in relation to “cooperative” governance, there are difficulties with merging operations. In order to simplify merger procedures, the legislature passed the Act Partially Amending the Commercial Code in 1997.³⁰² It is still unclear whether this had any significant positive impact.

Japan has a history of mergers and combinations promoted by government bureaucrats. For example, under the National General Mobilization Law of 1938³⁰³ the government asked industries to increase efficiencies by coordinating production and eliminating competition.³⁰⁴ During the recession of 1965, MITI encouraged large-scale mergers to produce concentrations of economic power on a par with the United States and West Germany.³⁰⁵ This policy apparently did not arise solely for the purpose of efficiently organizing industry, but also partially from concerns that foreign capital would enter the Japanese market in the wake of capital liberalization.³⁰⁶ Later, as part of its activities of strengthening domestic capital integration, MITI tried to consolidate the top six Japanese steel companies into two or three and the ten automobile manufacturers into two, Nissan and Toyota.³⁰⁷

Large scale mergers closed or under discussion in 1997 included: 1) Mitsui Petrochemical Industries and Mitsui Toatsu Chemicals, which created Mitsui Chemicals in October 1997;³⁰⁸ 2) Suzuken Co., the largest pharmaceutical wholesaler, and Akiyama, Inc., the eleventh largest, expected in April 1998; and, 3) Japan Telecom Co. and International Japan Telecom Inc, in October 1997.³⁰⁹ In addition, some financial institutions in Japan are considering mergers, perhaps in order to deal with bad debts in the wake of the bubble economy and to prepare for Japan’s version of London’s Big Bang, an expected competition increase with foreign market entrants.³¹⁰

³⁰¹ Takahashi, *supra* note 53, at 228.

³⁰² Shōhō no Ichibu o Kaisei Suru Hōritsu [Partial Amendment to the Commercial Law], Law 71 of 1997. This Act disposes of 1) the requirement of a general meeting to report the merger and the general meeting for consolidation, 2) the requirement of a special notice to creditors when notification of the merger is provided in an official gazette or newspaper, and 3) in certain situations, the requirement of a general meeting to approve the merger agreement.

³⁰³ Kokka Sodōinhō [National General Mobilization Law] Law No. 55 of 1938, art. 16.

³⁰⁴ Kanazawa, *supra* note 27, at 484.

³⁰⁵ JOHNSON, *supra* note 28, at 276-77.

³⁰⁶ *Id.*

³⁰⁷ JOHNSON, *supra* note 28, at 276-77.

³⁰⁸ This new company will have more than a 50% market share in the case of some products. *Id.*

³⁰⁹ *Overcoming Long Aversion*, *supra* note 300.

³¹⁰ A merger with Hokkaido Takushoku Bank, a major commercial city bank, was originally planned for April 1, 1998, although as of September 8, 1997, the banks determined to suspend the merger. *Bank*

As of December 15, 1997, the Nikkei Weekly forecasted a record high number of 745 mergers and acquisitions in 1997.³¹¹ Despite lingering pessimistic views, it is clear that numerous mergers are occurring in Japan. Professor Kunio Ito of Hitotsubashi University in Tokyo stated, "Company presidents understand the financial benefits of mergers and acquisitions and can shrug off their psychological aversion"³¹² The numbers indicate that, whether or not company managers can shrug off their aversions, economic realities are causing a change in circumstances. In 1993, the JFTC received 1,917 notifications regarding mergers and 831 notifications of acquisitions of business.³¹³ In 1991 and 1992, these numbers with respect to merger notifications were 2,002 and 2,091, respectively.³¹⁴ In each year of 1991 to 1993, more than eighty percent of these merger notifications involved total assets ranging from ¥1 billion and ¥10 billion.³¹⁵ The following numbers of merger notifications involved a total amount of assets of U.S. \$833 million or more: forty-eight in 1991, fifty-five in 1992, and fifty-one in 1993.³¹⁶

The question is whether allowing the existence of pure holding companies and lifting the limitations under Article 9-2 will significantly contribute to an increase of these numbers. During discussions regarding the revision of Articles 9 and 9-2, AMA Article 11 was also implicated as an obstacle to mergers and acquisitions among financial holding companies. Due to the Article 11 restriction, mergers and acquisitions can result in compulsive stockholding liquidation. For example, Article 11 required Mitsubishi Bank to sell a large number of shares upon absorbing Nippon Trust and Banking Co. as a subsidiary because their combined stockholdings in certain companies exceeded five percent.³¹⁷

Merger Sidetracked by Debts, Doubts, NIKKEI WEEKLY, Sept. 8, 1997, at 1. Had that merger occurred, it would have been the biggest merger of financial institutions since the birth of the Tokyo-Mitsubishi Bank. *Mega-Mergers, Now Medium Merger-Expect Many More to Come*, DAILY YOMIURI, Apr. 23, 1997, at 7. There have been various bank mergers since 1971 beginning with 1) Dai-Ichi Bank and Nippon Kangyo Bank (now Dai-Ichi Kangyo Bank), 2) Taiyo Bank and Kobe Bank, 3) Taiyo Kobe Bank with Mitsui Bank (now known as Sakura Bank), and 4) Kyowa Bank and Saitama Bank to form Asahi Bank. *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ Fair Trade Commission, *Trends and Major Cases of Mergers, Acquisitions of Business, etc. in Fiscal 1993*, 21 FTC/JAPAN VIEWS, June 1995.

³¹⁴ *Id.*

³¹⁵ *Id.* at 6. At U.S. \$1.20 per yen, this approximates U.S. \$8.3 million and U.S. \$83.3 million, respectively.

³¹⁶ *Id.*

³¹⁷ *Gov't Plans to Loosen Rules on Share Holding*, DAILY YOMIURI, May 7, 1997, at 1 [hereinafter *Looser Rules on Share Holding*].

B. "Cooperative" Governance and the Control of Excessive Concentrations of Power

Curtis Milhaupt described the typical non-Japanese observer's point of view: "Japan offers an appealing vision of a land where the legal system remains aloof from matters of corporate governance."³¹⁸ The influence of Japan's Commercial Code upon stock company governance may differ from state corporate law's influence upon U.S. corporate governance; however, many fundamental similarities exist between Japan's and other governance systems and differences may exist only in matters of degrees. As Milhaupt also wrote, a closer analysis of company governance in Japan reveals a major role for law.³¹⁹

The Commercial Code Part II, or Company Law (entitled "*Kaisha Hō*") provides basic legal provisions which form the legal framework of governance in stock companies.³²⁰ German codes greatly influenced Japan's Commercial Code, which was established in 1899.³²¹ After the Second World War, the Commercial Code was amended, adopting some aspects of Anglo-American law.³²² Other important related laws include the AMA, the Securities and Exchange Act, and labor laws, among others.

A study of Japanese governance in action, however, reveals institutions relevant to the issue of governing concentrations of power to control companies within company groups, cross-stockholding relationships, and perhaps companies under the control of the holding company structure. Despite the fact that governance in Japan has fundamental legal foundations similar to those in other countries, observers of Japan who focus on Japanese business practices and customs, and Japanese "law in action," find Japan's law plays a less important role in explaining governance than it does in the United States.³²³

³¹⁸ Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L L.J. 3, 5 (1996). Legal mechanisms such as stockholder organs, judicial enforcement of managerial fiduciary duties, and private party security law enforcement do not play a leading role in Japanese corporate governance. *Id.* at 20-21.

³¹⁹ *Id.* at 35-63.

³²⁰ The law of limited liability companies (*yūgen kaisha*) is found in a separate act entitled the *Yūgenkaisha Hō*, [Limited Liability Company Act], Law No. 74 of 1938.

³²¹ Not only the Commercial Law, but also the Meiji Constitution and the present Civil Code were heavily influenced by German law. Takuma Ishiyama, *The Company Law in Japan (I)*, 15 WASEDA BULL. COMP. L. 56, 56 (1994).

³²² In particular, Illinois state law influenced the revisions, probably because the official of the Occupation Forces in charge of the amendment came from Illinois. *Id.*

³²³ See Milhaupt, *supra* note 318, at 3; see generally Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436 (1994).

1. *Directors, Auditors, and Management*

Separation of ownership and control is said to constitute the central feature of U.S. corporate governance.³²⁴ In contrast to the U.S. contractual approach to corporate governance, Japan's stock companies are said to operate under a "cooperative company structure" (*kaishakyōdōtai*), unifying the identities of management, labor, and the company itself.³²⁵ The development of a cooperative company structure appears to have been encouraged by government policies during the wartime planned economy, in part to curb perceived stockholder abuses.³²⁶ This cooperative company structure appears to foster entrenched vested interests among the players in Japanese governance and to obstruct the influence of external factors such as mergers and acquisitions, outside directors, the labor market for managerial skills, and stockholder's exercise of legal rights. Some of its other features, such as lifetime employment, may reduce companies' abilities to downsize and make cost-saving adjustments, while intra-group transfers of management and cross-stockholding may stifle the directing and guiding influences of the market for management and capital.

This Article does not argue that Japan's government institutions are generally better or worse than possible alternatives. Instead, we assess such institutions as possible candidates for providing the means for effectively curbing excessive concentrations of the power to control companies and influence markets in Japan.

a. *Directors*

In the cooperative company structure, director positions are commonly held by individuals who, since graduating from college, have been trained and educated by the company itself. Typically, directors are insiders formally elected by stockholders and appointed by the CEO, with the exceptional intervention of appointees of large stockholders in times of crisis or behind the scenes.³²⁷

³²⁴ Gilson, *supra* note 290, at 330 (citing ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 4-9 (1932)). A recently popular view is that firms are better seen as an "institutionalized network of norm-generating relationships" embedded in an historical, social, and political framework based upon relations. See Milhaupt, *supra* note 318, at 11.

³²⁵ Zenichi Shishido, *Koporeto Gabanensu ni Okeru Kabunushi Sōkai no Igi* [Opposition to General Shareholders Meeting on Corporate Governance], 1444 SHŪJI HŌMU 2, 4 (1996).

³²⁶ See generally Okazaki, *supra* note 48.

³²⁷ ROE, *supra* note 131, at 179.

Such company executives apparently comprise a large percentage of directors in public Japanese stock companies. One study of 119 public companies in Japan, using data from 1980 to 1988, found bank outside directors in stock companies at the rate of 7.5% per firm-year, and non-bank outside directors at the rate of 5.9%.³²⁸ U.S. public companies employ outside directors at a much higher rate. One U.S. survey of 100 companies listed on the NYSE indicated that eighty-six companies had more than one outside director.³²⁹ In 1990, the same survey indicated that fifty-one boards maintained a ratio of outside to inside directors of three to one or greater, and forty reported a ratio of four to one.³³⁰ This difference is not a recent trend. Even in 1963, a sampling of over 1,000 U.S. directors found only 59.3% were insiders.³³¹

More outside directors might provide an opportunity for an objective "check" on the activities of companies wielding and/or subject to the control of groups or holding companies. Whether Japanese companies will welcome active outside directors and whether such directors would actually have a tangible, let alone positive, impact on governance remains at issue. In the United States, the actual impact of outside directors is said to be difficult to quantify.³³²

In January 1997, the Japan Association of Corporate Executives released its Manifesto for a Market-Oriented Economy. This manifesto called for increasing the number of outside directors to more than ten percent of a typical company's average total number of board members.³³³ Foreign investors may also push Japan's companies to accept more outside directors. For example, in 1992 the California Public Employees Retirement System ("CALPERS") exercised voting rights against Nomura Securities and Daiwa Securities to demand acceptance of outside directors.³³⁴

More independent directors cannot offer improvement, however, if they are not effective in their roles and some observers may note that

³²⁸ Steven N. Kaplan & J. Mark Ramseyer, *Those Japanese Firms with their Disdain for Shareholders: Another Fable for the Academy*, 74 WASH. U. L.Q. 403, 406 (1996) (discussing a study of 1980-1988 board data for 119 publicly held companies that Fortune magazine listed among the 500 largest foreign industrials in 1980).

³²⁹ MONKS & MINO, *supra* note 283, at 202.

³³⁰ *Id.* at 203.

³³¹ *Id.* at 227 n.51 (citing STANLEY C. VANCE, CORPORATE LEADERSHIP: BOARDS, DIRECTORS AND STRATEGY 50 (1983)).

³³² *Id.* at 204.

³³³ Kazuo Mori, *Cleaner Business Requires Transparency*, NIKKEI WEEKLY, Aug. 11, 1997, at 4.

³³⁴ Masaru Hayakawa, *Shareholders in Japan: Attitudes, Conduct, Legal Rights, and their Enforcement*, in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM 237, 243 (Harald Baum ed., 1997).

"indifference" often accompanies "independence." One may observe that the finding of *this initial glance* is that the typical system of inside directorships in Japan seems to provide less than strong candidates for providing an effective check on abuses and mismanagement of their concentrated power to control companies by holding companies.

b. *Auditors*

The role of statutory auditors (*kansayakunin*) in Japan's stock companies may play a role similar to that of the outside director in U.S. corporations. Under Japan's Commercial Code, each company must have at least one auditor and large companies (having more than ¥500 million of capital or ¥20 billion of debt) are required to organize a board of at least three auditors.³³⁵ Auditors may request business reports in order to examine the company's business and financial situation.³³⁶ They possess the authority to enjoin *ultra vires* or otherwise illegal conduct.³³⁷ An auditor owes a duty of care and is liable for damages upon a breach of those duties.³³⁸

A 1997 seminar sponsored by leading business organizations and business leaders in Japan questioned the effectiveness of auditors and expressed a need for more effective external governance checks than currently exist.³³⁹ The situation with respect to auditors appears similar to that of directors. Although the 1993 Amendments to Commercial Code Exceptions require at least one "independent auditor" for large corporations, those auditors are typically former directors or former employees of other companies in the group.³⁴⁰ In other cases, the auditors of a corporation are retired directors of that corporation³⁴¹ who presumably have friendly long-term relations with incumbent managers and directors. In contrast to truly "independent" auditors, it seems that the conditions in

³³⁵ See generally Shiro Kawashima & Susumu Sakurai, *Shareholder Derivative Litigation in Japan: Law, Practice, and Suggested Reforms*, 33 STAN. J. INT'L L. 9, 24-27 (citing Commercial Code Article 183 and Kabushiki Gaisha no Kansatō ni Kansuru Shōhō no Tokurei ni Kansuru Hōritsu [Exceptions to the Commercial Code Concerning Audits and Related Matters of Stock Companies], Law No. 22 of 1974, arts. 18(1), 18-2(1)).

³³⁶ Kabushiki Gaisha no Kansatō ni Kansuru Shōhō no Tokurei ni Kansuru Hōritsu [Exceptions to the Commercial Code Concerning Audits and Related Matters of Stock Companies], Law No. 22 of 1974, art. 7.

³³⁷ Kawashima & Sakurai, *supra* note 335, at 25.

³³⁸ *Id.* at 27.

³³⁹ Kiho Yokoyama, *Business Elite Call for Tougher Auditors*, NIKKEI WEEKLY, Aug. 25, 1997, at 4.

³⁴⁰ Kawashima & Sakurai, *supra* note 335.

³⁴¹ *Id.* These observations are also confirmed in Yokoyama, *supra* note 339. After the above-cited seminar, the Japan Federation of Economic Organizations (*Keidanren*—one of Japan's four most influential business organizations) established a new committee on governance. *Id.*

which "inside" auditors function hardly encourages aggressive scrutiny of directors and management. Thus, auditors as well as directors currently appear to be less than strong candidates for serving as a source of external control over the governance of concentrations of economic power.

c. *Management*

Typical Japanese-style management is marked by the lifetime employment system which results in managers, like directors and auditors, traditionally rising from the lower ranks within the company, having joined the company immediately upon graduation from a university. Such managers are said to function not as agents of stockholders, but rather as de facto arbiters between stockholders and lifetime employees,³⁴² or simply as "controllers of the company."³⁴³

The apparent stronghold of management upon company governance relates to Chapter IV of the AMA in that it indicates another reason that efficient mergers and acquisitions may not occur even though they are allowed under the deregulation of Articles 9, 9-2, and 11. It has typically been difficult for Japanese enterprises to merge, in part due to protective company unions and lifetime employment systems. Without the intervention of mechanisms to deal with these entrenched interests under the *kyōdōtai* governance structure, mergers and acquisitions, particularly those which are unfriendly to management, may not occur despite their possible efficiencies.

As one extreme example of inadequately checked managerial abuses of company assets, from May 1984 through March 1997, Japanese police reported twenty-six violations of the Commercial Code arising in cases where management allegedly funneled a total of approximately ¥296.5 million in profits to professional stockholders referred to as *sōkaiya*.³⁴⁴ Management may illegally pay such funds to protect the image and interests of management, and purportedly the company. For example, management may pay funds in order to ensure that management is not embarrassed or that the stockholders' meeting is not disrupted.³⁴⁵ Although corporate blackmail

³⁴² Okazaki, *supra* note 48, at 351.

³⁴³ TAKEDA, *supra* note 20, at 357.

³⁴⁴ *Sōkaiya no Shinsō [The Truth About Sōkaiya]*, SHŪKAN DIAMONDO, May 10, 1997, at 2, 25. After the report above, the most recent *sōkaiya* pay-off scandal has allegedly involved pay-offs to the same *sōkaiya* by each of Japan's largest four security brokerages, as well as by Dai-ichi Kangyo, a prominent bank in Japan.

³⁴⁵ *Eight Held for Ajinomoto-Sōkaiya Ties*, DAILY YOMIURI, Mar. 12, 1997, at 1. Since 1982, many big firms have been victimized and/or are under investigation for paying-off *sōkaiya* including: Ito-

also exists in other countries, the Japanese cooperative company structure where management sees itself, labor, and the company as unified, may provide the background for strong incentives for general management to protect the reputation of both the company and the president.³⁴⁶

A 1996 article suggests enterprise governance in Japan does not fall short of the mark, at least if measured by replacement of chief executive officers in times of poor performance.³⁴⁷ Yet it is not self-evident that these numbers prove effective governance by management. Management turnover does not necessarily implicate active and effective stockholder rights in Japan. Katsuto Uchihashi, a Japanese journalist specializing in business issues wrote: "It has been an unwritten law in the corporate world that when a scandal comes to light, a number of company officials are sacrificed—and in some cases arrested—to shield top management and the organization itself. . . this way of dealing with scandals is no longer acceptable."³⁴⁸ In Japan, the expression "a lizard losing its tail" refers to upper-management turnover which involves stepping down in difficult circumstances and leaving subordinates to clean-up through efforts which go nowhere and involve little remorse or soul-searching in the company.³⁴⁹

Prior government policy played an important role in establishing the current stereotypical Japanese stock company governance and wrestling control from stockholders. Lifetime employment, seniority based wage systems, and company unions all have been promoted to some extent by the government during the wartime economy, and played an apparently less prominent role in the pre-war period than at present.³⁵⁰ The present degree of exclusion of external governance factors therefore should (probably) not be interpreted as being anything other than the result of twentieth century

Yokado (10/1992); Kirin Beer (7/1993); Sogo Co.; Konica Corp.; Parco Co.; and Takashimaya (6/1996). *Nihon Kigyō no Bubun, Hyō ni* [A Portion of Japan's Companies, By Chart], ASAHI SHIMBUN, Mar. 21, 1997, at 10; *Nomura's Top Execs. Tied to Sōkaiya*, DAILY YOMIURI, May 31, 1997, at 2. Recent cases include Ajinomoto's management being suspected of turning over ¥5 million. *Ajinomoto, Sōkaiyara ni 500 Man Yen* [Ajinomoto, Five Million Yen to the Sōkaiya], ASAHI SHIMBUN, Mar. 11, 1997, at 1.

³⁴⁶ Shishido, *supra* note 325, at 2.

³⁴⁷ Kaplan & Ramseyer, *supra* note 328. One study indicates that when stock prices or profits fall, the appointment of outside directors increases at a rate indicating that outside appointments are more subject to sensitive stock price than in the United States. Top executive and turnovers occur at a comparable rate. See generally Steven Kaplan, *Top Executive Rewards and Firm Performance: A Comparison of Japan and the U.S.*, 102 J. POL. ECON. & ORG. 510 (1994); and see Kaplan & Ramseyer, *supra* note 328 (discussing directors and executive turnovers).

³⁴⁸ Katsuto Uchihashi, *Openness Can Work as Corporate Shield*, DAILY YOMIURI, June 3, 1997, at 13. See also Michio Sato, *How Not to Take Responsibility for Corporate Misconduct*, DAILY YOMIURI, June 11, 1997, at 7; Yasuhiko Shibata, *Still and Forever? A Nation of Fiefdoms*, DAILY YOMIURI, June 11, 1997, at 7.

³⁴⁹ Junichi Hayakawa, *How to Cure Japan's Corporate World*, DAILY YOMIURI, June 4, 1997, at 7.

³⁵⁰ Okazaki, *supra* note 48, at 357.

politics, which are not immune to change. Such changes by law, however, may occur gradually, if at all, because proponents of changes face the difficult task of proving tangibly that the general costs of making such changes are lower than the possible benefits and the costs of not changing. They also have to infringe upon vested interests.

Japanese management may be forced to face some changes as the result of the 1997 AMA revisions. In March 1997, an article in the *Asahi Shimbun* stated, "looking at Western countries as an example, the holding company is the corporate group's 'strategic headquarters' directing subsidiaries in a top-to-down fashion. Presidents of subsidiaries function as talent scouts in the industry; and when those employees fail to measure-up they are fired."³⁵¹ While such conditions cannot set well with employees who have come to expect lifetime employment, it remains to be seen whether and to what extent the 1997 AMA revisions will actually influence entrenched managerial interests in Japan's stock companies.

2. *Government-Business Ties*

The Japanese economy has had a long tradition of a strong bureaucratic presence in the private economy.³⁵² Although the issues addressed in this Article do not raise the same degree of concerns in 1997 as they did in 1947, strong links between bureaucrats and large Japanese companies warrant discussion in connection with controlling concentrations of economic power.

The government-business link in the modern economy has many facets; however, we will only deal with one such institution here. Non-elected government officials, including those who as bureaucrats belonged to ministries that exercise administrative guidance (*gyōseishido*) over particular firms, routinely retire from the government to be directors, corporate heads, and highly paid part-time advisors in Japan's stock companies. This practice is known as the "descent from heaven" (*amakudari*).³⁵³

A recent survey of thirty-seven major financial institutions found over 100 high-ranking bureaucrats receiving appointments in the financial

³⁵¹ *JFTC Support*, *supra* note 197.

³⁵² See *supra* Part II.A.

³⁵³ *Amakudari* is the common practice of resigning from the bureaucracy into a lucrative position in a public corporation or private industry. See JOHNSON, *supra* note 28, at 70. Ulrike Shaede has recently presented a detailed and current analysis in Ulrike Shaede, *The "Old Boy" Network and Government Business Relationships in Japan*, 21 J. JAPAN STUD. 2, 293-317 (1995).

institutions.³⁵⁴ The extensive licensing and approval authority of the government may constitute one reason for private sector participation in the practice. Companies may believe that by employing former bureaucrats they will obtain favorable treatment from ministries.³⁵⁵ *Amakudari* has also been implicated in abuses of government-business ties such as in Japanese bid-rigging practices in the Japanese construction industry.³⁵⁶

Although under the National Public Service Law³⁵⁷ the National Personnel Authority (*Jinji-in*) bans former high ranking civil servants from assuming positions in companies with ties to their former administrative offices, such officers may nevertheless take part-time advisor positions for such firms.³⁵⁸ However, in recent years, close to 200 former bureaucrats each year also annually receive waivers of the restriction from the National Personnel Authority.³⁵⁹ In 1996, 134 officials (forty-six from MOF and MITI) received such waivers,³⁶⁰ the criteria for which are not publicly available.³⁶¹

Ulrike Shaede notes major differences between Japan's business-government ties and U.S. "old boy" networking. First, the National Personnel Authority remains in charge of former bureaucrats as their de facto employment agent, arranging for rotations among companies.³⁶² Because income remains under the influence of the National Personnel Authority, strong incentives exist to act in the interests of the former employing ministry.³⁶³ Other differences include that traditionally half of all bureaucrats are graduates of the School of Law at Tokyo University and retired bureaucrats meet monthly at "vintage meetings" and quarterly at "Old Boy Meetings," as arranged by their prior ministries.³⁶⁴ These practices and traditions all promote non-transparent strong government-business ties which may overshadow other non-governmental external elements.

³⁵⁴ *Survey: Banks Still Hiring Retired Top Bureaucrats*, DAILY YOMIURI, Mar. 11, 1997, at 3; *Amakudari Ban Waivers Declined in '96*, DAILY YOMIURI, Mar. 29, 1997, at 1.

³⁵⁵ JOHNSON, *supra* note 28, at 70.

³⁵⁶ For a detailed account of public construction scandals see BRIAN WOODALL, *JAPAN UNDER CONSTRUCTION, CORRUPTION, POLITICS, AND PUBLIC WORKS* (1996).

³⁵⁷ *Kokka Kōmuin-Hō* [National Public Service Law], Law No. 120 of 1947, as amended by Law No. 54 of 1995.

³⁵⁸ *Gov't Plans to Tighten Amakudari Rules*, DAILY YOMIURI, July 29, 1997, at 3.

³⁵⁹ *Id.*

³⁶⁰ *Amakudari Ban Waivers Declined in '96*, *supra* note 354.

³⁶¹ *Gov't Plans to Tighten Amakudari Rules*, *supra* note 358.

³⁶² Shaede, *supra* note 353, at 349.

³⁶³ *Id.*

³⁶⁴ *Id.* at 351.

Amakudari deserves consideration in any analysis of the power to control groups of companies in Japan's economy. Certainly the vast majority of retired bureaucrats do not become involved with abuses of political connections in business-government relations. They may, however, play a role in Japan's economic successes and their post-retirement employment in industry has beneficial aspects. Government oversight and networking may lead to more profitable domestic companies, even though the government's interests do not always coincide with either the interests of stockholders or fairness in the international market economy.

3. Institutional Participants

The significant roles of government bureaucrats and some of the other government institutional participants in Japan's governance also deserve consideration as an external positive force in governance.³⁶⁵ For example, the role of other institutional participants could be seen at work in the recent incident involving Nomura Securities Co., whereby managers allegedly provided illegal favors to a racketeer (*sōkaiya*). Following the 1997 Nomura Securities Co. incident, several important companies dropped Nomura from consideration as an underwriter.³⁶⁶ Members of the finance industry also inflicted swift punishment. Large trust and banking firms (Sumitomo, Mitsui, Yasuda, and the Long-Term Credit Bank of Japan) suspended trades through Nomura because of the improprieties of management.³⁶⁷ In 1997, the Securities and Exchange Surveillance Commission filed criminal complaints against Nomura and three former senior officials, urging an indictment first against management and later against the officers of Dai-Ichi Kangyo Bank who allegedly financed the racketeers.³⁶⁸ For its role in the Nomura Securities Co. scandal, MOF excluded Dai-Ichi Kangyo from underwriting government bonds and suspended the bank for one year.³⁶⁹

³⁶⁵ Public prosecutors have been arresting management of large Japanese companies like never before, in the recent wake of crack-downs on management's illegal payments, referred to as *sōkaiya*, of corporate profits to ward off harassment by professional stockholders. Examples include the May 30, 1997 arrest of former President Hideo Sakamaki of Nomura Securities. *Nomura's Sakamaki Arrested*, DAILY YOMIURI, May 31, 1997, at 1.

³⁶⁶ *Firms Move to Drop Nomura as Underwriter*, DAILY YOMIURI, Mar. 29, 1997, at 14.

³⁶⁷ *Nomura to Torihikiteishi Aitsugu [Nomura Trades Suspended]*, ASAHI SHIMBUN, Mar. 12, 1997, at 3; *Banks, Companies Suspend Dealings with Nomura*, DAILY YOMIURI, Mar. 12, 1997, at 1. The California Public Employees' Retirement System ("CALPERS") also removed Nomura from a list of 14 approved fund management firms. *Biggest U.S. Pension Fund to Halt Dealings with Nomura*, DAILY YOMIURI, Mar. 19, 1997, at 12.

³⁶⁸ *Securities Watchdog Files Complaint Against Nomura*, DAILY YOMIURI, May 14, 1997, at 1.

³⁶⁹ *DKB Clean-up Bid Under Cloud of Doubt*, DAILY YOMIURI, June 11, 1997, at 14.

4. *Stable Stockholders (Antei Kabunushi)*

Active stockholders in holding companies' subsidiaries and in holding companies themselves may provide one means for ensuring that management of particular companies in company groups with concentrations of power to control other enterprises, remain focused on company profits rather than on other political, social, or personal agendas of government bureaucracies, management, or other companies in the group. Stockholders are arguably another absentee among possible external, non-bureaucratic sources for checking abuses of excessive concentrations of economic powers in Japan.

In addition to accepting low dividends,³⁷⁰ stockholders of Japan's companies are typically less than active, make infrequent use of derivative actions, and participate less in annual general meetings than they could. The absence of external pressure from stockholders could lead to lost opportunity costs in Japan's economy if stock companies fail to change as quickly as they would with outside pressure. The lack of external pressures in Japan has been blamed for the fact that while the United States confronted downsizing by the mid-1980s, Japan appears to have addressed the issue quite slowly.³⁷¹

Changes in deregulation, internationalization, economic recession, and politics may work to erode the foundations of the social-economic order on which Japan's cooperative stock company governance is based.³⁷² If the 1997 AMA revisions remove barriers to institutional investment, more active institutional investors may emerge and monitor management, though it is unclear if institutional investors can fulfill such a role. In any case, in the face of deregulation of concentrations of economic power to control industries, such as that wielded by company groups, experimentation with the empowerment of stockholders (other than the traditional stable stockholders) as one external means of governance might contribute positively as another external control of excessive concentrations of economic power in company groups.

³⁷⁰ In fiscal year 1991 (ending March 31, 1992), Japan's public stock companies yielded an average dividend of 1.97%. Despite a U.S. slump in earnings the same year, 86.88% of U.S. companies in one survey maintained an average dividend yield of over five percent. Howard D. Sherman & Bruce Andrew Babcock, *Redressing Structural Imbalances in Japanese Corporate Governance: An Institutional Perspective*, in *JAPANESE CORPORATE GOVERNANCE* (David H. Kaufman ed., 1994).

³⁷¹ Gilson, *supra* note 290, at 337.

³⁷² Milhaupt, *supra* note 318, at 48.

a. *Stockholder derivative (representative) actions*

Because of a growing number of active foreign investors, the issue of derivative suits in Japan has recently received attention overseas.³⁷³ The purpose for addressing the issue herein is limited to providing a tangible indication that general stockholders in Japan have not proven to be active external checks upon abuses by management.

It is sometimes stated that derivative suits are not an important factor within Japanese enterprise governance, although this is not entirely true. From 1950 until 1993, only thirty-one cases had reached the courts.³⁷⁴ There were 145 cases in the courts in 1994, possibly in response to the 1993 Commercial Code Amendments that replaced an expensive derivative suit filing fee structure based on the potential amount of recovery with a fixed fee of ¥8,200.³⁷⁵ As of December 1996, the total number of court cases in Japan related to derivative lawsuits reached 188, with 174 being filed in district courts and fourteen cases in high courts.³⁷⁶

The first stockholder suit against a bank in Japan took place when stockholders of the Dai-Ichi Kangyo Bank filed suit against all directors who had assumed posts since 1989.³⁷⁷ In 1997, actions were taken against Nomura Securities Co.³⁷⁸ executives and Sumitomo Corp.³⁷⁹ In response to a recent high profile incident of illegal copper trades at the Sumitomo Corp., a stockholder, supported by a citizens group, filed suit demanding compensation of ¥200.4 billion.³⁸⁰ Activism by U.S. stockholders may be contributing to stockholder activism in Japan. Within days of the recent exposure of Nomura's payments to *sōkaiya*,³⁸¹ the *Asahi Shimbun* reported a reference to the possibility of a derivative suit being filed by a U.S. institutional stockholder.³⁸² The number of such threats will only grow if the

³⁷³ There have been some recent English language articles which offer a more in-depth explanation of the situation in Japan than offered here. Kawashima & Sakurai, *supra* note 335.

³⁷⁴ Hayakawa, *supra* note 334, at 247.

³⁷⁵ *Id.*

³⁷⁶ *News*, SHŌJI HŌMU, Apr. 15, 1997, at 42. This source does not mention rates of success, or whether such cases involved large public or small private companies.

³⁷⁷ Plaintiffs took legal action due to criminal charges brought against bank's top management in a payoff scandal to corporate blackmailers. *DKB Shareholders to Sue Execs for 7.5 Billion Yen*, DAILY YOMIURI, July 6, 1997, at 2.

³⁷⁸ Plaintiffs took legal action in response to executives alleged arranged payments of illegal profits through an off-the-book fund linked to corporate blackmailers. *Id.*

³⁷⁹ *Sumitomo Corp. Sued over Huge Trading Loss*, DAILY YOMIURI, Apr. 9, 1997, at 2.

³⁸⁰ *Id.*

³⁸¹ The *sōkaiya* are alleged to have links to criminal syndicates and engage in bribery of management. In 1983, the number of practicing *sōkaiya* was estimated at 1,700, and at approximately 1,000 in 1997. *Wily Ways of Corporate Parasites*, DAILY YOMIURI, May 28, 1997, at 7.

³⁸² *Nomura Shōken ni Bei ga Kabunushi Sōshō*, [American Stockholders File Derivative Suit Against

Big Bang results in increased foreign investors in Japan's capital. The Japan Federation of Economic Organizations (*Keidanren*), with the support of the LDP panel on corporate governance, has called for changes in the Commercial Code by 1998 in order to cut-off the growing number of derivative suits.³⁸³ Under this plan, auditors can negotiate a settlement with directors and if a majority of the stockholders approve this settlement then the complaining stockholder's right to sue will become null and void.³⁸⁴ Considering the director-auditor relationship discussed above³⁸⁵ and the large number of management friendly cross-stockholdings in most large companies, this plan could significantly dampen the effectiveness of derivative suits as an external check, bringing the means back within the ultimate control of internal governance mechanisms.

Other related issues exist. For example, the rights of stockholders of a parent company to use a double derivative lawsuit against officers of a mismanaged subsidiary who may have caused decreased dividends to the parent company is not as established in Japan's Commercial Code as it is in U.S. law.³⁸⁶ In addition, although the number of derivative suits in Japan has increased in recent years, most of these cases did not involve listed companies, and stockholders have never won a case on allegations of mere poor management.³⁸⁷

b. *Stockholder activism*

The activation of general stockholder's meetings, as well as the adoption of policies to increase stockholder control of management and directors, has received attention in the wake of 1997 AMA revisions.³⁸⁸ Not all authorities agree, however, that adopting policies to activate general stockholder control is either appropriate or possible.³⁸⁹ Among other issues, critics point out that such ideas ignore the real world problems that general stockholders face, including the lack of an incentive to incur necessary monitoring expenses or to provide gratuitously any expert advice to the

Normura Securities], ASAHI SHIMBUN, Mar. 12, 1997, at 10.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ See *supra* Part IV.B.1.

³⁸⁶ *Mochikabukaisha Kaikin o Isogu na [Don't Rush Lifting the Prohibition on Holding Companies]*, ASAHI SHIMBUN, Feb. 4, 1997, at 5 [hereinafter *Lifting Prohibition*].

³⁸⁷ *LDP, Keidanren Panels Target Shareholder Lawsuits*, NIKKEI WEEKLY, Sept. 8, 1997, at 10.

³⁸⁸ See generally Shishido, *supra* note 325.

³⁸⁹ "It is probably not possible, nor cannot be thought to be appropriate, for the shareholders, who may possess only a petty amount, to management based upon the premise in the Stock Company Law that equity lies with the shareholders." *Id.* at 2 (author's translation).

company at general stockholder's meetings.³⁹⁰ According to the 1996 White Paper on General Shareholder Meetings, stockholders in fifty percent of the corporations on the market cast only ten to twenty percent of eligible votes.³⁹¹ Another thirty percent of the studied corporations reported voter participation rates of twenty to thirty percent.

In addition to the lack of derivative suits, general stockholder participation in governance at Japanese companies is typically weak. On June 27, 1997, 2,355 stock companies carried out annual stockholder meetings on the same day.³⁹² It is sometimes asserted that typical Japanese public companies have hollow, merely formalistic stockholder meetings that are devoid of substance.³⁹³ Chairs at such meetings may be aligned in a manner strategically separating the Chairman and officers from the general stockholders.³⁹⁴ The police may be on hand to ensure against disturbances.³⁹⁵ Management typically orders employee stockholders to arrive early and directs them to fill the front rows at the meeting hall. Quite often, employee stockholders occupy the first three rows nearest the front, forming a physical barrier between officers and the general stockholders, a practice known as "employee sovereignty" (*kyūgyōin no shūken*).³⁹⁶ Prior to the actual meeting rehearsals may be carried out with employee stockholders, during which employees practice asking and answering questions, and promptly affirming motions raised by management.³⁹⁷ According to the 1996 White Paper on General Shareholder Meetings, eighty percent of public corporations on the market completed their 1996 meetings within thirty minutes.³⁹⁸ These practices all allow the Chairman to move the meeting along easily, but they also create an atmosphere that discourages general stockholder participation.

In the wake of recent incidents, however, some stockholders have become more active. For example, at Nomura Securities Co. in 1997, the number of stockholders attending the general stockholder's meeting

³⁹⁰ *Id.*

³⁹¹ *Id.* at 3.

³⁹² *Kabunushi Sōkai 2,355 Sha [General Meetings of Stockholders 2,355 Companies]*, NIHON KEIZAI SHIMBUN, June 27, 1997, at 1. The actual number of companies might be slightly more or less. The Daily Yomiuri counted 2,351. *Stockholders Meetings Set Record*, DAILY YOMIURI, June 28, 1997, at 1. In 1996, this number was estimated at 2,241. *Wily Ways of Corporate Parasites*, *supra* note 381.

³⁹³ Shishido, *supra* note 325.

³⁹⁴ *Id.*

³⁹⁵ *Id.* At the request of approximately 2,200 companies, about 10,000 police officers were mobilized to keep order at meetings in Japan on June 27, 1997. *Stockholders Meetings Set Record*, *supra* note 392, at 1.

³⁹⁶ Shishido, *supra* note 325.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 2.

increased from 250 to 883.³⁹⁹ Apparently, some stockholders shouted in protest against the employee stockholders' monopolization of the front row at the meeting.⁴⁰⁰

Commercial Law Article 230-10 provides that the authority to make important decisions for Japanese companies belongs to either the board of directors or to shareholders through resolutions at general stockholder meetings. When a corporation restructures as a holding company, the directors of that holding company exercise the holding company's rights as the shareholders of the subsidiary company.⁴⁰¹ The Commercial Code currently provides no right for the stockholders of a holding company to directly participate in decision-making of the operational subsidiaries which form the wellspring of their profits.⁴⁰² Holding company stockholders also have no ability under the Commercial Code to exercise many important rights in the operations of subsidiaries. These non-exercisable rights include: 1) election of directors (Article 254); 2) dismissal of directors (Article 257); 3) the right to file a petition for a derivative suit (Article 267); 4) the right to demand injunctions against illegal acts (Article 272); 5) the right to file suit for cancellation of a resolution (Article 247); and 6) the right to make a claim for appointment of an auditor (Article 294).⁴⁰³ Article 245 of the Commercial Code which requires a resolution of the general meeting of the stockholders prior to any operations division spin-off, merger, or disposal of a substantial portion of operations, would also be circumvented under the holding company structure.⁴⁰⁴ Subsidiaries can be bought and sold and the holding company's stockholders will have no Opposing Shareholder's Claim for Buy-out under Article 245-2.⁴⁰⁵

In some respects, stockholder activism, as one means of providing an external check on stock companies, appears to have been receiving some reconsideration in the wake of the 1997 AMA revisions. The growing number of foreign investors also serve as a catalyst in this movement.⁴⁰⁶ U.S. pension funds alone reportedly held approximately U.S. \$13 billion of Japanese stock in recent years.⁴⁰⁷ Such pension funds have exercised their

³⁹⁹ *Stockholders Meetings Set Record*, *supra* note 392.

⁴⁰⁰ *Id.*

⁴⁰¹ MITI RESEARCH COMMITTEE, *supra* note 8, at 34.

⁴⁰² *Id.* at 21-22.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ Foreign stockholders in 1995 held over 20% of the issued and outstanding stock of over 74 listed companies. *Gaikokujin Mochikabu Hiritsu, Jyōba 993 Sha de Jyōshō* [Foreigner Stockholder Percentage, Increased at 993 Companies on the Market], NIHON KEIZAI SHIMBUN, June 26, 1996 at 1.

⁴⁰⁷ *Id.*

votes against below-average dividends, and in some cases have demanded board seats.⁴⁰⁸

On the other hand, the reception of foreign stockholders as an external element in governance has also been accompanied with allegations of difficulties. In 1989, T. Boone Pickens purchased nineteen percent of Koito Manufacturing Co. and became its largest single stockholder.⁴⁰⁹ Pickens demanded higher dividends and board representation, similar to the representation afforded to Toyota Motor Corp., another nineteen percent stockholder; however, his demands were summarily dismissed, as was his request for disclosure of the company's tax returns.⁴¹⁰ U.S. stockholders have also recently contended that their "no" vote proxies regarding dividends and board size issues have not been forwarded by bank trustees to the issuing companies.⁴¹¹

Proponents of decreasing limitations on holding companies can point out that the problems noted above existed prior to the new AMA Articles 9 and 9-2 with respect to enterprising holding companies. However, if deregulation increases concentrations of economic power via holding companies, the significance of such issues may heighten.

c. Group ties and cross-stockholding

In recent years, approximately seventy-two percent of listed shares on markets in Japan have been held by domestic corporations.⁴¹² Many of these shares are held in stable management-friendly stockholding arrangements where stocks are cross-held by several companies, sometimes within a company group, in which the companies possess business ties and hold shares on a management friendly basis.

These relations have both positive and negative aspects for company groups. The positive attributes of these formations probably did not supply the rationale for their formation. It has been said that their roots lay in the continuance of pre-war *zaibatsu* culture, rather than in their recently discovered utilitarian aspects of coordinating cooperative economic activity and foreclosing third party interference.⁴¹³

⁴⁰⁸ Aron Viner, *Bringing Outside Directors into Japan's Boardrooms*, in *JAPANESE CORPORATE GOVERNANCE*, *supra* note 370, at 54.

⁴⁰⁹ MONKS & MINOW, *supra* note 283.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 287.

⁴¹² Paul Sheard, *Interlocking Shareholdings and Corporate Governance*, in *THE JAPANESE FIRM, THE SOURCES OF COMPETITIVE STRENGTH*, *supra* note 48.

⁴¹³ Shimotani, *supra* note 97, at 16.

Company groups held together by cross-stockholding have been attributed the ability to mitigate certain informational and incentive problems in financial markets.⁴¹⁴ Cross-stockholding among member companies also provides protection against outside interference in the form of enterprise buy-outs (*kigyō baishu*) and third party interference in company management.⁴¹⁵ In addition, cross-stockholding among members supports intimate and perhaps cost-saving long-term relationships in daily transactions. Relational cross-stockholding in the Japanese system also may promote long-term planning wherein managers can ignore short-term swings in stock prices and accounting profits to pursue projects with longer pay back periods.⁴¹⁶

The Big Six enterprise complexes and company groups also may provide a means for mutual support among stock companies during downturns in the market. For example, in August 1997 the Mitsui group announced its plan to help Mitsui Construction Co. rebuild its finances.⁴¹⁷ The plan included loans from four financial institutions (Sakura Bank, Mitsui Trust and Banking, Mitsui Mutual Life Insurance Co., and Mitsui Marine & Fire Insurance Co.).⁴¹⁸ Two group members, Mitsui Fudosan Co. and Mitsui & Co., a real estate developer and a leading trading company, respectively, also allegedly agreed to support the operations with preferential orders.⁴¹⁹ Some analysts in Japan explain the move not as long-range business planning but as short-term protection of corporate pride or merely a strategic move to protect declines in their own stockholdings.⁴²⁰ If Mitsui Construction Co. failed, other Mitsui companies might also fear having their bond ratings downgraded.⁴²¹ With respect to the related group banks, if Mitsui Construction Co. were to fail, they may be accused of not taking care of customers or not checking their credit-worthiness.

⁴¹⁴ Takeo Hoshi, *The Economic Role of Corporate Grouping and the Main Bank System, in THE JAPANESE FIRM, THE SOURCES OF COMPETITIVE STRENGTH*, *supra* note 48.

⁴¹⁵ Kawakita, *supra* note 46, at 9. Some have also recently noted that not all cross-stockholding may lead to insulation of management. Intra-stock company stockholding may tend to insulate (about 1/3 of total cross-holdings) but ownership by financial intermediaries within the company group may tend to discipline management. ROE, *supra* note 131, at 181.

⁴¹⁶ Gilson, *supra* note 290, at 332-33.

⁴¹⁷ Masako Fukuda, *Group Ties Get Builder Out of Fiscal Bind*, NIKKEI WEEKLY, Aug. 18, 1997. The plan calls for Mitsui Construction Co. to cut interest bearing debts and pledge to cut its work force of 5,460 by 560, as well as concentrate on projects with higher profit margins.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ Announcement of the plan sent Mitsui Construction's stock up 48.1% higher than it had been one week prior to the announcement. *Id.*

⁴²¹ *Id.*

In addition to their alleged positive attributes, group formations have less positive attributes. For example, some identify them as one factor behind Japan's allegedly closed markets.⁴²² So-called "preferential" trading relationships among company groups do not always reflect economic efficiencies, and close relationships within company groups might foster exclusionary trading practices for protectionist reasons even in the absence of tangible economic efficiencies.

The Big Six are renowned for their famous president's clubs (*Shacho Kai*), which allegedly function as a medium for inner-complex organization and information sharing. There have been allegations that these clubs support the allegedly closed nature of Japan's markets, orchestrating actions by members of the Big Six. This view was not shared by the 1994 Japan Fair Trade Commission Investigation of Enterprise Complexes (*Kōsei Torihiki Inkai Kigyōshūdan Chōsa*), which found that:

Regarding the president club member enterprises, which enterprises form the six large enterprise complexes, the visible stable stockholding interdependencies, and dispatches of workers, and trading relationships, the extent of such relationships cannot be called strong; moreover, they have become extremely weakened and it is difficult to assert that the six large enterprise complexes possess exclusive or closed trading customs.⁴²³

Intra-group assistance, however, is neither guaranteed nor unlimited.⁴²⁴ Bail-outs like Mitsui's and the coordinated efforts facilitated through president's clubs, may change as cash strapped companies and financial institutions try to deal with bad debt and the need for cash and returns on investment in the late 1990s economy.⁴²⁵ In addition, from the beginning of the latter half of the Meiji Era through the Sino-Japanese War of 1937, a significant number of stockholders demanded extremely high

⁴²² Sheard, *supra* note 412, at 311 (citing Chalmers Johnson, *Trade, Revisionism, and the Future of Japanese-American Relations*, in SOCIETY FOR JAPANESE STUDIES, JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 105-36 (K. Yamamura ed., 1990)).

⁴²³ MITI RESEARCH COMMITTEE, *supra* note 8, at 17.

⁴²⁴ Near the same time, Sakura Bank cut-off Daito Kogyo Co., a mid-sized contractor to which Sakura, as its main bank, had already lent more money than Japan's other 46 banks had lent to a general contractor. Masako Fukuda, *Another Builder Seeks Protection from Creditors*, NIKKEI WEEKLY, Aug. 25, 1997, at 8.

⁴²⁵ See Stephen D. Prowse, *The Structure of Corporate Ownership in Japan*, 47 J. FIN. 1121, 1138-40 (1992).

dividends through general meetings of stockholders.⁴²⁶ Measures supported by the government probably helped encourage and craft the current upper-hand of management and relational governance institutions; politics may change the situation, or economics may gradually demand changes which politics might not move to contain.

Whether the Big Six, due to their closely knit economic relations, actually result in exclusive or closed markets is an issue of contention between the United States and Japan and has been the subject of the Japan-U.S. Structural Impediments Initiative talks. It is clear, however, that the Big Six constitute a large concentration of economic power capable of influencing companies and markets in Japan. With respect to governance, they possess the power to have both positive and negative effects. The issue in light of the 1997 AMA revisions is whether such awesome economic forces should be allowed to establish a new form of entity, the holding company, to rationalize their economic control over other enterprises given that they already enjoy large and concentrated economic power.

C. *The Main Bank System*

Japan's governance has been characterized as bank-centered with cross-stockholders providing an important monitoring mechanism. Commentators such as Milhaupt have alleged that perhaps Japan's system, with its main banks, offers benefits not otherwise found in the U.S. system.⁴²⁷ The formation of this system does not appear to have arisen from efficiencies, however. In 1942, the Government of Japan promoted a new financial system and the formation of the National Financial Control Association (*Zenkoku Kin'yū Tōseikai*) to organize banks' consortia under the guidance of the Bank of Japan.⁴²⁸ The Association instructed "manager banks" to monitor borrowers.⁴²⁹ This system was promoted as statecraft designed to shore-up government control of industry in the war economy.⁴³⁰

The main bank plays a strong role as a controller and monitor of Japanese companies.⁴³¹ In its role as lender, the main bank requires reviews

⁴²⁶ Hayakawa, *supra* 334, at 239.

⁴²⁷ Milhaupt, *supra* note 318. "The *keiretsu* system and other, less cohesive corporate groupings are a means of encouraging asset-specific investments and product market competition, thus constraining opportunism and shirking." *Id.* at 25. "These relationships, in effect, provide an alternative to the disciplining and risk-bearing functions played by capital markets in some other economies." Milhaupt also points out that bank monitoring activities may be decreasing due in part to lender liabilities. *Id.* at 50-52.

⁴²⁸ Okazaki, *supra* note 48, at 368-69.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ Mark J. Roe & Ronald J. Gilson, *Understanding the Japanese Keiretsu: Overlaps Between*

of borrower's business plans, and in circumstances of poor performance, it intervenes to impose new management or business strategies.⁴³² Main banks may also act as the monitor for other banks lending to the same corporate client.⁴³³

The role of the main bank in governance, however, has limitations. The role of banks probably does not improve normal corporate governance before crisis, but only facilitates restructuring when big problems arise⁴³⁴ such as might threaten the main bank's interests as creditor. Also, banks may instigate or fail to monitor abuses that benefit bank monitors, such as over-expansion and over-reliance on debt financing.

With regard to the issue of financial industries developing excessive power and control, the Finance System Research Committee determined that because Article 11 would remain intact the danger of such power was not great.⁴³⁵ The Committee indicated that adequate care and attention was still required to make certain such results do not arise.

Even under the present conditions and under Article 11, Japanese city banks wield considerable economic influence. While the pre-war rate of owned corporate capital to financed capital in Japan (sixty-six percent) was comparable to the U.S. rate (fifty-two percent), by 1972 the Japanese rate slipped to around sixteen percent and has since held steady at that rate.⁴³⁶ Between 1990 and 1992, the asset amounts of the three largest banks in Japan were about three times as large as the amounts of assets in the three largest U.S. banks, even though Japan's GNP was only about sixty percent of that in the United States and the largest Japanese industrial firms are smaller than the largest U.S. firms.⁴³⁷ The main bank system is yet another important prong of governance that points to concentrated control and in-group monitoring.

V. RELATED LEGAL ISSUES

In addition to issues directly relating to Chapter IV of the AMA and the 1997 AMA revisions, a number of other legal issues deserve attention. First, there exist concerns that deregulation prohibitions under Chapter IV will result in increased violations of other provisions of the AMA. In

Corporate Governance and Industrial Organization, 102 YALE L.J. 871; Milhaupt, *supra* note 318, at 22.

⁴³² Roe & Gilson, *supra* note 431, at 879.

⁴³³ *Id.*

⁴³⁴ *Id.* at 880.

⁴³⁵ *JFTC Support*, *supra* note 197.

⁴³⁶ JOHNSON, *supra* note 28, at 10.

⁴³⁷ ROE, *supra* note 131, at 182.

addition, domestic concerns exist with respect to other areas of law such as tax, labor, and the Commercial Code. In particular, the most often expressed concerns include the need to 1) increase public disclosure of information regarding enterprises, 2) support laborers and the labor unions' rights, and 3) prevent control of industries through finance and investment.⁴³⁸ These concerns are briefly addressed below.

A. *AMA Concerns*

Relations within large-scale enterprise groups may harm competition in the market. On the other hand, proponents of the principal of deregulation have argued that the purpose of the AMA is to protect against restraints of competition in trade, without regard to the indirectly related standards found in Articles 9, 9-2, and 11.⁴³⁹ According to this argument, AMA provisions such as the following should sufficiently restrict equity structures and related activities which result in "substantial restraints on competition in particular fields of trade":⁴⁴⁰ Article 1, Prohibition of Private Monopolization and Undue Restraint of Trade; Article 10, Prohibition of Particular Stockholdings by Companies, Filing Requirements;⁴⁴¹ Article 13, Restrictions on Interlocking Directorates; Article 14, Restrictions on Stockholdings by a Person Other than a Company; Article 15, Restrictions on Amalgamations;⁴⁴² and Article 16, Restrictions on Acquisitions of Business.

Some critics blame MITI and interested large enterprises for pushing holding company deregulation ahead without paying adequate attention to AMA concerns.⁴⁴³ Lax AMA enforcement in Japan is part of the reason why deregulation creates a perceived risk. On this point, one might also

⁴³⁸ *JFTC Support*, *supra* note 197.

⁴³⁹ *See generally* MITI RESEARCH COMMITTEE, *supra* note 8.

⁴⁴⁰ *Id.* at 16.

⁴⁴¹ Article 10 of the AMA prohibits stockholding and acquisitions of stock that 1) may have the effect of "substantially restraining competition in any particular field of trade," and 2) have occurred through unfair trade practices. For an English language explanation of how Article 10 is implemented, see Fair Trade Commission Executive Bureau, *Administrative Procedure Standards for Examining Mergers, etc. by Companies*, 19 FTC/JAPAN VIEWS (1995) (discussing procedures issued on Sept. 11, 1981, as revised on Aug. 18, 1994).

⁴⁴² Article 15 of the AMA prohibits mergers of companies if the effect of such merger may be to substantially restrain competition in any particular field of trade, or if unfair trade practices have been employed in the course of the merger. For an English language explanation of how Article 15 is implemented, see Fair Trade Commission Executive Bureau, *supra* note 441.

⁴⁴³ *Kabunushi no Kenrisokonau Osore [Fear of Injury to Stockholder's Rights]*, ASAHI SHIMBUN, Feb. 25, 1997, at 9 (commentary by Member of the JFTC Research Committee and Kyoto University, Professor Masahiro Shimotani).

have expected that the deregulation measures would generate adverse knee-jerk reactions overseas, where the words *keiretsu* and *zaibatsu* connote trade deficits, informal trade barriers, and closed markets.⁴⁴⁴ JFTC Chairman Yasuchika Negoro, however, recognized that legal and administrative obstacles have obstructed enforcement of the AMA, and vowed strict enforcement as deregulation progresses.⁴⁴⁵

1. Control of Abuses of Economic Power under General AMA Provisions

The revision of AMA Articles 9, 9-2, and 11 are of fundamental importance in Japan wherein Article 1 of the AMA provides that one of the main purposes of the AMA consists of "preventing the excessive concentration of economic power" to "promote the democratic and healthy development of the national economy. . . ."⁴⁴⁶ Two issues of concern are a fear of greater inhibitions on free and fair competition and restraints on production, sales, prices, and technology in light of less than aggressive AMA enforcement.

One may argue that the alleged closed practices of mutual trading between *keiretsu* enterprises pose little threat in the now open Japanese market because exclusive trading can only harm competition where access to the market is closed. According to this argument, in Japan's open markets where enterprises are strained under severe international competition, yen fluctuations, and price deflation, inefficient *keiretsu* activities in exclusive dealings are not practicable and it is hard to believe that the holding structure would be adapted by *keiretsu* groups to strengthen and expand control over the group beyond expansions which create efficiencies.⁴⁴⁷ Under this efficiency theory, proponents of deregulation argue that mere differences in economic power between large groups and mid-sized companies do not provide an

⁴⁴⁴ Although the *keiretsu* are commonly thought to create trade barriers based upon non-competitive and inefficient trade relations, some recent commentators suggest the *keiretsu*'s efficiency as a source of the alleged exclusionary effects. See Roe & Gilson, *supra* note 431. While the U.S. government often names *keiretsu* relationships as suspects responsible for Japan's closed markets, one report appears to praise aspects of the *keiretsu* system. See H.R. COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS, 101ST CONG., 2D SESS., REPORT OF TASK FORCE ON THE INTERNATIONAL COMPETITIVENESS OF U.S. FINANCIAL INSTITUTIONS 66, 189-90, 193-94 (Comm. Print 101-7, 1990) (noting that Japanese "cross-shareholding arrangements create linkages with real advantages; . . . the Japanese *keiretsu* system [is] a very effective system designed to maintain Japanese business competitiveness.").

⁴⁴⁵ *FTC Pushing for Revision of Antimonopoly Law*, DAILY YOMIURI, Jan. 17, 1997, at 12 (statement from Negoro's speech to a lecture meeting of the Yomiuri International Economic Society on Jan. 16, 1997).

⁴⁴⁶ AMA art. 1.

⁴⁴⁷ MITI RESEARCH COMMITTEE, *supra* note 8, at 16.

adequate reason to prohibit the former. Accordingly, as long as the company groups do not violate antitrust provisions, large-scale enterprises should replace other enterprises if they are more efficient.⁴⁴⁸ This argument assumes, however, the absence of monopoly rents and a sufficiently open market. In any case, it does not seem warranted to treat pure holding companies as per se illegal merely because of their form. It does not seem that in Japan today, pure holding companies and probably even large holding companies could be so harmful to competition and so void of any redeeming virtues that they should be deemed conclusively illegal.

Articles 10 (restrictions on stockholding by companies) and 14 (restrictions on stockholding by persons other than companies) restrict stockholdings if "the effect of such acquisition or ownership may be substantially to restrain competition in any particular field of trade."⁴⁴⁹ Both Articles 10 and 14 provide for certain duties to notify the JFTC with respect to stockholdings and acquisitions.⁴⁵⁰ It is not obvious from the AMA text why the Article 9 prohibition on holding companies which have a "large influence that extends to the private economy" and tends to obstruct "free and fair" competition is necessary when Articles 10 and 14 may cover this area. The answer may rest on the difficulty of proving a "substantial restraint." In contrast to the absolute ban under prior Article 9, the drawback of Articles 10 and 14 lies in the monitoring costs of regulating by "effect" rather than by "form."

With regard to specific trading activities which injure competition and which could increase due to concentrations of business equity, the AMA and the Unfair Competition Prevention Act contain general provisions probably easily recognizable to lawyers in Germany and the United States. As a matter of law in action, however, one must consider whether the actual application of existing AMA measures outside of Chapter IV (law in book), function sufficiently to curb the possible effects of concentrated economic power in Japan. Then, one must consider whether AMA deregulation is likely to increase the frequency of AMA violations.

⁴⁴⁸ *Id.* at 15.

⁴⁴⁹ AMA arts. 10, 14.

⁴⁵⁰ AMA Article 10 requires domestic companies whose business is other than financial, with total assets exceeding ¥2 billion, and all foreign companies whose business is other than financial, holding shares of companies in Japan, to submit reports in accordance with JFTC Rules within three months of each financial year's conclusion. AMA Article 14 also requires a report of holdings to the JFTC in accordance with Commission rules within 30 days of acquiring holdings in excess of 10% in a company. This requirement applies only when a person, other than a legal entity, holds stock in domestically competing companies. *Id.*

2. *Special Concerns of Mid-to-Small Companies*

Some mid-to-small Japanese companies have reservations with respect to the 1997 deregulation. According to a representative of the Japan Chamber of Commerce and Industry (*Nisshō*), an organization of mid-to-small size enterprises, deregulation should have been conditioned on strengthening the JFTC's supervisory functions so that large companies' power to control business does not become excessively concentrated such that superior bargaining positions are used to control mid-to-small size companies against their will.⁴⁵¹

3. *Lack of Civil Actions*

Harry First, in his article *Antitrust Enforcement in Japan*, indicates that by some measures JFTC antitrust enforcement in recent years approaches the level of government antitrust enforcement in the United States.⁴⁵² Japan's AMA, however, lacks in practice an effective means of encouraging civil enforcement of AMA policy.

Although the JFTC has declared plans to increase staff and step up enforcement in the near future, such measures are arguably insufficient. An example of an inadequate measure is the hiring of ten additional staff members to review cases.⁴⁵³ As of 1996, the JFTC employed 534 officials. According to the General Secretariat, 181 were investigators in the JFTC's Investigation Bureau and fifty-five were investigators in local offices.⁴⁵⁴ A recent *Yomiuri Shimbun* survey, however, disclosed that the JFTC actually had only 200 investigators since it had shifted some of the approved investigators to non-investigative positions.⁴⁵⁵

As of May 1996, there had been only twenty cases of private parties claiming damages for breaches of the AMA in lawsuits.⁴⁵⁶ According to First, Japan has made only the slightest efforts to promote private enforcement, perhaps because permitting private actions would reduce JFTC control over antitrust policy by turning the construction of doctrines to the courts.⁴⁵⁷ A

⁴⁵¹ Akihiko Isono, *Keizai Kai, Tsugi no Itte [The Economic World, Its Next Move]*, 75 *ECONOMISUTO [WEEKLY ECONOMIST]*, Apr. 1, 1997, at 47 (citing Mr. Kosaku Inaba, a representative of *Nisshō*).

⁴⁵² Harry First, *Antitrust Enforcement in Japan*, 64 *ANTITRUST L.J.* 137 (1995).

⁴⁵³ *FTC Pushing For Revision of Antimonopoly Law*, *supra* note 445.

⁴⁵⁴ *FTC Told to Stop Shuffle, Keep Investigators Active*, *DAILY YOMIURI*, Apr. 8, 1997 at 2.

⁴⁵⁵ *Id.*

⁴⁵⁶ MASAHIRO MURAKAI, *DOKUSENKINSHI-HŌ NO NICHIBEI HIKAKU (SHITA) [A JAPAN-U.S. COMPARISON OF ANTIMONOPOLY LAW (2)]* 109, 169 (1992).

⁴⁵⁷ *Id.* at 180.

1996 MITI committee's research paper has called, however, for the construction of greater means for private remedies for breaches of the AMA.⁴⁵⁸

Again, civil actions in antitrust, another possible external or civilian means of directing and controlling the abuse of substantial concentrations of economic power to control enterprises, remain all but foreclosed. Private interest is not necessarily more suitable for the task, but one should note the apparent absence of sufficiently effective provisions providing for such a civil control as a matter of law in practice.⁴⁵⁹

B. Labor Law Issues

The Japan Trade Union Confederation (*Rengo*) and other labor organizations called for revisions to the Trade Union Law in response to the deregulation of holding companies. The Japan Trade Union Confederation claimed that the Trade Union Law should be revised to provide unions the right to bargain collectively with a parent holding company and called for the establishment of a Commission for the Reform of the Labor Law (*Rō-shihōsei Shingikai*).⁴⁶⁰ One term of the agreement among the leading political parties to support lifting the ban included the establishment of a two-year study of the issue of reforming the Labor Union Act (*Rōdōkumiai Hō*) with regard to bargaining rights.⁴⁶¹

With respect to companies and bargaining, the Japanese Economic Federation (*Nikkeiren*), citing the report of a Labor of Ministry Expert

⁴⁵⁸ From late 1995 through 1996, the Law of Civil Remedies Research Committee, composed of more than 16 prominent Japanese legal professors and lawyers, met to discuss this issue. In their publication MINJITEKIKYUZAISEIDO KENKYŪKAI CHŪKAN TORIMATOME—JIRITSUTEKI NA KYŌSHITSUJYO NO KEISEI NI MUKETE [PRELIMINARY CONCLUSIONS OF THE LAW OF CIVIL REMEDIES RESEARCH COMMITTEE—TOWARDS FORMATION OF AN AUTONOMOUS COMPETITION SYSTEM] (Aug. 1996) (on file with author), the Research Committee states:

[The JFTC] cannot help but choose to focus as a point of emphasis on those incidents which socially have very large impact; the Fair Trade Commission's measures do not extend to other incidents. Therefore, when the Fair Trade Commission does not take measures, illegal acts are not eliminated, and moreover, the remedies for private persons injured by such acts are insufficient.

Id. In order to overcome this type of problem, it is necessary to begin to prepare a system aiming for dispute resolution by entities participating in the market such as parties in competition, etc., without consulting bureaucratic measures, and by effective methods of civil remedies in the court system." *Id.* at 1.

⁴⁵⁹ The authors are aware that the JFTC and MITI have been considering increasing private remedies under the AMA and that to a certain extent private remedies are available within Article 709 (Torts) of the Civil Code.

⁴⁶⁰ *Ban Likely Listed, supra* note 7; *Mochikabugaisha to Kogaisha Rōkumi no Koshō* [Negotiations Between Holding Companies and Labor Unions at Subsidiaries], ASAHI SHIMBUN, Mar. 4, 1997, at 4.

⁴⁶¹ *Holding Companies Fundamentally Deregulated Next Year, supra* note 201.

Committee (*Rōdōshō no Senmonka Kaigi*), claimed that under Article 7 of the Trade Union Law, current precedent provides that a parent company may be treated as an employer when it can be concretely determined to occupy such a position.⁴⁶² This interpretation has not been generally accepted by others, including the Chairman of the Expert Committee, who concludes that revisions are necessary in light of deregulation and other current issues.⁴⁶³

C. Tax Reform

In tandem with the introduction of pure holding companies, business circles asked for the introduction of a consolidated tax system under which the total revenues of group companies would be taxed.⁴⁶⁴ Such a system would allow group members to offset losses posted by some subsidiaries with profits from others.⁴⁶⁵ Business circles also requested the introduction of tax breaks on the transfer of real estate and other assets to subsidiaries in new holding company formations.⁴⁶⁶

By February 1997, it was announced that the Government Tax Research Committee planned to begin research regarding tax law restructuring for the year of 1998, and the break-up of NTT was to be facilitated as a special exception to the tax laws in effect.⁴⁶⁷ The Ministry of Finance decided to implement special measures discussed for NTT including 1) setting off the income from profitable companies against unprofitable companies for a limited time (a proposed three years), and 2) tax exemptions for realized gains on transfers of assets.⁴⁶⁸ One estimate stated that without such measures NTT would face ¥400 billion in transfer taxes on roughly ¥1 trillion of gains on transfers.⁴⁶⁹

VI. CONCLUSION

Whether or not Japan made the right choice with the 1997 AMA revisions is beyond the scope of this Article. If effective governance mechanisms are in place to ensure that stockholders' rights are upheld and

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Ban Likely Lifted*, *supra* note 7.

⁴⁶⁵ *Id.* *Call for Consolidated Taxation*, *supra* note 213.

⁴⁶⁶ *Id.*

⁴⁶⁷ *NTT Bunwari Jōteki Hi-kazei Ni [Break-up of NTT Without Taxation]*, NIHON KEIZAI SHIMBUN, Feb. 25, 1997, at 1.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Repeal of the Prohibition on Holding Companies*, *supra* note 6.

that free competition between companies is not obstructed, then holding companies should not be per se illegal. The goal of the Article has been to explain 1) the general issues relating to 1997 AMA deregulation of Articles 9, 9-2, and 11; 2) the issues at stake which require a proper weighing of the social benefits and gains involved in the holding company deregulation; and 3) the issues regarding the apparent need for stepping up active enforcement of general AMA violations and corporate governance.

This article examined some of the projected benefits of deregulating holding companies in Japan, as well as some of the critical views, which point to possible negative effects of holding company relationships and increased use of the pure holding company structure in Japan, *i.e.*, weakened general stockholder rights, the need for more aggressive antitrust enforcement and governance mechanisms, and a weakening of labor rights. Proponents of lifting the ban in Article 9 pointed out, probably correctly, that in today's Japan merely possessing an abundance of capital will not provide large-scale enterprises with abusive political powers.⁴⁷⁰ There also appears to exist little suspicion that any *zaibatsu* revival is possible.⁴⁷¹

Under the "classical evolutionary paradigm," what survives is presumptively efficient.⁴⁷² States compete by producing efficient law, and those that fail to do so receive less than the optimal amount of economic activity.⁴⁷³ As the 1995 working group report by the MITI Research Committee indicated, competition among enterprises in the global economy does not end with inter-company competition; it now also entails aspects of competition among systems which lie at the base of enterprises' (and nations') activities.⁴⁷⁴ It is the search for more of this optimal economic activity that lies behind the recent deregulation. In the midst of global-sized enterprises and large foreign mergers, large well-organized company groups under the control of holding companies may be important tools for Japan to meet global competition in the twenty-first century. As one part of Japan's deregulation process, the revision of the absolute prohibitions of Chapter IV of the AMA will at least provide Japanese industries another choice among organizational structures.

⁴⁷⁰ MITI RESEARCH COMMITTEE, *supra* note 8, at 15.

⁴⁷¹ If holding companies do not expand corporate control into new fields during the 1990s, but merely facilitate large corporations' abilities to branch-off existing departments into totally separate corporations, such fears will prove unfounded. Currently, costs prohibit forming such large scale holding companies. *Mochikabugaisha Jishitsu Zenmenteki Kaikin ni [Towards an Absolute and Actual Repeal of the Prohibition on Holding Companies]*, NIHON KEIZAI SHIMBUN, Feb. 25, 1997 at 1.

⁴⁷² Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641 (1996).

⁴⁷³ *Id.*

⁴⁷⁴ MITI RESEARCH COMMITTEE, *supra* note 8, at 5.

It is possible that deregulation could stimulate, directly or indirectly, new beneficial developments in stock company governance, antitrust enforcement, venture capital, etc. For example, the reporting requirements for holding companies offer an opportunity for the JFTC to examine the relationships between the involved companies. The deregulation might also lead to an increased number of institutional stockholders, which may contribute to the governance mechanism.

The history of the AMA prohibitions on holding companies probably does not supply a good example of the evolutionary paradigm in action. Japan systematically liquidated the giant holding companies under the dictates of the Potsdam Declaration, which strictly ordered the “democratization” of Japan—not the creation of efficiency. Politics played an important role in the creation of the *zaibatsu*, their destruction, and their re-emergence. Economics alone did not require Japan’s economic history to run this course, although the politics obviously were not immune from economics. During the Meiji Era, Japan could have adopted an open door policy to foreign investment instead of closing it out. Later, measures could have been taken to curb the growth of the *zaibatsu* rather than encourage them. Japan could have adopted stronger capital markets rather than stronger banks after the Second World War, and if it had done so its organizational structure and financial intermediaries *might* have looked more like those found in the United States, for better or worse. Japan could have also adopted rules of law that encouraged civil enforcement of the AMA and stockholder lawsuits against management. Inefficient rules may be challenged because the challengers find it profitable to do so,⁴⁷⁵ but there is no guarantee that the choice challengers have made is always the most efficient, nor that new laws will be more efficient than prior laws.

A. *Likelihood of Meaningful Governance Gains as a Result of the 1997 Deregulation*

Proponents have heralded the repeal of Article 9 as a means of creating governance gains, returning the original freedom of choice in industrial organization to economic enterprises, moving forward global harmonization of economic law, and encouraging foreign investment. Some of these rationales appear less than convincing. For example, the “original free choice in firm structure” rationale is a fallacy. Firm structures can be chosen only in accordance with the law and the question is whether the law is reasonable.⁴⁷⁶

⁴⁷⁵ *Id.*

⁴⁷⁶ Sigenori Honma, *Kigyōshūchūkisei toshite no Kabushikihyōkisei—Sōron* [The Legal Regulation of Business Concentration—An Overview], KEIZAIHOGAKKAINENPŌ DAI 7 GŌ, MOCHIKABUKAISHA TO

Harmonization, in and of itself, also fails to support the repeal of Article 9. The main aim of international harmonization should be the harmonization of the environment of economic competition among markets in order to encourage overall economic efficiency and to protect the rights of consumers.⁴⁷⁷ Furthermore, it is possible that because of the unique economic power of the Big Six and *keiretsu* relationships, the ban on pure holding companies under Article 9 and regulations under Articles 9-2 and 11 may some day prove to have played an important role in supporting de facto international harmonization. In Japan, the Big Six and their related companies control nearly twenty percent of the national economy. Among OECD member states, only Korea has a similar concentration of large companies.⁴⁷⁸ The Korean Antimonopoly Law has a ban on holding companies under Article 8(1), a prohibition of cross ownership with large business groups in Article 9(1), and a prohibition against financial companies from large groups exercising their voting rights.⁴⁷⁹

With respect to gains from foreign investment in Japan, what increasing foreign investment requires more than pure holding companies is a market receptive to foreign competition, a market which offers stockholders a competitive return on investment. The percentage of foreign investments in the largest 225 Japanese listed companies has risen rapidly since 1990 to a high of 9.4%, despite the pre-1997 AMA prohibitions.⁴⁸⁰ Because of low returns in Japan, Japan's domestic capital has also begun flowing out into foreign investments.⁴⁸¹ Finally, if deregulating *keiretsu* increases the strength of company groups, Japan's commitment to making "*keiretsu* more open and transparent," as stated in the Final Report of the Japan-U.S. Structural Impediments Initiative Talks ("SII")⁴⁸² could be compromised.⁴⁸³

DOKUSENKINSHIHO [THE ANNALS OF ECONOMIC JURISPRUDENCE, HOLDING COMPANY AND THE ANTIMONOPOLY LAW] 25 (1996).

⁴⁷⁷ *Id.*

⁴⁷⁸ The Korean equivalent of the *zaibatsu* is referred to as the *chaebol*. A Korean *chaebol* is generally family-owned, similar to the pre-World War II *zaibatsu*. Examples include Hyundai, Samsung, Daewoo, LG, and Sunkyung. See Chul-Kyu Kang, *Diversification Process and the Ownership Structure of Samsung Chaebol*, in *BEYOND THE FIRM*, *supra* note 65, at 31-58.

⁴⁷⁹ SEUNG WHA CHANG, *WORLD ANTITRUST LAW AND PRACTICE*, at Korea § 36.6.2 (James J. Garret, ed.).

⁴⁸⁰ Ichirō Kawamoto et al., *Kabushikimochiai Kaishō ni Tomonau Hōteki Shomondai* [*Various Legal Problems of the Dissolution of Cross-Stockholdings*], 1436 SHŌJI HŌMU 7 (1996).

⁴⁸¹ *Id.*

⁴⁸² Final Report of the Japan-U.S. Structural Impediments Initiative Talks, May 22, 1991, translated in part in IYORI & UESUGI, *supra* note 92.

⁴⁸³ See Funahashi, *supra* note 229, at 135 (in Japanese); see also IYORI & UESUGI, *supra* note 92 (in English).

On a related note, the role of strengthening the competitive market system as a form of corporate governance has not received much attention in the literature debates in Japan on these issues, and perhaps it should. Greater de facto deregulation of the markets for products and services through effectuating stronger general and effective price competition policies, promotion of the market for managerial skills, and greater means of access to entrepreneurial opportunity for individuals, could perhaps provide governance gains equal to or exceeding any gains to be expected from the 1997 AMA revisions.

One can learn about the value of pure holding companies to Japan's economy by viewing other countries such as the United States, where pure holding companies are generally not restricted. A study of the uses of holding companies in the United States carried out by the JFTC itself, however, does not appear to provide support for the arguments in favor of lifting the ban promoted by the JFTC and MITI Research Committees. According to the JFTC Committee, the holding company structure is often used in the United States, although there are not many examples of pure holding companies and the few notable examples include: large corporations undergoing diversification strategies; mediums for overseas operations; trucking and airline industries which must deal with various labor and corporate policies; and regulated industries advancing into side-line businesses.⁴⁸⁴

Because the management of the core business is very important in the United States, only few in management feel any appeal lies in being led by a pure holding company.⁴⁸⁵ Even in the United States, shareholding by corporations was not allowed until New Jersey passed a 1888 law enabling manufacturing corporations to hold shares.⁴⁸⁶ After this change in laws, holding companies with subsidiaries in a vertical relationship became visible, Standard Oil being a typical example.⁴⁸⁷ Even after holding companies became an accepted structure, among those corporations on a 1917 list of America's largest 278 corporations, few corporations engaged in expansive business through the structure of a holding company.⁴⁸⁸ The list included only sixteen pure holding companies.⁴⁸⁹

In the United States, there are examples of holding companies in public utilities and banking, which are highly regulated industries. In such

⁴⁸⁴ MITI RESEARCH COMMITTEE, *supra* note 8, at 11.

⁴⁸⁵ *US Holding Companies are Advancing*, *supra* note 169.

⁴⁸⁶ *Id.* at 50.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* (citing a study by Harvard Business School Professor Alfred D. Chandler Jr.).

⁴⁸⁹ *Id.* at 51.

industries, holding companies may facilitate avoidance of risks that accompany diversification of public utilities, and also allow banks to branch out into other states and into new fields of business. Examples of using the pure holding company in international operations can also be seen among general enterprises.⁴⁹⁰

Thus, the U.S. example does not seem to provide strong support for the argument that pure holding companies will be greatly significant for Japan in terms of diversifying and retrofitting the overall economy. In fact, the year-long JFTC study of holding companies in Western countries concluded that in the United States large-scale corporations do not make much use of pure holding companies, and that upon lifting the ban only one percent of Japanese companies were forecasted to make positive use of the structure.⁴⁹¹

Nevertheless, businesses in many fields expressed beliefs that the prior pure holding company prohibition hindered industry's efforts to expand operations.⁴⁹² By February 1997, retail giants such as Daiei Inc., Jusco, and others had already announced plans to restructure under the holding company format upon deregulation.⁴⁹³ By March 1997, trading and entrepreneurs in the distribution business, as well as home electronics makers, and others such as Softbank, Orix, and the Big Six corporate complexes one-by-one began to announce preparations for adopting a holding company structure and spin-offs.⁴⁹⁴ Life insurance companies, insurance companies, and banks have also expressed keen interest in deregulation and the terms of the new legislation. When Daiei Inc. actually became the first to establish a pure holding company on December 17, 1997, Chairman Nakauchi stated that Daiei intended to use the holding company structure to divide the roles of the holding company and the mainstream business. The Executive Vice President indicated that the goals were the elimination of cross-shareholding and improvements upon transparency. Analysts pointed to more immediate financial concerns for adopting the new structure, such as the reduction of heavy debts through taking subsidiaries public.⁴⁹⁵

Financial institutions did not express unanimous support for the recent AMA deregulation in Chapter IV. Large banks favored a broad removal of restrictions while some securities and insurance industries

⁴⁹⁰ *Id.*

⁴⁹¹ *Lifting Prohibition, supra* note 386.

⁴⁹² *Call for Consolidated Taxation, supra* note 213 (citing Akio Kosai, President of Sumitomo Chemical Co.).

⁴⁹³ *Id.*; *Enterprise Tie-ups, supra* note 198.

⁴⁹⁴ *Id.*

⁴⁹⁵ Masako Fukuda, *Daiei Makes First Move on Holding Companies*, NIKKEI WEEKLY, Dec. 22, 1997, at 7.

indicated a preference for piece-by-piece removals.⁴⁹⁶ After all, Japan's securities market has undergone changes in recent years, and by January 1997, a widening gap has appeared between the values of stocks among banks, as well as between the value of the stock among Nomura Securities and the other big three securities companies.⁴⁹⁷ Although financial stocks fell generally within the industry, in part due to the *jūsen* bad debt situation, certain banks' stocks have fallen faster than others.⁴⁹⁸ The differences appear to result in part due to expectations that not all companies are expected to survive the coming Big Bang.⁴⁹⁹

To make matters worse, the Collective Research Office of Japan (*Nihon Sōgo Kenkyūsho*) indicated that the city banks may even suffer decreases in business upon the holding company ban's repeal, as it would become more possible for corporate groups to fund themselves and greatly reduce dependency on banks.⁵⁰⁰ Some experts such as members of Japan Securities and Economy Research Office (*Nihon Shōken Keizai Kenkyūsho*) predicted that repeal on the holding companies ban could also decrease the amount of sales in the stock market because the number of wholly-owned subsidiaries might increase, causing a decrease in publicly-owned affiliates.⁵⁰¹ Professor Hiroshi Okumura of Chuo University Department of Commerce expressed concern that lifting the ban on holding companies will not open Japan's securities markets but may hinder it by increasing the number of stable cross-stockholdings.⁵⁰²

B. Closing Remarks

Assuming there are certain gains to be derived by large company groups in Japan from pure holding companies in employee morale, clarification of responsibility, and innovation through spin-offs, there is no clear explanation in either the MITI or the JFTC Research Committee Reports as to the actual expected degree of significance of such economic gains to the national economy. In sum, the arguments published in favor of deregulation

⁴⁹⁶ *Ban Likely Lifted*, *supra* note 7.

⁴⁹⁷ *Kinyukabu Hirogaru Kakusa* [*Price Differentials Expanding in Financial Securities*], ASAHI SHIMBUN, Jan. 15, 1997, at 13.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

⁵⁰⁰ *Ginko Hanare Susumu Kanōsei* [*The Possibility of Increased Separation in Banks*], ASAHI SHIMBUN, Mar. 11, 1997, at 1.

⁵⁰¹ *Id.* According to the Asahi Shimbun more than one-half of the subsidiaries of U.S. holding companies are wholly-owned. *Kadai Nokoru Shosu Kabunushi Taisaku* [*Minority Stockholder Measures a Lingering Subject*], ASAHI SHIMBUN, Mar. 11, 1997, at 1.

⁵⁰² *Call for Consolidated Taxation*, *supra* note 213.

under Chapter IV of the AMA and in favor of free choice in firm structure appear incomplete.

The idea of revising AMA Article 9 and the idea of liberalizing the establishment of holding companies in and of itself are not unreasonable. However, taking into account that by cabinet ordinance many industries have been excluded from the safeguards in Articles 9-2 and 11, it is unclear to what extent the legislature has opened the flood gates. Only prescribing the Big Six with the ¥15 trillion limitation and not extending the prescription of the Article 9 Guidelines to encompass at least some of the other important company groups seems arbitrary. Also, had the ¥15 trillion limitation been fixed in the statute itself, rather than the Article 9 Guidelines, it would have provided a clearer commitment to check excessive economic power and perhaps a deserved guarantee to the public from the legislature.

In other places, such as in Article 9(5), the terms of the AMA revisions are considerably imprecise. For example, the phrase "large influence extends to the national economy and the progress of fairness and free competition becomes obstructed" has been left to the JFTC to interpret. The meaning of "large influence to national economy," where such influence cannot be easily measured, may be interpreted to create a very high hurdle against enforcement activities; perhaps "unreasonable or substantial influence upon the private economy or any market therein" would have been a better term. Also, the phrase "the progress of fairness and free competition" appears to imply that Article 9 is only concerned with increasing obstructions to competition, and has nothing to do with existing obstructions. Finally, because the only measure of enforcement available to the JFTC consists of the drastic dissolution of a holding company, the JFTC may feel pressure to only enforce the Article 9 provisions in extreme cases.⁵⁰³

According to Professor Masahiro Shimotani of Kyoto University, the odd thing about the 1997 AMA revisions is that the only point that really received any lasting attention was the issue of Labor Bargaining Rights (*Roshi Kōshō Ken*).⁵⁰⁴ In one recent article, he indicated that prior to the proposal of the 1997 AMA revisions to the Diet, the issues of excessive concentration of

⁵⁰³ The possibility of administrative guidance (*gyōsei shido*) and enforcement under Article 10 also deserves attention as related enforcement mechanisms. For example, see the role of administrative guidance in the NTT-DoCoMo-Case. *NTT ni Asshuku Shidō [Intensive Guidance to NTT]*, NIKKEI SHIMBUN, Apr. 11, 1997. The JFTC ordered NTT to decrease its 95% stake in NTT-DoCoMo, the mobile phone subsidiary of NTT, to 10% because its stockholdings lead to a substantial restraint of trade in the field of telecommunications. It is unclear whether the JFTC is willing to extend this policy generally to anti-competitive effects of company complexes and groups to order the liquidation of stakes in member companies.

⁵⁰⁴ *Discussion of the Lifting of the Prohibition*, *supra* note 135, at 34.

economic power, antimonopoly policy, information disclosure, protection of shareholder's rights, the consolidated tax system, and financial holding companies had not been thoroughly discussed. Related measures in important areas seem to have deserved greater attention than they received. These areas include issues such as private enforcement of antitrust violations, greater opportunities for owner participation in the control of management, greater access to venture capital and markets for smaller companies, individuals, and new market participants such as foreign companies.

