

1994

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Recommended Citation

Yoichiro Hamabe, *Changing Antimonopoly Policy in the Japanese Legal System - An International Perspective*, 28 INT'L L. 903 (1994)
<https://scholar.smu.edu/til/vol28/iss4/3>

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Changing Antimonopoly Policy in the Japanese Legal System—An International Perspective

The Antimonopoly Act of 1947 (AMA)¹ is one of Japan's most important laws impacting international business transactions. The AMA prohibits private monopolization, cartels, and unfair business practices in order to promote fair and free competition in the Japanese market, with an emphasis on the protection of consumer interests.²

Unlike the antitrust laws of the United States, the AMA is a single unit of comprehensive legislation.³ It consists of thirteen chapters. The general rules are set forth in chapter I of the AMA. Chapter II prohibits private monopolization and unreasonable restraints of trade. Chapter II also imposes surcharges (*kacho-kin*), which are calculated on the basis of the profits gained in violation of the AMA. Chapter III regulates trade associations by prohibiting certain activities because Japanese trade associations tend to restrict competition.⁴ The AMA also regulates

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1. Shiteki Dokusen no Kinshi Oyobi Kosei Torihiki no Kakuho ni Kansuru Horitsu [The Antimonopoly and Fair Trade Maintenance Act], Law No. 54, 1947, as amended [hereinafter AMA].

2. *Id.* art. 1; see also SHOHEI SHIBATA ET AL., DOKUSENKINSHIHO NO KAISETSU [COMMENTARY OF ANTIMONOPOLY ACT] 2 (Taisei ed., 1993). This recently published book was authored by the staff of the Japanese Fair Trade Commission (JFTC).

3. However, broadly speaking, Japanese antimonopoly laws may include The Subcontract Price Delayed Payment Prevention Act, The Improper Premiums and Improper Presentation Prevention Act, and other related laws or regulations. See *Antimonopoly Regulation*, ch. 9 *Supplementary Laws*, in 5 *DOING BUSINESS IN JAPAN* pt. IX (Z. Kitagawa ed., 1992).

4. SHIBATA, *supra* note 2, at 18.

certain monopolies (Chapter II-III); stockholdings, interlocking directorates, mergers, and transfers of businesses (chapter IV); cooperative price hikes (chapter IV-II); and unfair business practices (chapter V) by prohibiting certain conduct and requiring reports to the Fair Trade Commission of Japan (JFTC) with regard to specified activities.⁵ Chapter VI provides for various exceptions and exemptions, and chapter VII relates to indemnification of damages. This article focuses on the recent amendments to the AMA regarding JFTC enforcement (chapter VIII), litigation processes (chapter IX), and penal provisions (chapter X).⁶

Before discussing recent trends regarding the AMA, three significant characteristics of the Japanese legal system should be noted. First, the number of attorneys in Japan is relatively small,⁷ and private parties and companies rarely exercise their rights in court by using attorneys.⁸ Japanese people prefer to resolve conflict through negotiation to the greatest extent possible. The Japanese legal system is primarily enforced by administrative authorities. These bureaucrats have quasi-legislative, quasi-judicial, and administrative powers. Although most of these administrative officers are not lawyers, they broadly operate the Japanese legal system.

Second, even though litigation occurs less often in Japan than in the United States, the courts play a stable and important role in the Japanese legal system. Japan adopted a continental or civil law system, where statutes, as opposed to court precedent, supply the binding authority. However, in practice, Japanese judges follow court precedents in most cases. As a result, legal practice in Japan is very similar to that in common law countries like the United States. In a sense, Japanese courts follow precedent more strictly than do American courts, which sometimes appear to change their rules drastically. As a result of this attitude, Japanese courts tend to sustain the more conservative logic or argument presented.

Third, in comparison to the American judicial system, the Japanese judicial system has generally, although perhaps inadvertently, failed to protect consumers' or other individuals' interests. Because jury trials, punitive damages, broad discovery, and high accessibility to lawyers do not exist in Japan, consumers or other individuals in that country face a more difficult challenge when attempting

5. The JFTC is a national administrative agency established by the AMA. The JFTC is somewhat similar to the Federal Trade Commission and Antitrust Division of the Justice Department in the United States. However, the JFTC has broader quasi-legislative powers. MITSUO MATSUSHITA, *AMERIKA DOKUSENKINSHI-HO* [AMERICAN ANTITRUST LAWS] 31-32 (Univ. of Tokyo Press 1982); WILBUR L. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* § 16.13, at 510 (4th ed. 1991).

6. Its thirteen chapters consist of chapters I, II, III, III-II, IV, IV-II, V, VI, VII, VIII, IX, IX-II (Miscellaneous), and X.

7. In Japan, very few individuals (only 600 to 700) are allowed to pass the Japanese bar exam per year. See Elliott J. Hahn, *An Overview of the Japanese Legal System*, 5 NW. J. INT'L L. & BUS. 517, 522-31 (1983) (describing why there are few Japanese lawyers); *Legal Profession Adjusting to Changing Status Quo*, NIKKEI WEEKLY, Feb. 7, 1994.

8. JOHN O. HALEY, INTRODUCTION: LEGAL VS. SOCIAL CONTROLS IN LAW AND SOCIETY IN CONTEMPORARY JAPAN 1 (1988); Hahn, *supra* note 7, at 531-33.

to cure a social problem through litigation than they do in the United States. Although the challenge is not impossible, very few consumers or individuals have been victorious in civil litigation against companies in such areas as product liability and unfair competition. These three characteristics of the Japanese legal system are relevant to any discussion of the AMA.

The United States recently requested that Japan step up its enforcement of the AMA. The Structural Impediments Initiative (SII) between the United States and Japan illuminated the necessity and importance of enhancing AMA enforcement.⁹ While the mass media views recent trends toward enhancement of the antimonopoly policy as a response to U.S. and other international pressure, the JFTC has stressed that the trend is not due to foreign pressure but rather to the reconsideration of the market system within Japan.¹⁰ Regardless of the impetus, the Japanese government has recently attempted to improve enforcement of the AMA. In this regard, part I of this article discusses recent trends for enhancement of Japanese antimonopoly policy. Foreign companies will be able to enter the Japanese market more easily through the enhancement of antimonopoly policy.

Even with the positive effects apparently caused by U.S. concerns, the enforcement of the AMA is far from perfect. There are some ambiguous but basic concepts regarding the AMA of which a foreign company entering into a contract with a Japanese party should be aware. Although this article cannot explain in detail all conduct prohibited by the AMA,¹¹ part II provides a basic overview of several problems associated with the AMA. The AMA, like U.S. antitrust law, prohibits international contracts containing unreasonable restraints of trade or unfair business practices and requires certain international agreements to be examined by the JFTC.¹² Those contracts deemed by the JFTC as violations of the AMA may be subject to various sanctions.¹³ In this regard, part II also discusses how the AMA may affect international business transactions and foreign investment in Japan.

I. Recent Trends of the Antimonopoly Act

A. HISTORICAL BACKGROUND

Overall, the former Japanese cartel economy has been transformed into a highly competitive market economy through antimonopoly policy efforts by the JFTC.¹⁴

9. Mitsuo Matsushita, *New Measures Aimed at Reducing Trade Barriers*, in 2 JAPAN BUSINESS LAW GUIDE (CCH) ¶ 99-036, at 100,036-37 (1991).

10. SHIBATA, *supra* note 2, introduction.

11. See generally *Antimonopoly Regulations*, *supra* note 3, at IX; MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW (Yuhikaku 1990); 1 JAPAN BUSINESS LAW GUIDE (CCH) ¶ 37-000, at 32,002 (1993); FUGATE, *supra* note 5; see also Steven Z. Szczepanski, *Licensing Operations in Japan*, in 3 ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS ch. 31 (1992).

12. AMA, *supra* note 1, art. 6.

13. *Infra* part I.C.

14. HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS OF JAPAN 33, 40 n.91 (1983).

However, since antimonopoly policy conflicts with other policies, the Japanese government has not always emphasized the enforcement of antimonopoly laws.¹⁵ In particular, between 1953 and 1973, when the Japanese economy achieved remarkable overall growth, the JFTC was extremely weak when dealing with various business activities.¹⁶ For example, while the JFTC was making an effort to control mergers to prevent private monopolization, the Ministry of International Trade and Industry (MITI) was encouraging mergers to build up large companies to compete with other countries.¹⁷ While scholars and consumer groups supported the antimonopoly policy, the business sectors resisted efforts to strengthen antimonopoly law enforcement.¹⁸ The group-oriented and cartel-minded mentality of the Japanese people were probably contributing factors.¹⁹

Weak enforcement of the antimonopoly policy also seemed to be connected with the political situation in Japan. Since the Liberal Democratic Party (LDP) administration was substantially supported by protected industries, the party did not enforce a strong antimonopoly policy.²⁰ The general public could not politically advocate the antimonopoly policy in general elections against the LDP administration because the issue was too difficult, technical, and novel to understand.²¹ As a result, the original AMA was substantially weakened through several amendments before 1977. For example, strict restrictions on holding another company's shares and prohibition of international cartels were repealed from the original AMA under the LDP administration.²²

However, since monopolization and cartels caused inflation, Japan revived the antimonopoly policy. In 1977, amendments to the AMA strengthened antimonopoly policy.²³ Since then, the antimonopoly policy has been gradually and slowly strengthened. The MITI's lax policies with respect to cartels in some

15. *Id.* at 13-20.

16. See Mitsuo Matsushita, *Recent and Future Developments in Japanese Antitrust Law and Enforcement*, in INTERNATIONAL ANTITRUST LAW & POLICY, 1992 FORDHAM CORP. L. INST. 41, 44-46 (B. Hawk ed., 1993); *Antimonopoly Regulation*, *supra* note 3, § 1.02[2][d], IX 1-8.

17. In the *Yahata-Fuji Merger* case, the JFTC's attempt to prevent the formation of monopolistic big enterprise was futile. See MATSUSHITA & THOMAS J. SCHOENBAUM, JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW 140 (Univ. of Tokyo Press 1989).

18. The 1957 Annual Report of the JFTC stated that few industries were without a cartel, and that most prices were artificially influenced by a cartel. At that time, Japan was called "cartel island." SHIGEKAZU IMAMURA, DOKUSENKINSHIHO NYUMON [INTRODUCTION TO ANTIMONOPOLY LAW], 24 (Yuhikaku 3d ed. 1992).

19. Wolfgang Pape, *Gyosei Shido and the Antimonopoly Law*, 15 LAW IN JAPAN 12, 13 (1982) (citing S. Karashima, *Gyoseishido to dokkinho ni tsuite no ichi shiken* [An Opinion Regarding Administrative Guideline and the AMA], 566 JURISTO 28 (1974)).

20. In 1955 the LDP became the ruling party, and up until 1993, Japanese industries grew under the LDP administration.

21. One fear of the American type of strict enforcement of antitrust policy is that an efficient market may not require a work force sufficient to retain the workers at large. Since Japan has always kept its unemployment rate under 3% by fully absorbing the Japanese work force, the majority of people in Japan have not had a strong incentive to favor a change in antimonopoly policy.

22. IMAMURA, *supra* note 18, at 22.

23. *Id.* at 25; MATSUSHITA, *supra* note 11, at 4; FUGATE, *supra* note 5, § 16.13, at 509.

industries have been criticized. Consequently, many special statutes that allowed cartels to flourish have been abolished.²⁴

B. AMENDMENTS TO THE ANTIMONOPOLY ACT

In part because of international criticism and a more domestic, consumer-oriented movement, fair and appropriate enforcement of the AMA has been in demand in today's Japan. According to the JFTC, the antimonopoly policy is now important because (i) competition must be promoted even if business leaders may be reluctant to compete with each other; (ii) demands based on advanced technology and consumer choice can be effectively realized only through free and fair competition in the market because many new businesses based on new ideas and technology can enter the market; and (iii) the Japanese economy cannot isolate itself from international rules.²⁵

The expansion of new market-entry opportunities will be an important policy, not only for foreign companies, but also for domestic business enterprises. If lifetime or long-term employment by the major companies erodes as predicted, and if the new efficient distribution system eliminates intermediary brokers and other excessive workers from the work force, those workers who are no longer employed in the major companies or existing distribution lines should be given the opportunity to enter the market with new business entities. The recent, long recession stimulated Japanese employment by the use of various early retirement programs. Further, many consumers are seeking more competitive prices with their new-found knowledge of foreign prices in the United States and other countries. Increasing domestic employment and foreign competition may be the underlying stimuli changing Japanese antimonopoly policy on the international level. Under these circumstances, the AMA and its administrative guidelines have been amended in accordance with the Japanese government's promise to the United States in the SII.²⁶

The 1991 amendment to the AMA increased the surcharges, or administrative fines, imposed on cartel participants to deprive them of any profit gained from illegal cartel activities,²⁷ from 0.5 percent to 2 percent, depending on the industry,

24. Japan had been allowing many cartels to be exempted from the AMA. Now the exempted cartels are abolished, but some exempted systems still exist. IMAMURA, *supra* note 18, at 110-11; see also *infra* notes 141-48 and accompanying text.

25. SHIBATA, *supra* note 2, at 4.

26. The Japanese government promised to take the following four steps to enhance AMA enforcement: (i) increase of surcharges, (ii) increase of criminal penalties, (iii) assistance to private plaintiffs who sue for AMA violations, and (iv) formulation of new guidelines on distribution systems and business practices. Matsushita, *supra* note 9, at 100,037.

27. Since criminal penalties and the recovery of damages by private parties were seldom used and possessed very little deterrent value, an administrative fine would be useful. MATSUSHITA, *supra* note 11, at 52-53. However, this surcharge system is unique in that it is separate from criminal fines. The government explains that the purpose and procedure for a surcharge are different from criminal fines. IMAMURA, *supra* note 18, at 76. The JFTC has recently used surcharge payments actively and this trend is expected to continue. *Antimonopoly Regulation*, *supra* note 3, § 3.06[4], at IX 3-13.

to 1 percent to 6 percent, depending on the industry and the size of the company.²⁸ The surcharges are calculated on the basis of the total sales during an undue restraint of trade or a substantial restraint of competition by a business association.²⁹ In addition, the 1992 amendment increased the maximum amount of criminal fines from 5 million yen to 100 million yen (approximately US\$1 million) for private monopolization or undue restraint of trade.³⁰

From time to time the JFTC announces various guidelines for application of the AMA to clarify whether certain conduct is violative of the antimonopoly policy.³¹ In particular, on July 11, 1991, the JFTC announced the Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices (Distribution Guidelines) after receiving many comments.³² In 1992, the JFTC also established updated rules that limit the types of international contracts to be reported.³³ Now that many amendments of the AMA have been enacted, the next concern will be to increase enforcement of the law.³⁴

C. STRICTER ENFORCEMENT

The trend towards strengthening the antimonopoly policy has recently appeared not only in the legislative level, but also in the enforcement level. A violation of the AMA may be challenged by civil, criminal, and administrative proceedings. First, an injured party may seek civil damages against the violator because private monopolization, undue restraint of trade, and unfair business practices may constitute torts or create unjust enrichment.³⁵ Second, criminal penalties are available

28. SHIBATA, *supra* note 2, at 63-64; Akinori Yamada, *Recent Development and Future Prospective of Japanese Competition Policy*, in INTERNATIONAL ANTITRUST LAW & POLICY, 1992 FORDHAM CORP. L. INST. 91, 93-94 (B. Hawk ed., 1993).

29. AMA, *supra* note 1, art. 7-2.

30. SHIBATA, *supra* note 2, at 86-87. The original amendment bill attempted to increase criminal fines to 300 million yen, but the LDP strongly resisted. Jimin "Atsuryoku" de Enki [LDP Pressured to Postpone the Increase of Penalty], NIHONKEIZI-SHINBUN, int'l ed., Dec. 18, 1991, at 7 (one of the major national newspapers in Japanese, hereinafter NIKKEI). U.S. Trade Representative Carla Hills has said that the new fines are inadequate and urged tougher enforcement of the AMA. FUGATE, *supra* note 5, at 103 n.45 (Supp. 1993).

31. For example, in 1993 the JFTC announced guidelines concerning finance-system reform to prevent banks and securities companies from improperly influencing and using their power over other companies. The new guidelines prohibit a parent company from forcing other companies to transact with its subsidiaries. Kogaisha Torihiki Kyoyo wa Ihan [Enforcement of Transaction with Subsidiaries is Prohibited], NIKKEI, Apr. 2, 1993, at 7; see also FUGATE, *supra* note 5, § 16.13, at 513 (introducing new guidelines issued in 1989) and 101-02 (Supp. 1993) (introducing new guidelines issued in 1991).

32. Matsushita, *supra* note 9, at 100,037-47; Richard L. Thurston, *Japan—The Antimonopoly Act and Japanese Fair Trade Commission Enforcement*, 27 INT'L LAW. 533, 536-37 (1993); SHIBATA, *supra* note 2, at 116.

33. Law Guide, *supra* note 11, ¶ 37-570, at 32,403; HIDETO ISHIDA, DOKKIN SEISAKU KYOKA NO NAMI WO NORIKIRU [OVERCOME THE WAVE OF THE ENHANCEMENT OF THE ANTIMONOPOLY POLICY] 172, 172-74 (Chuoikeizai-sha 1994).

34. IMAMURA, *supra* note 18, at i.

35. AMA, *supra* note 1, art. 25.

for violations of various articles of the AMA.³⁶ Third, the JFTC can institute various administrative proceedings.

1. *Civil Action*

Civil action rarely succeeds against violators of the AMA.³⁷ Unless the JFTC delivers a decision regarding conduct that has caused damage to a person, the injured person may only pursue civil action based on general tort claims.³⁸ Also, since Japanese laws do not provide for punitive damages, treble damages, or class-action suits, injured consumers or traders ordinarily have difficulty seeking civil redress. Furthermore, consumers have an extremely difficult task to prove damages were caused by price cartel activities.³⁹ Since the AMA has no substantial evidence provisions, even final JFTC adjudicated decisions do not bind courts in civil lawsuits.⁴⁰ As a result, consumers have never won in civil actions for damages premised upon a violation of the AMA.⁴¹ For example, in *Tsuruoka Oil* the consumer claimants established the defendant's liability in a high court.⁴² The defendants, twelve oil wholesalers who occupied about an 85 percent share of the market, agreed to raise the price of oil during the oil crisis of 1973. The plaintiffs, about 1,600 consumers who bought oil from retailers at large, brought a tort claim for the damages calculated on the basis of the difference between the prices at the end of 1972 and the price in 1973, which was allegedly unreasonably high due to the price cartel of the defendants. The Sendai High Court,

36. *Id.* arts. 89-100.

37. MATSUSHITA & SCHOENBAUM, *supra* note 17, at 140. The JFTC found only fifteen civil cases as of 1991. *See* ISHIDA, *supra* note 33, at 53 (while about 600 private actions are brought per year in the United States, only twenty cases have been brought during the more than forty-year history of the AMA).

38. Arts. 709 and 719 of MINPO (Civil Code), Law No. 89, 1896 (Japan), as amended [hereinafter MINPO]; Minshu 26-9-1573 (Supreme Court, Nov. 16, 1972); Minshu 43-11-1259 (Supreme Court, Dec. 8, 1989); *see also Antimonopoly Regulation*, *supra* note 3, § 11.03, at IX 11-6.

39. Proving the existence of a violation of the Antimonopoly Act is often problematic, especially when the parties do not have a formal agreement. MATSUSHITA, *supra* note 11, at 43-46. In order to protect simultaneous price raises, the 1977 amendment of the AMA adopted certain reporting systems by which the JFTC can more effectively investigate such matters. MATSUSHITA, *supra* note 11, at 46.

40. Minshu 41-5-785 (Supreme Court, July 2, 1987); Minshu 43-11-1259 (Supreme Court, Dec. 8, 1989).

41. IMAMURA, *supra* note 18, at 184; SHIBATA, *supra* note 2, at 35; ISHIDA, *supra* note 33, at 53. However, in a rare case in 1993, the Osaka District Court granted a damage award in favor of the plaintiff, who was an owner of a building, against a subsidiary of an elevator manufacturer on the basis of a general tort involving a violation of the AMA. The building owner was prevented from using the elevator due to the defendant's unfair transactions and tying arrangement in violation of the AMA. ISHIDA, *supra* note 33, at 54.

42. Japan has trial courts (district courts), intermediate courts of appeals (high courts), and a Supreme Court. A high court can determine facts to be litigated. *See* Hahn, *supra* note 7, at 533-36. In this case, while the district court denied the defendant's liabilities, the high court granted the damage award. 1147 HANJI 19; Minshu 43-11-1539 (Sendai High Court, Akita Branch, Mar. 26, 1985).

Akita Branch, allowed the damage award based on the JFTC's recommendation.⁴³ However, the Japanese Supreme Court reversed and denied liability by applying the strict evidence rule in the civil action.⁴⁴ The Court held that the plaintiffs failed to prove that the defendants' price cartel caused the increase in price. The Court reasoned that the plaintiff failed to prove that there was no effect on retail oil prices caused by other factors, such as the continuing rise of oil prices, the increase in demand, the MITI's administrative guidance to set the maximum price, and the increase in various costs.⁴⁵ Most Japanese commentators, criticizing the Court's assumption that the above factors would automatically raise retail oil prices,⁴⁶ stated that the oil price was actually raised through the cartel.⁴⁷

To ease the difficulty of proof, in 1991 the JFTC published guidelines to help private parties access JFTC investigation materials to prove facts.⁴⁸ According to these guidelines, plaintiffs can obtain certain documents and materials from the JFTC⁴⁹ and can also submit investigation materials to courts as evidence through a request for the transmission of documents.⁵⁰ The JFTC's new guidelines in support of civil actions should be carefully watched.⁵¹

Unlike civil antitrust actions in the United States, Japanese private actions are still very limited. This limitation on private actions is caused not only by the Japanese legal system's lack of effective measures such as treble damages, class action litigation, and accessibility of attorneys, but also by a Japanese policy that does not use civil action as a primary tool in enforcement of antimonopoly laws.⁵²

43. In the *Tsuruoka Oil* case, the JFTC had issued a recommendation decision to eliminate a price cartel, which the defendants accepted and complied with. The high court followed the JFTC's decision. However, the Supreme Court stated that the JFTC's recommendation decision does not bind courts in civil actions. Minshu 43-11-1259, 1270-78 (Supreme Court, Dec. 8, 1989).

44. *Id.* at 1270-78.

45. *Id.* at 1276-78.

46. If fair competition were permitted in the market, suppliers could not have automatically raised the retail oil prices regardless of the factors indicated by the Court.

47. Masayuki Funada, *Dokinbo Shinketsu Hanrei Hyakusen [100 cases of the AMA]*, 110 BES-SATSU JURISUTO 249 (1991).

48. SHIBATA, *supra* note 2, at 287-88; ISHIDA, *supra* note 33, at 121-27.

49. Under these new guidelines, detailed information about a cartel bidding was disclosed in a civil action brought by a resident of Saitama Prefecture. *Shimei Gyoshakan no Dango Jittai Shosaini [Disclosed Detailed Information of Collusive Bidding among Designated Companies]*, NIKKEI, Aug. 31, 1993, at 35; *see infra* notes 51, 58, and 64.

50. MINSOHO (Civil Procedure Code), Law No. 29, Apr. 21, 1890, as amended, art. 319.

51. In 1991 in the *Saitama Doyokai* (Saitama Saturday Association) case, residents of Saitama Prefecture brought a damage claim against some construction dealers that were determined to be a cartel by the JFTC prior to the lawsuit. SHIBATA, *supra* note 2, at 36; *see also infra* notes 58 and 64. Also, the purchasers of seals used by government agencies recently brought a civil action against seal companies that had secret price arrangements. In this case, the price of seals was reduced from ¥9.8 per sheet to ¥3.9 per sheet by eliminating the cartel. *Dango Haijode Hangaku Ikani [Half Price by Eliminating the Cartel]*, NIKKEI, July 27, 1993, at 39.

52. Yamada, *supra* note 28, at 103 (emphasizing the reluctance of Japanese companies to bring lawsuits).

In this regard, civil action will only supplement antimonopoly policy.⁵³ Civil actions will be more widely used only after the adoption of more effective methods to utilize civil lawsuits or the emergence of more civil precedents in the Japanese litigation system.

Nevertheless, foreign companies victimized by the violations of the AMA may seek civil redress against Japanese companies by using the new weapons provided by the JFTC and by creating new precedents. For example, sixty-seven Japanese companies received a demand letter from the United States to pay ¥1,106,442,513 (approximately US\$10,000,000 at the time) plus attorneys' fees for cartel activities in the *Atsugi Base* case.⁵⁴ Certainly, victimized foreign companies may pursue civil actions based on tort claims in general, even without a JFTC decision. Although a foreign company's ability to establish a tort claim in Japanese courts is not clear, a civil claim based on the AMA may be used effectively by U.S. companies.⁵⁵ Thus, even supplemental means can work as leverage to promote Japanese antimonopoly policy.

2. Criminal Action

The AMA also provides criminal penalties for private monopolization, unreasonable restraint of trade, and trade association activities substantially restraining competition.⁵⁶ Few criminal cases have been brought in recent years. In the absence of a JFTC charge, no criminal action may be brought against an alleged violator of the AMA.⁵⁷ Since the AMA does not clearly define all actions constituting violative conduct, the JFTC appears to refrain from using such a drastic measure.

Prosecutors also appear to refrain from prosecuting violators of the AMA. In Japan, criminal defendants are rarely found innocent in courts because prosecutors

53. MATSUSHITA, *supra* note 17, at 65.

54. *Tsuyokino Bei, Baisho Seikyu Tsukoku* [Aggressive U.S. Demands a Claim for Damages], NIKKEI, Mar. 17, 1994, at 14.

55. In tort claims, the victimized foreign company must show the causal relationship between the violation of the AMA and its damages. For example, if a foreign company can show that it could have definitely procured a public construction project but for the cartel of Japanese companies, the foreign company may theoretically claim damages that were spent for the project against the companies that participated in the cartel. However, if the foreign companies could not have procured the project in any event because of other reasons than the cartel, the foreign companies would not have grounds to claim damages despite the existence of the cartel. Because they are different from Japanese traders or individuals, foreign companies may not be reluctant to sue for a violation of the AMA. Cf. ISHIDA, *supra* note 33, at 121.

56. AMA, *supra* note 1, art. 89; MATSUSHITA, *supra* note 11, at 84; SHIBATA, *supra* note 2, at 78-79.

57. AMA, *supra* note 1, art. 96. The Criminal Code of Japan also provides that a person who colludes for the purpose of preventing determination of a fair price or to acquire an unjust gain in public auction or bidding shall be punished with penal servitude for a period not exceeding two years or a fine not exceeding 2.5 million yen. Art. 96-3 of KEIHO (Penal Code), Law No. 45, 1907, as amended; see ISHIDA, *supra* note 33, at 178.

refrain from prosecuting questionable cases.⁵⁸ Only six claims against AMA violators were filed with the public prosecutor's office by the JFTC in the 1980s, and only five cases resulted in indictment.⁵⁹ Regardless of the rigid selection of cases, some defendants in the *Oil Cartel* case were found innocent. The court reasoned that the defendants did not have criminal intent because they acted within the constraints of the MITI's administrative guidance.⁶⁰ This ruling demonstrates the difficulty of taking criminal action against AMA violators.

However, in 1990, the JFTC announced guidelines concerning criminal charges against violators of the AMA.⁶¹ When a violation is clear or egregious, the JFTC will now make a criminal charge based on these guidelines. In 1991, the JFTC brought the first such charge since the oil cartel case of 1974 against a cartel of manufacturers of plastic wrap.⁶² Also, in 1993, the JFTC brought a charge involving secret price arrangements concerning the purchase of seals used by government agencies.⁶³ In addition, the JFTC may wish to avoid being suspected of failure to charge because of political pressure, as in the *Saitama Doyokai* case.⁶⁴ Since the JFTC announced that it will be active in making criminal charges, more criminal sanctions are expected, at least in cases involving intentional violations of the AMA.

3. Administrative Action

In practice, administrative procedure is central in the enforcement of the AMA. The JFTC is authorized to make (i) recommendation decisions,⁶⁵ (ii) consent decisions,⁶⁶ and (iii) formal decisions.⁶⁷ These JFTC decisions are subject to

58. Consequently, more than 90% of criminal defendants are found guilty in Japan. In the *Saitama Doyokai* case the JFTC did not charge suspected construction companies because the prosecutor's office was reluctant to indict because of the difficulties of proving the case. *Oshoku Kozo wo Tettei Kaimei* [Thorough Investigation of Bribery Structure], NIKKEI, Mar. 9, 1994, at 34; see also *infra* note 64.

59. Yamada, *supra* note 28, at 102.

60. Keishu 38-4-1287 (Supreme Court, Feb. 24, 1984); Matsushita, *supra* note 16, at 61.

61. SHIBATA, *supra* note 2, at 84-85; Yamada, *supra* note 28, at 115.

62. *Kotorii 8 Sha wo Kokuatsu* [JFTC Filed Criminal Charges Against 8 Companies], NIKKEI, Nov. 7, 1991, at 35.

63. "Kigyo no Hanzai" ni Tsuyoi Shisei [Aggressive Action Against White Collar Crime by Companies], NIKKEI, Feb. 25, 1993, at 3. [hereinafter *Aggressive Action*].

64. In the *Saitama Doyokai* case, a former minister of construction was arrested and indicted for bribery from a major construction company that attempted to prevent the JFTC's criminal charge for the suspected cartel. Since the construction companies were not actually charged by the JFTC for suspected cartels, the JFTC was suspected of having surrendered to political pressure from the minister of the construction, but the JFTC denies the suspicion. *Nakamura Zen Kensetsu Daijin wo Taiho* [Arrested Nakamura, a Former Minister of Construction], NIKKEI, Mar. 12, 1994, at 1, 3; *Nakamura Zen Kensetsu Daijin wo Kiso* [Indicted Nakamura, a Former Minister of Construction], NIKKEI, Apr. 2, 1994, at 1; NIKKEI, *supra* note 58.

65. If a respondent accepts the JFTC's recommendation, the JFTC may issue a "recommendation decision" without resorting to an adjudicative procedure. AMA, *supra* note 1, art. 48; MATSUSHITA, *supra* note 11, at 81-82.

66. AMA, *supra* note 1, art. 53-3; MATSUSHITA, *supra* note 11, at 82. If a respondent admits the finding of facts and the application of law stated in the JFTC's complaint, and the JFTC considers the respondent's proposal acceptable, the JFTC may issue a "consent decision," which is incorporated with the proposal. *Id.*

67. AMA, *supra* note 1, art. 54.

judicial review.⁶⁸ Also, the JFTC may issue warnings (*keikoku*) and notices (*chui*) for relatively small violations, even if the JFTC does not commence formal proceedings.⁶⁹

The AMA is unique in that the JFTC has broad authority to enforce it. Indeed, enforcement of the AMA relies heavily on the JFTC officers. For example, civil action under the AMA cannot be taken without a JFTC decision, and criminal action cannot be taken without a JFTC charge. The JFTC controls these administrative actions and has complete discretion to take such actions. Outside parties do not have the right to initiate any action before the JFTC, but can only ask the JFTC to take action.⁷⁰ If the JFTC fails to actively enforce the AMA, antimonopoly policy will be drastically weakened. Actually, the JFTC may have prevented some civil actions and criminal actions in the past, partly because other policies have prevailed over the antimonopoly policy.⁷¹

However, now recommendations issued by the JFTC against violators are dramatically increasing. While the JFTC issued recommendations in only seven cases in 1989, it issued twenty-nine in 1992.⁷² The total amount of the administrative surcharges imposed in Japan in 1990 is quite large compared with the fines imposed in the European Communities (EC) after the 1991 amendment of the AMA.⁷³ The amount of surcharges imposed between April 1989 and September 1992 is one-and-a-half times greater than the total amount of surcharges imposed between 1977 and 1988.⁷⁴ Also, the staff of the Investigation Division of the JFTC increased from 129 in 1989 to 186 in 1993.⁷⁵ Accordingly, it is anticipated that the JFTC will enforce the antimonopoly policy more strictly.⁷⁶

68. MATSUSHITA, *supra* note 11, at 83. Also, the JFTC may apply for a temporary injunction from the Tokyo High Court. AMA, *supra* note 1, art. 67.

69. IMAMURA, *supra* note 18, at 204-05; ISHIDA, *supra* note 33, at 22 (The number of *chui* is fewer than 100 cases per year).

70. Minshu 26-9-1573 (Supreme Court, Nov. 16, 1972).

71. IMAMURA, *supra* note 18, at 194.

72. *Aggressive Action*, *supra* note 63.

73. Matsushita, *supra* note 16, at 60 (stating that the JFTC imposed fines of about 12,562 million yen in Japan in 1990, while the EC imposed fines equivalent to about 7,908 million yen in European countries in 1990).

74. The JFTC imposed surcharges of 18 billion yen on companies involved in 41 cases between April 1989 and September 1992. Yamada, *supra* note 28, at 114.

75. SHIBATA, *supra* note 2, at 289. The JFTC had a staff of about 400 persons. MATSUSHITA & SCHOENBAUM, *supra* note 17, at 141. Now, the JFTC has about 500 persons. SHIBATA, *supra* note 2, at 289; *see also infra* note 124. However, the scale is still much smaller than that of the Antitrust Division of the Justice Department and the Federal Trade Commission in the United States.

76. The numbers of cases in which the JFTC took actions are as follows:

	<i>Recommendation</i>	<i>Warning</i>	<i>Notice</i>	<i>Order of Surcharges</i>
1988	6	65	17	3
1989	7	115	28	6
1990	22	60	85	11
1991	30	24	88	10
1992	34	21	—	17 (To 135 Companies)
1993	—	—	—	23 (To 406 Companies)

SHIBATA, *supra* note 2, at 281; *Karuteru Kacho Saiko no 23 ken* [23 Cases Imposed Surcharges on Cartels, the Most in Record], NIKKEI, Apr. 1, 1994, at 5.

D. RECENT RESPONSE OF PRIVATE COMPANIES

Given these changes, many companies have prepared compliance programs to guide employees in avoiding violations of the AMA.⁷⁷ Also, some industry associations, such as the National Bank Association Federation and Fair Trade Conference of Medical Supplies Manufacturers, are preparing or have prepared compliance manuals for the AMA.⁷⁸ Compliance programs generally consist of (i) the declaration of compliance with the AMA; (ii) the preparation of compliance manuals for employees; (iii) employee training about the AMA; (iv) internal systems and procedures to specific antimonopoly problems; and (v) internal systems to check and improve compliance programs in general.⁷⁹

In response to the JFTC's guidelines, each industry voluntarily reviews its trade customs. However, public opinion seems an even greater impetus for companies to promote free competition policies. For example, some automobile companies have revised their distributorship contracts to eliminate both the requirement that dealers consult with the manufacturer before engaging in transactions with other manufacturers and the dealers' obligation of exclusive use of designated repair parts.⁸⁰ Consequently, the manner of determining prices is changing by eliminating restrictive trade practices and customs.⁸¹ At the same time, the number of cases involving consultation with the JFTC regarding the lawfulness of proposed trade association activities is increasing.⁸²

Furthermore, since the long recession apparently forced Japanese people to seek cheaper prices, many companies now provide their products more effectively, more efficiently, and at a lower cost. In addition, Japanese consumers who have come to know the difference between foreign prices and domestic prices tend to seek reasonable market prices.⁸³ These changes in the Japanese marketplace will promote fair and free competition, induce each company to set

77. The JFTC's survey shows that about 80% of the companies that responded to the JFTC are preparing or willing to prepare the AMA compliance program. SHIBATA, *supra* note 2, at 31.

78. *Dokkinho Junshu Manyuaru no Shishin Zukuri* [Preparing the Guideline of the AMA Compliance Manual], NIKKEI, Jan. 17, 1992, at 7; *Dokkinho no Tebikisho Sakusei* [Prepared Manual for the AMA], NIKKEI, Feb. 3, 1992, at 11.

79. SHIBATA, *supra* note 2, at 28.

80. *Nissan Kosokukitei wo Minaoshi* [Nissan Reviewing Noncompetition Clauses], NIKKEI, Oct. 24, 1991, at 1. The provision prohibiting distributors from dealing with other manufacturers' cars, including foreign cars, was eliminated by the JFTC's guidance in 1979. However, whether a distributorship agreement would require distributors to consult with the principal before dealing with other manufacturers' cars was not clear. In 1991 the JFTC made it clear that such a requirement is prohibited by the Distribution Guidelines. Nevertheless, there are still foreign cars in the Japanese market. Jotaro Yabe, *Keiretsu Gaikokusha no Sannyu wo Sogai* [Keiretsu Prevents Entry of Foreign Cars], NIKKEI, Oct. 11, 1993, at 14.

81. *Yasuuriten ni Shukka Teishi* [Ceased Supply to Discount Stores], NIKKEI, July 22, 1993, at 1.

82. Matsushita, *supra* note 16, at 66. The JFTC annual report shows that the number of the consultations increased from 540 in 1987 to 960 in 1991. *Id.*

83. ISHIDA, *supra* note 33, at 17-18; *Yuragu Kakaku Keshohin no Jin* [Swaying Prices: Battle over Cosmetics], NIKKEI, Sept. 28, 1993, at 3 [hereinafter *Swaying Prices*].

reasonable prices, and eliminate unreasonable restrictions on competition. At the same time, retail price maintenance has become impractical for every product from cameras and electronics to detergents and men's wear. The entry of foreign companies, especially from southern and eastern Asian countries, has accelerated this trend.

For example, the cosmetics industry insisted on face-to-face sales, claiming that sales personnel must see the customer's skin and demonstrate each cosmetic to provide the customer with proper service. The effect of the industry's demand was to eliminate discount stores selling cosmetics at lower prices but without personal service.⁸⁴ In 1990, Shiseido, a major cosmetics supplier, terminated a supply agreement with and ceased selling cosmetics to Fujiyoshihonten (Fujiyoshi) for failure to sell the products with adequate explanation. Fujiyoshi brought a lawsuit against Shiseido, and the Tokyo District Court ordered Shiseido to supply the products to Fujiyoshi. The court held that the obligation to sell cosmetics face-to-face had the effect of maintaining retail prices in possible violation of the AMA.⁸⁵ Similarly, in 1993 Kawachiya filed a claim with the JFTC against Shiseido and other cosmetic suppliers claiming that Shiseido and other suppliers violated the AMA by ceasing business with Kawachiya, a discount store.⁸⁶ Kawachiya asserted that its termination was illegal and void because such termination was in retaliation for Kawachiya's discount activities and was therefore contrary to the AMA.⁸⁷

Japanese suppliers will no longer be able to insist on de facto price maintenance or distribution systems burdened by various trade customs. The AMA will play an important role in stimulating fair and free competition and providing reasonable prices in the Japanese market. Japanese people have paid more attention to antimonopoly policy because of recent developments in this area. Although unfair business practices may have arisen in the past from a lack of understanding of the antimonopoly policy, various informational and educational opportunities will promote a change in public understanding.

Promotion of antimonopoly policy will take a prominent place in Japanese society based on the recent amendments, stricter enforcement, and general trends of the AMA. As the Japanese government and many private companies come

84. The JFTC exempted cosmetics, detergents, medicines, and other goods from price competition, beginning in 1953, by granting manufacturers the right to enforce specific retail prices. Because this exemption was indicated as one of the reasons for inflation in the Japanese market, the JFTC rescinded those regulations in 1973. SHIBATA, *supra* note 2, at 230. Cosmetics manufacturers are rarely found utilizing substantial discount prices in order to lure customers to purchase their products. Instead, the cosmetics manufacturers send thousands of specialists to retail stores in order to advise women on how to best use their products. David E. Sanger, *Discounting Finally Makes It to Japan*, N.Y. TIMES, Oct. 11, 1993, at C1.

85. *Taimen Hanbai, Shiseido Gawaga Haiso* [Shiseido Side Lost, Face to Face Distribution], NIKKEI, Sept. 28, 1993, at 3 [hereinafter *Shiseido Side Lost*].

86. *Swaying Prices*, *supra* note 83, at 3.

87. *Shiseido Side Lost*, *supra* note 85, at 3.

to understand that the antimonopoly policy is important and beneficial to Japanese consumers as well as foreign investors, active amelioration and enforcement of the AMA will continue. Due to Japanese domestic necessity and international pressure, such enforcement would signal an unprecedented change. As a result, more foreign companies should be able to enter the Japanese market. However, some obstacles to achieving the desired result still require clearing. Part II of this article explores some of these obstacles.

II. Legal Ambiguities and International Issues in Japanese Antimonopoly Law

JFTC enforcement of the AMA is generally predictable and transparent⁸⁸ because the JFTC provides an unofficial consultation process in addition to many regulations and guidelines. However, like the antitrust laws in the United States, various ambiguities exist in basic areas of the law and in some of the JFTC's guidelines.⁸⁹

Since Japanese courts have not issued as many decisions as courts in the United States, just how the Japanese courts will deal with some important antimonopoly issues remains to be seen. Although the AMA was patterned after the antitrust laws of the United States in various respects, practices are somewhat different. Indeed, these differences may have presented foreign parties with practical problems that may have affected investment decisions regarding Japan.

This section of the article explores four topics: the legal effect of a domestic AMA violation (domestic legal problems); extraterritorial application of the AMA (international legal problems); cartels in bidding (economic and political problems); and special features of the AMA (structural problems). Through the discussion, this section draws two primary conclusions. First, foreign companies will benefit from better understanding of the Japanese antimonopoly laws. Second, foreign demands, including U.S. demands, have been and will continue to be beneficial to the enhancement of the antimonopoly policy.

A. LEGAL EFFECT OF AN AMA VIOLATION

The first question, a domestic legal issue, is whether a contract clause that violates the AMA is valid. The JFTC appears to take the position that such a clause is invalid.⁹⁰ However, invalidation of a clause due to its violation of the AMA is less likely in Japan than under antitrust laws in the United States.⁹¹ This

88. K. Blake Thatcher, *The Administrative Regulation of Technology Induction Contracts in Japan*, 8 NW. J. INT'L L. & BUS. 197, 234 (1987).

89. The JFTC has established prior consultation systems, because some guidelines are still ambiguous. *The United States and Japan*, in INTERNATIONAL ANTITRUST LAW & POLICY, 1992 FORDHAM CORP. L. INST. 107, 116 (B. Hawk ed., 1993).

90. SHIBATA, *supra* note 2, at 286.

91. MATSUSHITA, *supra* note 5, at 428.

ambiguity may obscure the impact of the AMA in Japan. The Supreme Court of Japan has held that a clause violating the AMA is not void per se because the AMA does not require such drastic measures.⁹² The clause may only be deemed invalid if it is contrary to "the public order and good morals" under the Civil Code of Japan.⁹³

The real issue is deciding what offends the public order and good morals. According to an authoritative commentator, (i) a contract whose purpose is to violate the AMA, such as a cartel agreement or a joint boycott agreement, should be entirely invalid; (ii) certain clauses in violation of the AMA, such as improper exclusive conditions and illegal restraints of resale prices, should be invalid and unenforceable only with regard to the illegal portions before they are performed; and (iii) once the illegal clause is voluntarily performed, no party can reverse the outcome for violation of the AMA.⁹⁴ Thus, a party cannot seek restitution after the contract has been performed.⁹⁵

While a violation of the AMA is determined primarily in terms of antimonopoly policy, the validity in a private relationship should be considered together with its contractual relationship and the fairness between the parties in the particular transaction. When a new legal relationship is established and people rely on it, the law must protect such reliance by balancing it with antimonopoly policy. Accordingly, a clause violating the AMA will not always be deemed invalid between the parties.

To avoid any antimonopoly complications, a prospective party entering into an international contract should be careful of Japanese antimonopoly policy. Although the AMA only requires notification within thirty days from the date of certain international contracts,⁹⁶ any party may contact the JFTC to seek unofficial assurance of favorable treatment.⁹⁷ Even in a questionable case, if the JFTC has issued negative clearance (certifying that the JFTC will not take action against the transaction) the parties can engage in business activities without fear of antimonopoly issues.⁹⁸ Also, under the new Rules on Filing Notification of International Agreements or Contracts of 1992, either party may submit an application for a review of the contract prior to execution or within thirty days following execu-

92. Judgment of June 20, 1977, Saikosai [Supreme Court], 31 Minshu 502 (Japan).

93. MINPO art. 90.

94. IMAMURA, *supra* note 18, at 181.

95. MATSUSHITA, *supra* note 11, at 87.

96. AMA, *supra* note 1, art. 6, para. 2.

97. The JFTC's unofficial consultation process may appear to be uncertain primarily due to the ambiguities present in the AMA.

98. SHIBATA, *supra* note 2, at 121. This negative clearance is similar to a Business Review Letter provided by the Antitrust Division of the Justice Department or an Advisory Opinion provided by the Federal Trade Commission of the United States. Unlike a Business Review Letter, a negative clearance issued appears to be a guarantee that it will not take legal action against the party. Even so, problems arise when a third party claims damages against the protected party. MATSUSHITA, *supra* note 5, at 38-40.

tion.⁹⁹ Accordingly, in practice it is advisable to check antimonopoly issues before finalization of contract negotiations.

Unfortunately, this ambiguity and technicality may prevent strict and straightforward enforcement of the AMA in business transactions at large. Neither Japanese companies nor foreign companies can automatically assert invalidity due to the violation of the AMA. In the demand for the strengthening of Japanese antimonopoly policy, this limitation is important because private companies may still enter into transactions suspected of AMA violations. The AMA alone cannot promote free competition and fully open the Japanese market.

B. INDIRECT EXTRATERRITORIALITY

The second question relates to an international legal issue, the extraterritorial application of the AMA. The AMA applies to transactions or trade within the territory of Japan. If the contract is performed in Japan, it may be subject to the AMA.¹⁰⁰ However, the JFTC and many Japanese commentators deny the extraterritorial effect of the AMA, claiming that the AMA protects fair and free competition only in the Japanese market.¹⁰¹ The JFTC exercises jurisdiction over overseas businesses only indirectly by ordering the Japanese party to delete or modify the relevant contractual provisions.¹⁰²

While a Japanese party may benefit from a JFTC order to revoke some restrictions, the foreign party does not have standing to take legal action against the JFTC under the holding of the Supreme Court of Japan. In *Novo Industri S.A.*, a Danish company, Novo Industri S.A. (Novo), filed a lawsuit against the JFTC with the Tokyo High Court to quash the JFTC order requiring a Japanese distributor to delete a provision of exclusive dealing and noncompetition.¹⁰³ Generally, if a Japanese respondent is dissatisfied with the JFTC's decision, the respondent can file a lawsuit with the Tokyo High Court against the JFTC.¹⁰⁴ However, in the *Novo* case, the Supreme Court denied Novo's standing, reasoning that a JFTC recommendation was binding on the Japanese respondent party who had accepted

99. Simon Berger, *Regional Developments: Pacific Basin*, 27 INT'L LAW. 547 (1993).

100. The fact that an agreement was made outside Japanese territory does not immunize it from Japanese jurisdiction.

101. In this regard, the JFTC will not agree with the position that U.S. antitrust law should govern foreign enterprises if their conduct hampers U.S. exports by U.S. into Japan. MATSUSHITA, *supra* note 16, at 75, 76. Therefore, the antimonopoly issues in Japan should be discussed under the AMA, not under U.S. antitrust laws.

102. MATSUSHITA, *supra* note 5, at 282. Similarly, the United States FTC has suggested prudence by the U.S. government in enforcing its antitrust laws against companies in foreign countries. *Government-Business Mission to Japan Focuses on Urging Anticartel Enforcement*, 62 Antitrust & Trade Reg. Rep. (BNA) 522 (Apr. 16, 1992).

103. MATSUSHITA, *supra* note 11, at 72-74.

104. AMA, *supra* note 1, arts. 77, 85.

the recommendation but was not binding on any third party, including Novo, a foreign party.¹⁰⁵

The *Novo* Court also stated that the Japanese party could not use the JFTC recommendation as a defense to the foreign company's challenge for breach of contract.¹⁰⁶ Under this holding, the Japanese party is bound by the JFTC decision, and violation is punishable. If the Japanese party breaches the contractual provision in accordance with the JFTC decision, the Japanese party may be liable for breach of contract. However, if the Japanese party can show that the relevant provisions are contrary to the public order and good morals under the Civil Code,¹⁰⁷ the foreign party cannot claim breach of contract because the provisions are null and void.

The Supreme Court holding in *Novo* seems to create a dilemma, because courts may not be able to easily ignore the JFTC's decision as a defense to breach of contract. However, this conflict may be unavoidable because the effects of administrative law and private law can be separate.¹⁰⁸ Still, a clause in violation of the AMA is likely to be unenforceable.¹⁰⁹ Accordingly, the Japanese party will not be liable for breach of contract regardless of the *Novo* decision.

In practice, in light of the unfairness to the foreign party, the JFTC usually initiates a formal hearing in which both the Japanese party and the foreign party are named respondents, instead of issuing a recommendation only to the Japanese party.¹¹⁰ However, in *Komatsu-Bucyrus*, when the JFTC attempted to serve a representative of Bucyrus with a complaint, Bucyrus argued that the representative did not have any authority to accept the service. Although a foreign company may avoid the dispute, avoidance is not necessarily beneficial. If a foreign company has substantial interests in any antimonopoly issue, it should not rely on the Japanese party or the JFTC's action, but should instead be involved in the enforcement process of the AMA.

Each foreign company may voluntarily attempt to break through some antimonopoly problems. For example, the Distribution Guidelines assume that Japanese "distributors have less bargaining power than manufacturers."¹¹¹ However, this assumption is not necessarily accurate when foreign manufacturers are depending on

105. Judgment of Nov. 28, 1975 (*Novo Industries v. JFTC*), Saikosai [Supreme Court], 29 Minshu 1592 (Japan).

106. If the contract has a force majeure provision to cover governmental action, the Japanese party is not obligated to comply with the provisions, and the foreign party cannot claim damages. However, the Supreme Court held that the foreign party may be able to claim damages in general. *Id.*

107. MINPO art. 90.

108. This ruling means that the contractual relationship between private parties and the relationship between the government and a private party can be different. Kengo Ishii, *Commentary on Novo Case*, 31 Hoso Jiho I-149, 162 (1979).

109. See *supra* notes 90, 94 and accompanying text.

110. See, e.g., *Komatsu-Bucyrus*, 28 Shinketsushu 79 (JFTC Oct. 26, 1981); MATSUSHITA, *supra* note 11, at 74-76; IMAMURA, *supra* note 18, at 175.

111. Thurston, *supra* note 32, at 537.

domestic wholesalers, suppliers, and retailers to penetrate the market.¹¹² If a Japanese distributor has more bargaining power than a foreign manufacturer when entering a distributorship agreement, the manufacturer may be allowed to restrict some activities of the Japanese distributor. In this regard, a foreign manufacturer should consider and apply Japanese antimonopoly policy, depending on the manufacturer's share in the industry, the nature of the industry, and other factors related to bargaining power. If a foreign company believes that there are justifiable reasons to sustain its position, the company must be able to show them to the JFTC.

To ensure that the AMA functions fairly with respect to both Japanese and foreign companies, foreign companies should follow the antimonopoly policy to be procedurally protected in Japan. To this end, the JFTC should have powers to regulate any party that does business or enters the market in Japan. For the JFTC to have broad power to investigate and regulate international business transactions, an international treaty may be needed to create mutual powers to regulate international transactions fully in each party's territory.¹¹³

C. CARTEL BIDDING

The third topic is cartel bidding (*dango*), especially in the construction industry. This issue became hot because of recent bid-rigging scandals and the U.S. demand in the SII.¹¹⁴ Several problems plague the construction industry that typify the problems in enforcement of antimonopoly policies in Japan. Since many cases of AMA violations involving construction companies have come to light,¹¹⁵ the JFTC announced guidelines concerning various activities of trade associations for the construction industry in public bidding in 1984.¹¹⁶ However, many construction companies did not cease cartel bidding¹¹⁷ due to the political and economic environment.

112. *Id.*

113. *Dokkin Seisaku Kyochō He Nichibei Kyotei* [Cooperation for Antimonopoly Policy between Japan and the U.S.], NIKKEI, Sept. 20, 1993, at 3 (reporting on the U.S. proposal to enter into a bilateral agreement with Japan to allow for cooperation in the enforcement of antimonopoly policy); Matsushita, *supra* note 16, at 76-78 (suggesting bilateral approach, trilateral approach, and multilateral approach).

114. The U.S. government has been complaining about the unsavory ties between Japanese politicians and the construction industry, claiming such links unfairly shut U.S. contractors out of the Japanese market. Jacob M. Schlesinger, *Japanese Arrest Shimizu Chairman in Bribery Probe*, WALL ST. J., Sept. 21, 1993, at A18.

115. Article 8 of the AMA prohibits trade association activities that substantially restrain competition. AMA, *supra* note 1, art. 8.

116. SHIBATA, *supra* note 2, at 205, 219.

117. For example, the *Yokosuka U.S. Navy Base* cartel case took place in 1988, and the *Kaidokyo* case took place in 1989. Iwakazu Takahashi, *Dokinho Shinketsu Hanrei Hyakusen* [100 Cases of the AMA], 110 BESSATSU JURISUTO 82, 83 (1991) (commenting on the *Kansai Airport* case). Also, the JFTC found that sixty-five construction companies were involved in bid rigging public civil works, and the JFTC issued surcharge payment orders amounting to 1 billion yen (approximately US\$8 million) to 43 firms. Yamada, *supra* note 28, at 97.

Bidding among designated companies may be the first reason why many cartel scandals occur in Japanese public-works bidding. In these projects, government agencies designate a certain number of construction companies that can compete for a project. This designation readily results in an oligopolistic situation. Also, construction companies must submit voluminous project proposals to technical officers for approval. As a result, only the company determined by the cartel to get the project from the government can afford to prepare the necessary documents. Construction companies believe they will suffer large losses without cartels. If a company fails to obtain a particular project after preparing the necessary documents, the company will likely lose its investments. As long as government agencies have the power to decide various detailed matters, the bidding company must spend a great deal of time preparing documents to meet the government agency's demand, which may sometimes be unnecessary. Depending upon the companies competing for a particular project, politicians may mediate the competition at the final stage.¹¹⁸ These cozy relationships among politicians, bureaucrats, and big private companies tend to destroy free and fair competition.

Therefore, the market environment must change to eliminate cartel bidding in several respects. The JFTC has stated that bidding should be adopted in general competition, and that even if bidding among designated companies is used, fair competition should be maintained.¹¹⁹ If certain companies are designated due to technical necessity, the criteria for bidding should designate the companies allowed to participate in the bidding. Foreign companies should also be allowed to participate in bidding to the extent possible. Moreover, government authority must be limited to facilitate efficiency of the bidding process. All these factors should be considered to promote fair and free competition in bidding.

In 1993, the revelation of widespread bid-rigging for public-works projects helped to end the LDP's four-decade reign. The new coalition administration promised to make efforts to improve the system of public-works bidding. Under the new administration, for example, the Ministry of Construction (MOC) decided to abolish the ranking system of construction companies for conditional bidding in general and to adopt objective criteria to evaluate construction companies for their qualification for public works.¹²⁰ Conditional bidding will be used not only for national projects, but also for local projects in the range of ¥700,000,000

118. Fukumoto & Shimizu, *Kokyo Koji Nyusatsuno Genbakara [Report from the Scene of Bidding in Public Project]*, NIKKEI, Apr. 9, 1993, at 13.

119. Kotorii Ippan Kyoso Nyusatsu Motomeru [*JFTC Requests General Competition Bidding*], NIKKEI, Sept. 30, 1993, at 1.

120. The ranking system of construction companies was created for bidding in general to select good companies to complete construction projects. For example, the Ministry of Construction placed about thirty companies under rank A and about 130 companies under rank B in the area of general public works. Only rank A companies may participate in big public works projects, which account for more than 500 million yen (approximately US\$5 million). *Kensetsukaisha Kakuzuke Haishi [Repeal Ranking Construction Companies]*, NIKKEI, Sept. 20, 1993, at 1, 3.

(approximately US\$6,400,000 at the time) or more.¹²¹ In the objective criteria, achievements in foreign countries are also considered.¹²² Also, the MOC is preparing countermeasures to promote transparency and competitiveness of bidding by adopting an independent supervisor of bidding, eliminating the promotion of the joint venture system that caused bid-rigging, and adopting stricter penalties.¹²³ In addition, the JFTC will have liaison conferences with other governmental agencies to prevent bid-rigging for public-works projects.¹²⁴

In this process, the government took the initiative, while civil and criminal actions had little influence.¹²⁵ However, victimized foreign companies may pursue civil action against Japanese construction companies that violated the AMA.¹²⁶ Also, international criticism, including the U.S. demands, accelerated enforcement of the antimonopoly policy in general. In this regard, political foreign demands can be beneficial to the improvement of antimonopoly enforcement in Japan. Accordingly, the debate over antimonopoly policy enforcement in Japan should be sustained as long as the demands are appropriate and consistent with worldwide free and fair competition.

D. SPECIAL FEATURES

The fourth topic relates to the structural features of the AMA compared to foreign antitrust laws, particularly U.S. antitrust law. Some foreign investors may feel adversely affected by the enforcement of the AMA because enforcement may result in broad intervention by the JFTC.¹²⁷ With the exception of some ambiguity concerning the enforcement of the AMA, foreign investors should not worry about undue restrictions. Since the JFTC enforces the AMA by way of specific regulations and guidelines, foreign investors can rely on such regulations.¹²⁸ Overall, prohibited trade practices under U.S. and Japanese law are

121. *Jokensuki Ippam Kyoso Nyusatsu, Todofuken nimo Donyu* [Prefectures Adopt Conditional General Competition Bidding], NIKKEI, Oct. 16, 1993, at 1.

122. *Id.*

123. *Nyusatsu Kanshi ni Daisansha Kikan* [Third Party Institution Will Audit Bidding], NIKKEI, Nov. 1, 1993, at 5 (reporting that the MOC is attempting to amend the related statutes for these purposes).

124. *Kotorii Dango Boshi he Taisei Kyoka* [JFTC Strengthens Its Power to Prevent Cartels], NIKKEI, Oct. 21, 1993, at 5. At the same time, the JFTC announced an increase in staff investigating violations of the AMA. *Id.*

125. On the contrary, a former minister of the MOC under the LDP administration was suspected of preventing the JFTC from imposing criminal charges against construction companies in the *Saitama Doyokai* case. See *supra* notes 58 & 64.

126. See *supra* note 55. But see ISHIDA, *supra* note 33, at 47-51, 119-21, 128 (pointing out various difficulties in private litigation under the Japanese civil litigation system).

127. Thurston, *supra* note 32, at 540.

128. For example, the Antimonopoly Guidelines Concerning Joint Research and Development, issued in 1993, restrict various arrangements in joint research and development activities. However, the JFTC clarified that it would not restrict business activities when the shares of the participants in the industry are not more than 20% in total. SHIBATA, *supra* note 2, at 57. Accordingly, middle-sized companies will not have to worry about this point.

substantially similar,¹²⁹ even though actual commercial practices in each country may be quite different.

However, the AMA takes different approaches in some areas. For example, the AMA may be more restrictive of some business activities than are antitrust laws in the United States.¹³⁰ The provisions concerning monopolistic situations and stock acquisitions exceed remedies in the United States for monopolization.¹³¹ The JFTC may take necessary action against an enterprise involved in a monopolistic situation, even if such a monopoly has been acquired by normal business activity and no predatory intent or conduct has been found.¹³²

Holding companies are another example of broad Japanese regulation. Many countries, including the United States, permit holding companies. However, the AMA prohibits holding companies, regardless of their impact on competition.¹³³ Since foreign companies sometimes utilize holding companies to establish businesses abroad, the JFTC gives some leeway to foreign companies so that the company will not be regarded as a prohibited holding company when a foreign holding company owns only one Japanese company.¹³⁴

Japan's rule of per se illegality of holding companies developed before World War II when holding companies controlled large industrial combines (*zaibatsu*).¹³⁵ The business sector has repeatedly requested easing prohibitions against holding companies. However, since grouping companies can be achieved through mutually holding shares, this request has not been very strong.¹³⁶ Recently, various organizations have proposed amendment of the AMA to allow holding companies.¹³⁷ Due to the recent recession, many companies are now restructuring to streamline their organizations. Also, Japanese company structure, where compa-

129. FUGATE, *supra* note 5, § 16.13, at 508; ISHIDA, *supra* note 33, at 2, 32.

130. In some areas, the United States and Japan have many different approaches. *E.g.*, ISHIDA, *supra* note 33, at 32.

131. FUGATE, *supra* note 5, § 16.13, at 509.

132. AMA, *supra* note 1, art. 8-4.

133. *Id.* art. 9. The JFTC may bring a lawsuit to have such incorporation declared null and void. *Id.* art. 18; SHIBATA, *supra* note 2, at 183.

134. 5 DOING BUSINESS IN JAPAN, *supra* note 3, pt. IX, ch. 4, § 4.02. MATSUSHITA & SCHOENBAUM, *supra* note 17, at 159.

135. "Enterprises from various fields belonged to a corporate family (e.g., 'Mitsui' or 'Sumitomo') and were usually controlled by a holding company." MATSUSHITA, *supra* note 11, at 1; MATSUSHITA & SCHOENBAUM, *supra* note 17, at 158.

136. IMAMURA, *supra* note 18, at 42.

137. In 1993 the Industry Structure Council of the MITI proposed this idea. *Dokkinho-Rokiho Minaoshi* [Review of the AMA and Labor Standards Act], NIKKEI, June 16, 1993, at 1. In 1994 Keidanren (the Federation of Economic Organizations) proposed the same, and some European and American companies are also requesting it. *Mochikabukaisha Kaikin wo Teigen* [Proposed Release of Holding Companies], NIKKEI, Mar. 15, 1994, at 5; *Mochikabukaisha Kaikinron Saifujo* [Advocate for Release of Holding Companies Again], NIKKEI, Mar. 31, 1994, at 7. Both Keidanren and the MITI actively requested that holding companies be allowed, but the JFTC continued to oppose holding companies. *Id.*

nies own shares in each other, is criticized as exclusive affiliation (*keiretsu*).¹³⁸ This closely structured network appears to exclude new business entities from the market. If Japanese companies stop cross-holding shares and streamline organizations through holding companies, they may be able to reform themselves in response to foreign demands. Advocates of holding companies also argue that there is no reason to retain the prohibition against holding companies regardless of their impact on competition.¹³⁹ Whether and when holding companies will be permitted in Japan is uncertain, making this an issue of continued concern.

By contrast, the AMA differs from American antitrust laws in some areas. For example, a variety of provisions and special statutes exempt certain activities from application of the AMA.¹⁴⁰ The AMA provides exemptions for natural monopolies,¹⁴¹ activities based on the law concerning exemptions from the AMA,¹⁴² the exercise of intellectual property rights,¹⁴³ certain activities of cooperatives,¹⁴⁴ certain resale price maintenance contracts,¹⁴⁵ depression cartels,¹⁴⁶ and rationalization cartels.¹⁴⁷ The JFTC is now reconsidering these exemptions and broadening the types of industries covered by the AMA under the full pressure of competition.¹⁴⁸

Government agencies may resist the abolition of these exemptions due to the resulting impact on existing domestic industries. However, the current trend favors the elimination of such exemptions. For example, the MITI decided to abolish all exemptions for cartels within the textile industry because each textile

138. In the first joint report on SII, the United States urged greater efforts to eliminate the *keiretsu* system of Japanese companies; however, Japan pointed to significant antimonopolistic actions. FUGATE, *supra* note 5, § 16.13, at 102 (Supp. 1993); ISHIDA, *supra* note 33, at 27.

139. However, the *Nikkei* newspaper anticipates that even if a holding company is permitted, the Japanese company structure, in which companies own each other's shares, will not change dramatically because few companies can utilize a holding company effectively. Atsushi Suemura, *Kaikindemo Keiei Henkaku Susumazu* [Even If Released Holding Company, No Reform of Business May Occur], *NIKKEI*, July 11, 1993, at 39.

140. SHIBATA, *supra* note 2, at 221-25 (listing special statutes exempting certain activities from the AMA as of January 1, 1993); MATSUSHITA, *supra* note 11, at 88-95.

141. AMA, *supra* note 1, art. 21.

142. *Id.* art. 22.

143. *Id.* art. 23.

144. *Id.* art. 24.

145. *Id.* art. 24-2.

146. *Id.* art. 24-3. Although the JFTC approved 21 depression cartels in 1975, the JFTC has not approved further depression cartels since the one approved for the shipbuilding industry in 1988, making it the last approval of the JFTC. SHIBATA, *supra* note 2, at 234.

147. AMA, *supra* note 1, art. 24-4.

148. IMAMURA, *supra* note 18, at 110, 111. The number of exempted cartels totaled 1,079 cases as of the end of 1965, but the number decreased to 161 cases as of the end of January 1993. SHIBATA, *supra* note 2, at 222, 235. However, other government agencies are still reluctant to reconsider the exemptions to protect the current industries. *Dokkinho Jogai Karuteru Shukusho* [Decreasing Cartel Exempted from the AMA], *NIKKEI*, Nov. 2, 1993, at 1 [hereinafter *Decreasing Cartel*]; *Karamawarisuru Dokkinho Kyoka* [No Effect of Enhancement of the AMA], *NIKKEI*, Nov. 29, 1993, at 5.

company was already prepared for the repeal of such exemptions.¹⁴⁹ The JFTC is making efforts to abolish those exemptions, which the JFTC viewed as consistent with the basic policy of the new coalition administration of advocating consumer interests.¹⁵⁰ Accordingly, the AMA will probably fully cover most industries in the future. In this regard, foreign companies will have greater exposure to the AMA, and foreign countries should pay careful attention to the process to enhance the antimonopoly policy.

III. Conclusion

Enhancement of AMA enforcement is inevitable because "maintenance and promotion of fair and free competition is an extremely important policy objective, which not only serves the interests of the consumers but also increases new market entry opportunities, including those of foreign companies."¹⁵¹ However, civil actions or private parties will probably not play as central a role in the enforcement of the AMA in Japan as do antitrust laws in the United States.

Although the birth of the new coalition administration in Japan is timely with regard to enforcement of antimonopoly policy, dramatic and swift change cannot be expected in this area. Also, the AMA alone cannot enforce the antimonopoly policy due in part to the three significant characteristics of the Japanese legal system: law enforcement by nonlawyer bureaucrats, a conservative judiciary, and less protection through litigation.¹⁵² In general, conservative views may continue to slow the trend of increased enforcement of the AMA. Of course, politicians, bureaucrats, and big companies will not easily give up their own power and protected, cozy relationships.

However, the recent developments described in this article will accelerate enhancement of Japanese antimonopoly policy. The environment surrounding AMA enforcement has changed favorably. The JFTC must establish a steadfast antimonopoly policy in the current favorable environment. The Japanese economy cannot isolate itself from international trade, and international pressure has played a significant role in this area. The first step in the process to enhance antimonopoly policy enforcement is for American companies to understand and utilize Japanese antimonopoly policy in an appropriate manner. Although some companies may have attempted to avoid antimonopoly issues in Japan in the past, continued inactivity may become an impediment to entry and success in the Japanese market. When a foreign company has been victimized by a violation of the AMA, it may

149. *Tsusancho Seni Karuteru Zenpai [MITI Repeals All Cartel of Textile Industry]*, NIKKEI, Oct. 22, 1993, at 5.

150. *Decreasing Cartel*, *supra* note 148, at 1.

151. JOINT REPORT TO THE U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE sec. IV-1 (June 28, 1990).

152. *The United States and Japan*, *supra* note 89, at 127 (Professor Matsushita's statement in the panel discussion suggesting that the AMA may not be effective in preventing the *keiretsu* transactions).

be advantageous for such a foreign company to test the Japanese court system by seeking civil redress, despite a lack of precedent in this area.

Second, foreign countries, including the United States, should continue to pressure Japan to improve free and fair competition in the Japanese market.¹⁵³ Considering the current political situation, the Japanese people will have difficulty changing AMA enforcement drastically through national elections or consumer movements.¹⁵⁴ Foreign demands can be a source of reform to the Japanese domestic antimonopoly enforcement system, which in turn may impact international business transactions. Under the Treaty of Friendship, Commerce, and Navigation between Japan and the United States, Japan is politically obligated to take appropriate measures with a view to eliminating harmful effects upon commerce by business practices that restrain competition, limit access to the market, or foster monopolistic control.¹⁵⁵ Accordingly, it is consistent with this treaty for the United States government to demand stricter enforcement of the AMA. Since the JFTC may not have adequate experience in this area as compared to United States antitrust agencies, foreign assistance or new international agreements may also be appropriate.

Changes in Japanese antimonopoly policy have revived the AMA in the Japanese legal system. The Japanese market has been closed, and Japanese trade practices are often criticized. However, Japanese companies have merely pursued economic success in an environment where antimonopoly policy was often ignored. Now that Japanese enforcement of the AMA is on the rise, more Japanese people will see the benefits of antimonopoly policy. This increase in benefits should, in turn, foster further enforcement of the AMA, and a concomitant decline in foreign criticism of the Japanese market.

153. *Nihonno Dokkin Seisaku Kyoka, Bei EC ga Sukuramu* [The U.S. and EC Will Cooperate for Enhancement of Japanese Antimonopoly Policy], *NIKKEI*, Oct. 12, 1993, at 2 (reporting that the EC and the United States are going to cooperate and demand enhancement of the antimonopoly policy in Japan).

154. Sanger, *supra* note 84, at C1 (Mr. Fujisawa, the president of Fujiyoshi, commented, "we need Gaiatsu," which means foreign pressure).

155. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. 18, 4 U.S.T. 2063, T.I.A.S. No. 2863.