

# Washington University Global Studies Law Review

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Volume 3  
Issue 2 *Chinese Anti-Monopoly Law*

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January 2004

## Effectiveness and Transparency of Competition Law Enforcement—Causes and Consequences of a Perception Gap Between Home and Abroad on the Anti-Monopoly Act Enforcement in Japan

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### Recommended Citation

Makoto Kurita, *Effectiveness and Transparency of Competition Law Enforcement—Causes and Consequences of a Perception Gap Between Home and Abroad on the Anti-Monopoly Act Enforcement in Japan*, 3 WASH. U. GLOBAL STUD. L. REV. 387 (2004),  
[https://openscholarship.wustl.edu/law\\_globalstudies/vol3/iss2/11](https://openscholarship.wustl.edu/law_globalstudies/vol3/iss2/11)

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# EFFECTIVENESS AND TRANSPARENCY OF COMPETITION LAW ENFORCEMENT—CAUSES AND CONSEQUENCES OF A PERCEPTION GAP BETWEEN HOME AND ABROAD ON THE ANTI- MONOPOLY ACT ENFORCEMENT IN JAPAN<sup>†</sup>

MAKOTO KURITA<sup>\*</sup>

## I. INTRODUCTION

A striking contrast exists between the perception of domestic and foreign parties concerning the enforcement of Japan's Anti-Monopoly Act ("AMA"). In Japan, the Fair Trade Commission of Japan ("JFTC"), which is the enforcement agency of the AMA, is expected to act as a guardian of justice and a friend of the economically weak. Its efforts to maintain free and fair competition with limited power and resources have been praised to some extent. Those in business circles frequently complain that AMA enforcement is too stringent for them to improve international competitiveness. In contrast, from abroad the JFTC has long been seen as a "watchdog . . . trained not to bite."<sup>1</sup> Foreign firms and governments frequently allege that because of the AMA's lax enforcement, cartels and exclusionary practices are prevalent in Japanese markets. Foreigners say that their market access has been significantly impeded by these practices and various closed business groups.<sup>2</sup> They have requested that Japan take various measures to promote imports for specific goods and services, as well as measures against cartels

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<sup>†</sup> All Japanese language sources were verified by Global Studies.

<sup>\*</sup> Professor, Faculty of Law and Economics, Chiba University, Japan. This is the modified version of a paper presented at the International Conference on Competition Policy and Economic Development, organized by Institute of Law, Chinese Academy of Social Sciences (Beijing, September 17-20, 2002).

1. *Japanese Antitrust Enforcement: Up, Fido, Up*, ECONOMIST, Sept. 16, 1989, at 80.

2. Professor Haley argues that if cartels flourished in Japanese markets, foreign producers would have a competitive advantage to enter the market, because higher prices provide foreign companies with higher profits and incentives to penetrate. He goes on to argue that the improved enforcement of the AMA would provide disincentives to foreign producers to enter Japanese markets. John O. Haley, *Weak Law, Strong Competition, and Trade Barriers: Competitiveness as a Disincentive to Foreign Entry into Japanese Markets*, in JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 203 (Kozo Yamamura ed., 1990). Such an argument, however persuasive, seems to be neither prevalent nor popular abroad. This paper focuses on the contrast between foreign and domestic views; therefore this argument is omitted.

and exclusionary practices. In response, the JFTC made various efforts to strengthen the AMA and to improve its enforcement.<sup>3</sup>

In this Essay, I will explain the causes of the perception gap between home and abroad regarding the JFTC's enforcement activities,<sup>4</sup> analyze the JFTC's informal style of AMA enforcement, and make modest proposals to narrow the perception gap.<sup>5</sup> In Part II, I will briefly present "typical" views from both domestic and foreign sources concerning AMA enforcement and the JFTC's responses to foreign views. In Part III, I will examine domestic and foreign causes of the contrast, and identify the JFTC's informal enforcement style as an underlying feature. Finally, in Section IV I will make some modest proposals for improving both foreign perceptions and the effectiveness of AMA enforcement, and I will provide suggestions for developing Chinese competition law.

## II. TYPICAL VIEWS ON THE AMA ENFORCEMENT BY THE JFTC

The following summarizes the contrast between perceptions at home and abroad on the enforcement of the AMA by the JFTC<sup>6</sup> and then describes the JFTC's response to the foreign parties' allegations.

### A. *Domestic Views: The AMA as an Obstacle to Business Activities*

In Japan, few, if any, doubt that the AMA and its enforcement efforts are world-class and certainly comparable to those of other major jurisdictions. However, concerned industrial circles and ministries have echoed complaints about the JFTC's interpretations of the AMA, suggesting that the JFTC's guidance hinders trade associations and companies from implementing mutually beneficial activities for the purpose of preserving the environment and promoting recycling. There are also complaints that the JFTC's

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3. The governments of Japan and the United States have held continuous dialogues on structural economic policy issues since the end of the 1980s, named the Structural Impediments Initiative ("SII") and the Economic Framework Talks. Competition policy, including AMA enforcement, is one of the major subjects involved in the process.

4. In this Essay, I use the term "enforcement" to mean all activities by a competition agency for the purpose of accomplishing the goals of competition law. Therefore, I focus solely on government enforcement. Besides government enforcement, private enforcement is vitally important for the purpose of compensating victims and effectively deterring offences. The United States is currently the only jurisdiction where private enforcement is actively utilized (and allegedly misused) for these purposes.

5. I also focus on the source of the perception gap between home and abroad on the JFTC's enforcement activities and do not directly examine the substantive standards and criteria of the AMA violations and enforcement records of the JFTC.

6. I omit citations of various views from both sides.

quantitative standards and criteria on merger regulations, primarily based on market share figures, are too stringent and applied without due respect for actual competitive conditions in the relevant markets. The result of the JFTC's interpretation allegedly troubles companies that are planning and implementing the restructuring of their businesses. These complaints, however, rarely surface as legal disputes with the JFTC because, as will be discussed later,<sup>7</sup> the JFTC rarely takes legal action to remedy alleged AMA violations; the exception is perhaps hard-core cartels.

*B. Foreign Views: Market Closed by Exclusionary Practices and Lax Enforcement of the AMA*

The typical view from abroad regarding Japanese markets and the AMA is best exemplified by various reports published by the United States Trade Representative, including the annual National Trade Estimate Report on Foreign Trade Barriers.<sup>8</sup> The view is as follows: Japanese markets are closed to foreign firms, and competitive goods and services from abroad are thereby excluded from the second largest economy in the world. The most egregious barriers are anticompetitive or exclusionary practices by domestic firms, and Japanese governmental ministries and bureaus have been tolerating and even encouraging these practices. The JFTC has a long history of failing to enforce the AMA against such practices. For the purposes of further discussion this view will be referred to as the "closed Japanese market" theory.<sup>9</sup>

The closed Japanese market theory peaked during the Structural Impediments Initiative ("SII") talks, which addressed structural issues in both the Japanese and the United States economies.<sup>10</sup> Of the six broad areas addressed by the Japanese side in the Final Report of the SII, four (distribution systems, exclusionary business practices, keiretsu relationships, and pricing mechanisms) related to the AMA and competition policy.<sup>11</sup> Soon

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7. See *infra* Part II.C and accompanying notes.

8. See, e.g., Office of the United States Trade Representative, Access to Japan's Photographic Film and Paper Market: Report on Japan's Implementation of Its WTO Representation (Aug. 19, 1998), available at [http://www.ustr.gov/html/act301.htm#301\\_99](http://www.ustr.gov/html/act301.htm#301_99) (text on file with WASH. U. GLOBAL STUD. L. REV.).

9. As to specific allegations by foreign firms based on the closed Japanese market theory, see, e.g., MASAOKI KOTABE & KENT W. WHEELER, ANTICOMPETITIVE PRACTICES IN JAPAN: THEIR IMPACT ON THE PERFORMANCE OF FOREIGN FIRMS (1996).

10. Structural Impediments Initiative Joint Report, June 28, 1990, U.S.-Japan, at [http://170.110.214.18/tcc/data/commerce\\_html/TCC.Documents/Japan\\_Structural\\_Impediments\\_Initiative.html](http://170.110.214.18/tcc/data/commerce_html/TCC.Documents/Japan_Structural_Impediments_Initiative.html) (last visited Oct. 20, 2003).

11. *Id.*

after the SII, the Film Dispute between the United States and Japan arose when one company's complaint regarding the Japanese film market developed into one of the most serious conflicts between the two governments and one of the most difficult legal battles of the panel proceeding at the World Trade Organization (WTO).<sup>12</sup>

*C. JFTC Response: Role of the AMA and Vigorous Enforcement by the JFTC*

From the JFTC's perspective, cartels and unfair trade practices are prohibited under the AMA. The JFTC has vigorously enforced these AMA regulations, issuing cease-and-desist orders<sup>13</sup> and imposing heavy surcharges.<sup>14</sup> Since the 1980s, when economic frictions with major trading partners, particularly those with the United States, intensified, the JFTC has made efforts to strengthen the AMA. These efforts include the investigation of import-restriction cartels<sup>15</sup> and the surveillance of distribution and business practices in various industries.<sup>16</sup>

Until the middle of 1990s, the JFTC gained confidence in the AMA and its AMA enforcement measures. The JFTC argued against the allegations of the closed Japanese market theory by highlighting its improved enforcement record. The JFTC's response to foreign views was eloquently presented in a speech delivered in 2000 by then-Commissioner Itoda. The speech was provocatively entitled "JFTC Barks."<sup>17</sup> The speech summarizes the JFTC's

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12. *Japan-Measures Affecting Consumer Photographic Film and Paper*, WTO, U.N. Doc. WT/DS44/R (1998). Although the WTO Panel decision was in favor of Japan, the dispute and the JFTC's response to it revealed some problems with the JFTC's enforcement style. See *infra* note 41 and accompanying text. As to the views from the United States perspective on the Film Dispute, see, e.g., Donald I. Baker & W. Todd Miller, *Antitrust Enforcement and Nonenforcement as a Barrier to Imports—With Illustrations from the Japanese Film Dispute*, 24 *EMPIRICA* 83 (1997).

13. For example, the JFTC rendered cease-and-desist orders to cement manufactures for their price-fixing cartels and imposed surcharges of more than 11 billion Yen. JFTC Recommendation Decision, 37 *SHINKETSUSYU* 58 (Jan. 25, 1991).

14. The surcharge system is a monetary measure imposed by the JFTC to disgorge profits gained by illegal price-related cartels. The amount of surcharge is calculated by a mechanical formula, specifically by multiplying each firm's sales of goods or services from the cartel by a fixed percentage (six percent in principle).

15. The soda ash import cartel case (JFTC Recommendation Decision, March 31, 1983) was the most important at the time.

16. On the development of the AMA and its enforcement during the process of the SII, see Makoto Kurita, *Recent Development of Competition Policy in Japan and Their Implications for International Harmonization of Competition Laws*, in *INTERNATIONAL HARMONIZATION OF COMPETITION LAWS* 361 (C. J. Cheng et. al. eds., 1995).

17. Commissioner Shogo Itoda, *Japan Fair Trade Commission Barks: Yesterday, Today and Tomorrow: Competition Policy of Japan*, Address Before the Royal Institute of International Affairs (Feb. 22, 2000), at <http://www2.jftc.go.jp/e-page/speech/00-0222.htm> (last visited Oct. 20, 2003). See

activities during the 1990s and explains the revolutionary changes that the AMA and the JFTC implemented.<sup>18</sup>

The JFTC also solicited foreign complaints on exclusionary practices and promised to address such complaints, if warranted. From the JFTC's standpoint, however, most of the foreign complaints were abstract, baseless, exaggerated, or obsolete, and rarely conducive to actual enforcement activities.

The JFTC's efforts to strengthen the AMA enforcement attracted favorable attention from Professor First in the middle of 1990s.<sup>19</sup> According to First, from the late 1980s to the early 1990s, the JFTC's enforcement of administrative fines was improving and becoming roughly comparable to that of the United States Department of Justice ("DOJ"). This observation was true at least as far as anti-cartel enforcement by governments was concerned.<sup>20</sup> First's view was based on the comparison between the total amount of administrative surcharges imposed by the JFTC and that of the criminal fines obtained by the DOJ. Since the late 1990s, however, the DOJ has drastically strengthened its enforcement activities against international cartels, imposing huge criminal fines and long prison terms.<sup>21</sup> The Commission of the European Community ("EC Commission") has followed the DOJ's lead, although not by means of the criminal law.<sup>22</sup> The JFTC, however, issued "warnings," or informal instructions not to repeat the offense, only to Japanese participants in international cartel cases.<sup>23</sup> The

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*also* Syogo Itoda, *Competition Policy of Japan and Its Global Implementation*, in *COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM PERSPECTIVES FROM THE E.U., JAPAN, AND THE USA* 61 (Clifford A. Jones & Mitsuo Matsushita eds., 2002).

18. Descriptions in Commissioner Itoda's speech on the JFTC's activities without distinguishing formal and informal measures may lead to misunderstandings by its readers. *See also* James D. Fry, *Struggling to Teethe: Japan's Antitrust Enforcement Regime*, 32 *LAW & POL'Y INT'L BUS.* 825, 825 (2001). ("to rebut[ting] Commissioner Itoda's above assertion").

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

20. *Id.* at 160.

21. The DOJ obtained a guilty plea and 500 million US dollars in criminal fines from F. Hoffmann-La Roche, the Swiss pharmaceutical giant, for leading a worldwide conspiracy to raise and fix prices and allocate market shares for certain vitamins. *See* Press Release, United States Department of Justice, *F. Hoffman-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel*, (May 20, 1999), (on file with WASH. U. GLOBAL STUD. L. REV.), available at <http://www.USdoj.gov/opa/pr/1999/May/196at.htm> (last visited Oct. 26, 2003).

22. The EC Commission imposed an administrative fine of 462 million Euros on F. Hoffmann-La Roche. *See* Press Release, European Commission, *Commission Imposes Fines on Vitamin Cartels*, (Nov. 21, 2001) (on file with WASH. U. GLOBAL STUD. L. REV.), available at [http://europa.eu.int/rapid/start/cgi/gvesten.ksh?p\\_action.gettx+=gt&doc+IP/p1/1625101AG](http://europa.eu.int/rapid/start/cgi/gvesten.ksh?p_action.gettx+=gt&doc+IP/p1/1625101AG) (last visited Oct. 26, 2003).

23. Press Release, Japan Fair Trade Commission, *Warnings Against Dasichi Pharmaceutical Co., Ltd. and Eisai Co., Ltd.* (Apr. 5, 2001) (on file with WASH. U. GLOBAL STUD. L. REV.), available at <http://www2.jif.tc.go.jp/e-page/press/2001/20010405vitamin.pdf> (last visited Oct. 26, 2003).

outcomes of recent international cartel cases clearly demonstrate that Professor First's 1995 evaluation concerning anti-cartel enforcement by governments is now out dated.<sup>24</sup> Therefore, the JFTC must drastically review its anti-cartel enforcement mechanism, including sanctions against cartel participants under the AMA.<sup>25</sup>

### III. WHAT CAUSES THE CONTRAST BETWEEN HOME AND ABROAD?

The background and causes of domestic and foreign parties' contrasting perceptions of the enforcement of the AMA by the JFTC must be identified. This Section will point out reasons that foreign parties, particularly those from the United States, tend to blame the JFTC for the lax enforcement of the AMA. It will then show several reasons that the JFTC's activities are and have been likely misunderstood by foreign parties. Based on these analyses and a focus on the enforcement style of the JFTC, this Section will identify the underlying cause of the perception gap.

#### A. Causes from Foreign Origin

Several reasons exist for foreign parties to blame the JFTC for lax enforcement of the AMA.

##### 1. *Obsolete or Anecdotal Evidence*

Historically, the JFTC and its enforcement of the AMA have been inconsistent, and it is only since the 1990s that the JFTC has gained the support of political, bureaucratic, and industrial circles. No one can deny that exclusionary practices were prevalent when the ministries and the business community were eager to take countermeasures against import and capital liberalizations. Times, however, have changed, and the JFTC has become more vigilant in detecting AMA violations. Also, business practices have changed. If foreign complaints are based on obsolete or anecdotal evidence,<sup>26</sup>

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24. It is fair to add that Professor First clearly pointed out serious deficiencies in other areas of the AMA enforcement. See First, *supra* note 19.

25. The JFTC-commissioned study group published its report on comprehensive review of the AMA enforcement systems. See Report of "Study Groups on Anti-Monopoly Act," JFTC press release (Oct. 28, 2003), available at <http://www2.jftc.go.jp/e-page/press/index03-2.html> (text on file with WASH. U. GLOBAL STUD. L. REV.).

26. I have no intention of arguing that all foreign complaints are baseless. Obsolete evidence may reveal on-going violations, and anecdotal evidence may indicate structural misconduct. Competition agencies must analyze such evidence on its merits with imagination and zeal.

the JFTC might have many difficulties in initiating formal enforcement procedures.<sup>27</sup>

## 2. *Double Standard*

Whether intentional or not, a kind of “double standard” is sometimes employed in the arguments of foreign parties. Although anticompetitive practices are prohibited both in the AMA and in the antitrust laws of the United States, interpretations of these laws are quite flexible and change over time. In the United States, since the 1970s the so-called Chicago School has gradually gained support, and its economic rationale and criteria for antitrust violations have been adopted by both enforcement agencies and courts.<sup>28</sup> Roughly speaking, the Chicago School criteria tend to bring about weak enforcement of antitrust laws. For example, the Chicago School argues that vertical restraints (territorial or customer restrictions) are generally pro-competitive or at least competitively neutral, and therefore they should be treated as per se legal, or at least, presumptively legal. Trade representatives and other proponents of the closed Japanese market theory often argue, albeit based on the old antitrust theories and cases that are neither effective nor prevalent at this moment, that anticompetitive vertical practices like exclusive dealing, which would be punished severely in the United States, are tolerated in Japan because of the JFTC’s weak enforcement of the AMA. Thus, these proponents argue for strict enforcement, based on a different standard, which is not even prevalent in their home country.<sup>29</sup>

## 3. *Conduct or Practice v. Situation*

Antitrust or AMA violations must be specific restrictive “practices,” as distinguished from restrictive “situations.” For example, under antitrust laws, exclusive dealing must be an arrangement between a supplier and its distributors not to deal in competing products. Similarly, under the AMA, exclusive dealing is a practice by a supplier dealing with its distributors on the condition that the distributors do not deal with competing products. On the other hand, a situation where distributors, based on their respective

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27. In the Film Dispute, Kodak’s allegations against Fuji’s anticompetitive practices were based on incidents mostly in the 1960s and 1970s; thus it might be difficult to prove the current practices and situations.

28. See, e.g., Richard A. Posner, *The Next Step in Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 6 (1981).

29. The Film Dispute is typical on this point as well. Fuji responded to Kodak’s allegations by criticizing Kodak for urging the U.S. Government to apply a double standard of market definition.



business judgment, deal with the products of a specific supplier is not a violation of the AMA or the antitrust laws. However restrictive or exclusionary such a situation is, it cannot be deemed a violation because there is no “practice.” Foreign complainants sometimes allege such a situation, but not a practice. Therefore, such allegations are meaningless in the context of an AMA violation.<sup>30</sup>

#### 4. *Misunderstanding on Japanese Economy*

In the 1980s, Japanese-style management was praised and long-term transactional relationships (called *keiretsu*) were considered to be a source of competitive advantage for Japanese companies.<sup>31</sup> Abroad, many believe that long-term transactions are prevalent in Japan, and that foreign firms are excluded from creating close business ties between and among Japanese firms. From an outsider’s perspective, a long-term transaction, however efficient for the parties concerned, is an insurmountable barrier to new entry. Once such an understanding on Japanese economy has become well known, it is very difficult to refute. It is, however, quite questionable how firmly and prevalently such business relationships between Japanese companies were maintained even in the 1980s,<sup>32</sup> and such relationships may have changed after the burst of the bubble economy in the 1990s.

#### 5. *Difficulties of Analysis*

Most of the exclusionary practices alleged by foreign parties are vertical in nature. The role and effect of vertical restraints as a barrier to international trade is quite difficult to analyze, and proponents of the closed Japanese market theory may have manipulated neutral analyses in their favor. As Professor Scherer writes, “Competition policy rules should not be added to the arsenal of international trade policies merely to rescue would-be national market entrants from their own marketing strategy errors and faintheartedness.”<sup>33</sup>

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30. This does not mean that no problem exists in such a restrictive situation from a viewpoint of competition policy.

31. JAMES P. WOMACK ET AL., *THE MACHINE THAT CHANGED THE WORLD: HOW JAPAN’S SECRET IN THE GLOBAL AUTO WARS WILL REVOLUTIONIZE WESTERN INDUSTRY 1* (1991).

32. Recently, Professors Miwa and Ramseyer energetically published articles on misunderstandings regarding Japanese keiretsu issues, and also published a book for the general public. YOSHIRO MIWA & J. MARK RAMSEYER, *NIHONKEIZAI-RON NO GOKAI: KEIRETSU NO JUBAKU KARA NO KAIHO [MISUNDERSTANDINGS OF JAPANESE ECONOMY: EMANCIPATION FROM SPELLBIND OF “KEIRETSU”]* (2001).

33. F. M. Scherer, *Retail Distribution Channel Barriers to International Trade*, 67 *ANTITRUST L.*

### 6. *Requesting Affirmative Action by Japanese Government*

Private firms are likely to have a distaste for fierce competition. In order to secure their penetration Japanese markets, foreign firms may request so-called “affirmative actions,” or more favorable treatment than is given to domestic firms, on the pretext that they have been unfairly excluded by the anticompetitive practices employed by domestic firms. A typical example may be the Semi-Conductor Arrangement in 1986, which allegedly guaranteed a twenty percent market share to foreign products in the Japanese semi-conductor market.<sup>34</sup> During the Economic Framework Talks, the United States repeatedly argued for quantitative criteria to monitor market penetration of foreign goods and services into Japanese markets. Based on these arguments the United States representatives may have expected that the Japanese Government would take affirmative actions in response to their requests based on the closed market theory.

### B. *Problems From the Japanese Side*

Now let's turn to the causes of discontent from amongst the Japanese. This Section point out various deficiencies in the JFTC's enforcement of the AMA.<sup>35</sup>

#### 1. *Informal Measures*

The JFTC sometimes takes informal measures (“warnings”) in investigative cases of companies without resorting to formal actions (cease-and desist orders). As the JFTC admits, an informal measure is a kind of administrative guidance, compliance with which depends on the respondent. The reasons for using the informal measures vary. An informal measure can save enforcement resources such as time and manpower and may be issued even in cases of insufficient evidence of the alleged violations. Also, newspaper coverage of the JFTC's informal measures is very similar to that of formal actions. An informal measure, however, is legally insignificant from a foreign perspective. Suppose that the JFTC takes ten formal measures and ten informal measures. The JFTC counts twenty measures in total, but

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J. 77, 112 (1999).

34. CLYDE V. PRESTOWITZ, *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD* 65 (1988).

35. Some of these causes are recognizable not only in the context of AMA enforcement by the JFTC but also in general Japanese bureaucracy, and rectifying the causes may be all the more difficult.

foreign parties see only ten formal measures. This may be one of the perception gap between domestic and foreign observers.

Resorting to more formal measures was one of the JFTC's commitments in the SII. The JFTC has made efforts to issue formal orders against blatant cartels such as price-fixing and bid-rigging. However, as far as other types of practices are concerned, few formal measures have been taken. Instead, informal warnings and press releases have been issued.<sup>36</sup> Major allegations against access barriers to Japanese markets for foreign parties stem from import-restricting arrangements and exclusionary practices by domestic firms. The JFTC's enforcement record clearly shows that few formal measures have been taken to remedy such practices.<sup>37</sup>

## 2. Survey Method

The JFTC has frequently conducted surveys of the various industries or practices based on the AMA and competition policy. The JFTC has surveyed the auto, auto parts, paper, flat glass, color film, and insurance industries. The United States has alleged that these industries maintain exclusionary practices in distribution channels. The JFTC surveys are not an investigative procedure against specific companies, but rather are a general fact-finding process conducted on an industry-by-industry, or product-by-product basis. From the JFTC perspective, such a method can be quite effective because of its extensive nature and low cost. For example, industry-wide research can be conducted, instead of company-specific and resource-extensive investigation. Additionally, not only the AMA violations, but also inappropriate practices can be identified and rectified, if necessary, through the JFTC's administrative guidance. When a complaint is received regarding an alleged violation, the JFTC is not obliged under the AMA to open investigation into specific companies. Instead, the JFTC may conduct industry surveys not only under the AMA, but also on the basis of broader competition policy. A

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36. A typical example is the Microsoft case in Japan. In 1998 the JFTC issued a warning against Microsoft (United States), in addition to taking formal measures against Microsoft (Japan) for illegal tying and alleged exclusive dealing in Japan with internet service providers concerning its Internet Explorer, which was also one of the allegations by the DOJ in the United States. Press Release, Japan Fair Trade Commission, *A Recommendation and Warnings to Microsoft Co., Ltd. and Microsoft Corporation*, (Nov. 20, 1998), (on file with WASH. U. GLOBAL STUD. L. REV.), available at <http://www2.jftc.go.jp/e-page/press/1998/19981120.htm> (last visited Oct. 26, 2003). Microsoft reportedly issued its own statement that the JFTC investigation had found no violation of the AMA on its alleged exclusive dealing.

37. Out of 147 formal orders issued by the JFTC during the last 5 years (FY1998-2002), 108 orders were bid-rigging cases and 8 were price-fixing cases. See HEISEI 14 NENDO KOSEI TORIHIKI IINKAI NENJI HOUKOKU 41 [2002 JFTC ANNUAL REPORT], Oct. 7, 2003.

survey is usually conducted by requesting voluntary cooperation from the parties involved.<sup>38</sup> The JFTC's findings and administrative guidance are not legally binding, although any adverse publicity generated by the findings may bring about voluntary compliance. The survey method, if improperly employed in such cases where investigation is warranted, may lack effectiveness and transparency. Foreign companies, however, have alleged that the JFTC is reluctant to initiate formal investigations into local Japanese companies.

During the Film Dispute, Kodak alleged that Fuji violated the AMA. The JFTC conducted extensive surveys on the color film industry,<sup>39</sup> and requested that Fuji adopt new measures.<sup>40</sup> While Kodak reportedly filed a complaint with the JFTC concerning Fuji's alleged AMA violations, no press release was issued on this matter.

### 3. Guidelines

The JFTC publishes various kinds of enforcement guidelines, including those for industries, which describe the JFTC's interpretations and AMA enforcement policy. These guidelines, however, by their nature, are sometimes too abstract to enable the parties to find answers to specific competition problems, and are also too "conservative" for business circles to utilize. The meaning of "conservative" is as follows: The JFTC officials tend to be so afraid of committing Type II errors (under-enforcement) that they instead find no problem in a business plan that in reality is problematic under the AMA. The JFTC officials tend also to neglect the cost of committing Type I errors (over-enforcement) when it halts a business activity which is in fact competitively neutral or even pro-competitive. These tendencies make the JFTC's guidelines conservative and quite broad in the already gray category of problematic practices. Furthermore, the framework for analyzing the competitive effect of problematic practices is not fully delineated in the JFTC guidelines. The guidance that the JFTC offered to requesting parties in accordance with such guidelines is quite cautious and vague. At times, the guidance only repeats the same language found in the guidelines. From the standpoint of foreign complainants alleging that specific practices fall under

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38. While the JFTC may order any party to submit reports or data during its survey process, it usually requests voluntary cooperation.

39. Press Release, *Survey of Transaction Among Firms Regarding Photographic Color Film for General Use and Photographic Color Paper*, July 23, 2003, (on file with WASH. U. GLOBAL STUD. L. REV.), available at <http://ww2.jftc.go.jp/e-page/press/1997/film1/film1.htm> (last visited Oct. 26, 2003).

40. *Id.*

the gray category of problematic practices in the AMA guidelines, the JFTC never initiated investigations. This result leads to the perception that the AMA and its guidelines may be adequate, but that the JFTC enforcement is inadequate.

#### 4. *Informal Consultation Prior to "Prior Notification" of Mergers*

As is the case with competition laws in other jurisdictions, the AMA requires prior notification concerning mergers and acquisitions. As a formal procedure, the JFTC, upon receiving notification of a merger transaction, investigates the transaction and, if necessary, takes action. Parties to a large-scale transaction in Japan usually approach the JFTC in advance of notification in order to consult informally with the organization concerning the transaction plan. The JFTC, after conducting hearings, fact-finding investigations, and examinations of the plan, then informs the parties of its conclusion as to whether the plan poses competitive problems under the AMA. The plan, if problematic, is to be modified or abandoned. The JFTC publishes its brief conclusions regarding major prior consultation cases. Business circles complain about the JFTC's stringent attitudes towards mergers, although no formal action against mergers has occurred in over thirty years.<sup>41</sup> The AMA adopted a prior notification and examination procedure in its original enactment in 1947, much earlier than the United States, which adopted pre-merger notification in the Hart-Scott-Rodino Act of 1976. These informal prior consultation processes that do not result in formal decisions have led to a misunderstanding on the part of foreign parties, who believe that the JFTC does not engage in merger enforcement under the AMA.

Under the current practice of informal merger enforcement, merging companies that are likely simply to follow the JFTC's conclusions or that engage in little legal counseling tend to modify or even abandon their plan pursuant to the JFTC's initial response and without further examination. On the other hand, merging parties with much experience and ample legal counseling often try to persuade the JFTC to accept their original plan and may indeed actually obtain compromises from the JFTC. These compromises may be made by the JFTC without the necessary information regarding the transaction and relevant market conditions, because during the informal process the JFTC does not have the legal authority to obtain such information. In addition, the JFTC's examinations in prior consultation cases

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41. The recent legal case was Yawata-Fuji (Nippon Steel) merger case in 1969. *JFTC Consent Decision*, 16 SHINTETSUSYU 46 (Oct. 30, 1969).

can be quite lengthy, and some in business circles complain that the delay interferes with restructuring processes and business strategies. The current informal process of merger examination by the JFTC poses these kinds of serious procedural problems.<sup>42</sup>

Regarding the substantive issues of merger enforcement, the JFTC promulgated its merger guidelines, which are quite different from those of its counterparts: the Department of Justice and the Federal Trade Commission of the United States and the EC Commission of the European Union. The JFTC's merger guidelines provide various factors to be examined, but do not provide the analytical methods and tools necessary for merger investigation. Those kinds of deficiencies may accrue from the under-development of analytical frameworks and legal doctrines as well as investigative tools and techniques in merger cases. These deficiencies also reflect the current practice of prior consultations on a confidential and informal basis.

#### *5. Ineffective Overseas Public Relations*

As is the usual case with Japanese institutions, including governmental agencies, the JFTC's overseas public relations activities may be ineffective. The most difficult barrier may be language. If the JFTC provides no English language material on enforcement activities, many foreign parties may believe that no material means no enforcement activity. Informal measures, which are ambiguous even for domestic parties, are all the more difficult for foreign parties to understand. While the JFTC has an English language homepage<sup>43</sup> that it updates daily and English brochures on the JFTC and the AMA, overseas public relations efforts must be intensified. The JFTC should adopt the positive attitudes of senior officials of foreign competition agencies, who actively participate in international conferences and symposia on competition law and policy, and more aggressively publicize their enforcement efforts.

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42. The JFTC recently published and implemented new procedures for its prior consultations in order to expedite review process and to improve transparency. Press Release, *Policies Dealing with Prior Consultation Regarding Enterprise Combination Plans*, (Dec. 11, 2002), available at <http://www.jftc.go.jp/e-page/press/2002/december.pdf> (last visited Oct. 26, 2003). The efficacy of such efforts has yet to be seen.

43. Japanese Fair Trade Commission, available at <http://www.jftc.go.jp/e-page> (last visited Oct. 26, 2003).

*C. Overall Assessment: Attention to Informal Enforcement Style of the JFTC*

The foreign parties' perception of the JFTC, as a watchdog that does not bite, in this Author's view accrues from the lack of visibility and transparency in the JFTC's enforcement activities.<sup>44</sup> As highlighted above, the JFTC employs various informal enforcement measures such as the survey method, the issuance of guidelines, and prior consultations on business plans, in addition to the formal enforcement procedures under the AMA.<sup>45</sup>

Informal measures are frequently employed because of their significant advantages and merits. First, for the parties concerned, such measures are much more favorable than investigation. For example, anonymity in the informal process is of primary importance for respective companies. Second, for the JFTC, the informal measures conserve limited resources and budget. Third, such methods are often effective in addressing competition problems all over the industry in terms of both law and policy.

Informal measures, however, may be seriously deficient for dealing with specific practices as well as in developing an effective regime of competition law enforcement. First, the JFTC may arrive at unaccountable conclusions during the informal process. Second, a double standard may arise between formal investigative cases and informal consultation cases or surveys. Third, informal measures may lack effective power to collect information and secure compliance. Fourth, the procedural rights of respondents may be jeopardized because of their inability to file protests with court. Fifth, the analytical framework and legal doctrines involved are underdeveloped. Sixth, certain circumstances may not be foreseeable for the parties concerned.

IV. MODEST PROPOSALS BOTH TO FOREIGN PARTIES AND THE JFTC AND SUGGESTIONS FOR CHINESE COMPETITION LAW

*A. Proposals for Foreign Parties*

I would like to provide the following caveats to foreign parties, who criticize the JFTC's enforcement of the AMA:

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44. Professor Haley concentrates on informal measures in investigative proceedings. JOHN O. HALEY, *ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1947-1998* 115, 168 (2001). From a broader perspective, my analysis here covers informal measures out of investigative processes.

45. *Id.*

- Remember that competition law protects the competitive opportunity or process, not competitors.
- Watch the actual conditions of Japanese economy carefully, without prejudice to stereo-typed images or superstitions.
- Use the prevailing standards and criteria of competition laws to analyze the specific competition issues.
- File complaints with the JFTC on specific practices, rather than on general allegations, and provide direct evidences.

#### *B. Proposals for the JFTC*

I also would like to offer the following suggestions to the JFTC to improve foreign perception of its enforcement of the AMA:

- Conduct case investigations, not general surveys. The survey method may be effective, however, a survey cannot serve as a substitute for case investigation. Surveys and case investigations are mutually complementary.
- Increase the number of formal measures based on the AMA, particularly vis-à-vis exclusionary practices. The JFTC's enforcement record shows it has attempted to take formal actions against hard-core cartels. If warranted, formal actions must be taken against other types of practices.
- Revise guidelines in order to narrow the gray areas and to provide analytical tools and methods. A prerequisite for promulgating effective guidelines is to take formal actions and to adjudicate cases. The JFTC can establish analytical methods, techniques, and criteria, and provide clear guidance to the business community by means of such cumulative efforts.
- Respond as clearly as possible to prior consultations on specific business plans. In consultation cases, competitors' collaborative activities, against which the JFTC would not have taken formal measures in case of investigations, might be halted because of the JFTC's ambiguous responses. The JFTC must narrow the gap between the examination standards or criteria for investigation cases and those for consultation cases.



- Conduct formal investigations of merger cases in addition to just prior consultations. Although the current informal administration of merger cases may have significant merits for both the JFTC and merging parties, there are also serious disadvantages. Because of the long-standing informal treatment of mergers, the JFTC has yet to clearly establish doctrines concerning the competitive analysis of mergers. In addition, businesses lack legal certainty and foreseeability, and the general public has little chance to review the JFTC's conclusions on merger cases.
- Improve overseas public relations activities. It would be particularly effective for the members and senior staff of the Commission to make presentations at international conferences and business gatherings.

Roughly speaking, the substantive provisions of the AMA are similar to those of the United States antitrust laws. However, the procedural provisions and actual enforcement methods of the AMA are significantly different. It is neither practical nor desirable for the JFTC to flatly abandon all informal enforcement measures. It is necessary, however, to reduce the heavy dependence on informal measures by way of selecting optimal methods to address specific competition problems on a case-by-case basis.

### *C. Suggestions for Chinese Competition Law Enforcement*

Most of the discussions regarding the draft Chinese competition law have focused on the substantive provisions as well as on the organization and independence of the enforcement agency. Instead, emphasis should be placed on procedural provisions and particularly on the practical ways and methods for a competent agency to address anticompetitive practices. To smoothly introduce new competition law and to secure compliance with it, a number of practical problems must be resolved.<sup>46</sup> The issues include, but are not limited to:

- The dissemination of regulations under competition law and the education of the bureaucracy, the business community, and the consuming public.

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46. It might be useful to learn from the experiences of the United Kingdom, which adopted the EC-type competition law in 2000. The Office of Fair Trading, the enforcement agency of competition law, has made various efforts to disseminate the new law and to educate both the business community and consuming public, to provide guidance and prevent future violations, and to solicit information regarding alleged violations.

- The establishment of formal administrative procedures to enforce competition law, from case selection, investigation, and adjudication to final order and compliance.
- The solicitation of information regarding alleged violations from various sources and a quick response to inquiries from informants.
- The implementation of regulations providing for spot inspections, information-collection orders, interrogatories, expert witnesses, and the like.
- The establishment of filing requirements regarding specific practices or activities, if warranted.
- The promulgation of guidelines regarding specific practices and the establishment of prior consultation procedures.
- The allocation of enforcement roles between formal investigative procedures and informal procedures such as survey, and the establishment of criteria on such allocation.

In each jurisdiction, formal and informal enforcement measures should be mutually complementary, and they should share the burdens of accomplishing the goals of competition law. The measures should take into account various factors, including the acceptability of competition law in the business community, the reliance on the enforcement agency and its administrative procedures, and the available resources for the enforcement agency. The Chinese competition agency may learn some lessons from both the JFTC's practices of informal AMA enforcement and foreign allegations against the JFTC.

## V. CONCLUSION

During the last decade, *gaiatsu*, or foreign pressure, has helped and prompted the JFTC to improve its position inside the Japanese Government and to strengthen the AMA and its enforcement.<sup>47</sup> Ongoing forward, however, the JFTC has to further improve the AMA enforcement regime and actual enforcement activities, including the procurement of larger resources. In this Essay, I analyzed the JFTC's style of the AMA enforcement and pointed out some deficiencies inherent in it.<sup>48</sup> I also illuminated lessons for

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47. See MICHAEL L. BEEMAN, PUBLIC POLICY AND ECONOMIC COMPETITION IN JAPAN: CHANGE AND CONTINUITY IN ANTI-MONOPOLY POLICY, 1973-1995 ch. 8 (2002).

48. I may have exaggerated too much the contrast between home and abroad regarding the

the future development of Chinese competition law that may be derived from the JFTC's experiences.

Japan, along with the EU and Canada, has proposed multilateral competition rules under the auspices of the WTO, and the Doha Ministerial Conference finally adopted "trade and competition" as one of the items on the agenda.<sup>49</sup> While future development on this issue is presently unclear, the "core principles" of national competition law and policy are on the table in multilateral negotiations. Most of the proposed core principles are related to procedural matters, such as the transparency of rules and regulations, the removal of nationality-based discrimination between firms, and the provision of due process and recourse to judicial procedures.<sup>50</sup> Informal enforcement measures employed by the JFTC may require scrutiny under such core principles as transparency and due process.<sup>51</sup>

"Antitrust is one of the best examples of legal transplants and convergence."<sup>52</sup> This statement is true, so far as the substantive provisions of competition law are concerned. Procedures, however, take deep root in their respective national legal soils and cultures, and thus develop gradually. Each jurisdiction must devise the most suitable and effective procedures to accomplish the goals of competition law, both investigative and non-investigative, against their own social and historical backgrounds. Transparency might be the only common denominator in such ever-lasting efforts.

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JFTC's enforcement, and foreign perception of Japanese markets may be changing, partly because of the stagnant Japanese economy since the 1990s. The JFTC has also made significant efforts to improve transparency and effectiveness, including formal actions against several private monopolization cases in the 1990s. Such efforts by the JFTC must be intensified in such ways as I have suggested in this paper.

49. World Trade Organization Ministerial Declaration, Nov. 14, 2001, WTO B.I.S.D., at 23-25, available at [http://www.wto.org/english/thewto\\_e/min01\\_e/mindeal-e.pdf](http://www.wto.org/english/thewto_e/min01_e/mindeal-e.pdf) (last visited Oct. 26, 2003).

50. See, e.g., KEVIN C. KENNEDY, COMPETITION LAW AND THE WORLD TRADE ORGANIZATION: THE LIMITS OF MULTILATERALISM Ch. 5 (2001).

51. Most of the JFTC enforcement issues are related to transparency and due process among core principles. National treatment, however, may also have significance. In fact, in the early 1990s, when the JFTC started reinvigorating its enforcement activities, some foreign parties groundlessly alleged that foreign firms might be the first targets of the JFTC.

52. HALEY, *supra* note 44, at 172.