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The Enforcement Effects of the Japanese Antimonopoly Law: 1947-1988

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Abstract: This paper aims to clarify the merits and demerits on the investigation attitude of the Japanese Fair Trade Commission which has the specialized authority of the Antimonopoly Law Enforcement. The primary objective of the Fair Trade Commission is to eliminate the violation concerned, and thereby to promote or maintain the fair and free competitive market. The Commission can achieve this objective using two methods: the prior recommendation requirement principle and the investigation annulment ruling. The merit of such an investigation attitude is that the enforcement procedure will be efficient. For example, these methods caused the number of quashing decision suits to decrease. Some demerits, however, remain. The number of self-elimination cases by the trade association tends to increase, and the price-fixing cartels have been only disposed by the recommendation order. That is to say, these methods are efficient to achieve the primary objective, but the possibility that they have connived truly guilty affairs remain.

1. Introduction

This paper analyzes quantitatively some relations between the investigation activity and the performance of the Japanese Fair Trade Commission (hereafter referred to as the "FTC"), which is the only enforcement agency of the Japanese Antimonopoly Law (hereafter referred to as the "AML"). Then, we appreciate the efficiency of the AML enforcement.

In Japan, many AML scholars have been legally interpreting the violations, but so far, the economists have not tried to analyze them quantitatively¹⁾.

Japanese AML consists of the provisions which are more than 10 chapters and

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its 100 articles in total. The fundamental articles of the provisions are: Article 3 (Prohibition of private monopolization or unreasonable restraint of trade), Article 8 (Prohibited acts of a trade association, filing requirement), Article 19 (Prohibition of unfair trade practices). Legally speaking, an entrepreneur has no relation with the AML, so far as he does not violate the above articles²⁾.

The primary objective³⁾ of the FTC is to eliminate the violation concerned, and thereby to promote or maintain the fair and free competitive market. To achieve this objective⁴⁾, the FTC has used two methods: the "Prior Recommendation Requirement Principle" and the "Investigation Annulment Ruling".

In section 1, we will clarify the following FTC's investigation attitudes. The first attitude is the prior recommendation requirement principle [Article 48 (1)]. That is to say, handling the violations, the FTC has restricted only the affairs where the fact of violation is reasonably presumed, and then has issued a recommendation based on such presumptions. As a result, in many cases the expensive hearing processes were eliminated altogether.

The second attitude is the investigation annulment ruling or the omission ruling (*Fumon Shobun* in Japanese), which is not prescribed in provisions. That is to say, the Commission has always chosen the investigation annulment ruling in the affairs where the evidence of the fact of violation is imperfect and the illegality is not necessarily clear, and has commanded the warning and caution to the violator. Such a method shows, in a sense, that the typical "Japanese Administrative Guidance (*Gyoseishido* in Japanese)" was introduced into the Antimonopoly Law.

As a reason why the number of violations is very small in Japan, we will verify that it is due to an increase in the number of cases disposed by the prior recommendation requirement principle and the FTC's discretionary authority. The former principle can be seen in the increasing number of recommendation and its decision. The latter authority can also be seen in the increasing number of the investigation annulment ruling.

Next, when we examined the movement of each decision passed by the FTC, we found that the number of the latter of Article 3 was important at the beginning and the number of Article 8 became more important later, but no large change was seen in the case of Article 19. The number of Article 8 violation decisions has decreased rapidly from the middle of 1970's, but, the number of self-elimination (out of the investigation annulment ruling) cases by the trade associations has increased. This fact suggests that the trade associations have recently intensified precaution against the FTC's investigation activity.

In section 2, we will examine the performance of the investigation activities. In the first place, we will examine the suit to quash a FTC decision. The subject of juridical review is to inquire whether the substantial evidence on the FTC decision exists or not. As a result, the number of suits was small, and so was its occurrence

rate. The FTC's success rate was more than 50 percent. From these facts, we can judge that the FTC's hearing proceedings are reasonable enough.

In the second place, we will try the regression analysis on some relations between the FTC's investigation abilities and its performance which is examined in Section 1. As an investigation ability index, we adopt the total number of staff and the investigation activity expenditure of the FTC. From such regression analysis, for example, we got a positive correlation between the detection rate by the FTC's own inquiry, the disclosure rate, called arrest rate in the Economics of Crime⁵⁾, and the total number of staff. This result coincides with the thinking in the Economics of Crime that, as a policy means to increase an arrest rate at the initial search, it is effective to increase the staff of the searcher party.

The recommendation rate related to price-fixing cartels has a positive correlation with two investigation ability indexes. This fact suggests that the investigation attitude of the prior recommendation requirement principle is a distinguished feature of the price-fixing cartel.

The sign of coefficients reversed between the price-fixing cartel and the unfair trade practices. This fact suggests that the FTC has a different investigation attitude between these two violation types.

Finally, we will summarize the merits and demerits of the investigation attitude which presents in both the prior recommendation requirement principle and the investigation annulment ruling.

2. Investigation Activity

A) Disposal Procedure of Violation

Figure 1 shows the process in which the violation is detected and then finally the suit to quash a FTC decision is appealed to the Supreme Court.

Generally, there are four methods to initiate the investigation of violation which are called the initiation of investigation. That is to say,

- 1) the detection of a violation by the FTC's own inquiry [Article 45 (4)],
- 2) the filing of a report by commoners aware of a violation [Article 45 (1)],
- 3) the notification by the Public Prosecutor General to the FTC [Article 74],
- 4) the notification by the Director General of the Small Business Agency [Article 3 (7) of the Law to Establish the Small Business Agency].

Among the four methods, the former three methods are prescribed in the AML. Fundamentally, the investigation is initiated by the former two methods.

First of all, the Investigation Department exercises the preparatory investigation to judge whether the compulsory inquiry on these initiation cases is necessary or not.

Next, the Commission (which shall be composed of a chairman and four commissioners: Article 29 (1)) receives the report, which is to judge whether an

investigation is necessary or not, from the Director General (in the Investigation Department).

When the Commission judges the necessity of investigation, it designates investigators from among the personnel of the FTC [Article 46 (2)] and causes them to proceed the investigation. The FTC makes its own prosecutive function share these investigators. This procedure is called the prosecutive proceedings. After these proceedings are taken, the case is called the formal investigation case.

All the investigation cases do not always proceed to the hearing proceedings. Though the legislation system does not necessarily adopt the prior recommendation requirement principle, when the FTC admits a fact of violation in practical affairs, it usually issues a recommendation to the violator. This principle is an important feature of the investigation activity in Japanese AML. That is to say, the FTC has the following investigation attitude. The function of this activity is to prevent ex-post complications. To accomplish this purpose, as pre-procedures, especially when the FTC expects some complications and when possible, the Commission would dispose the violation concerned before the hearing procedures.

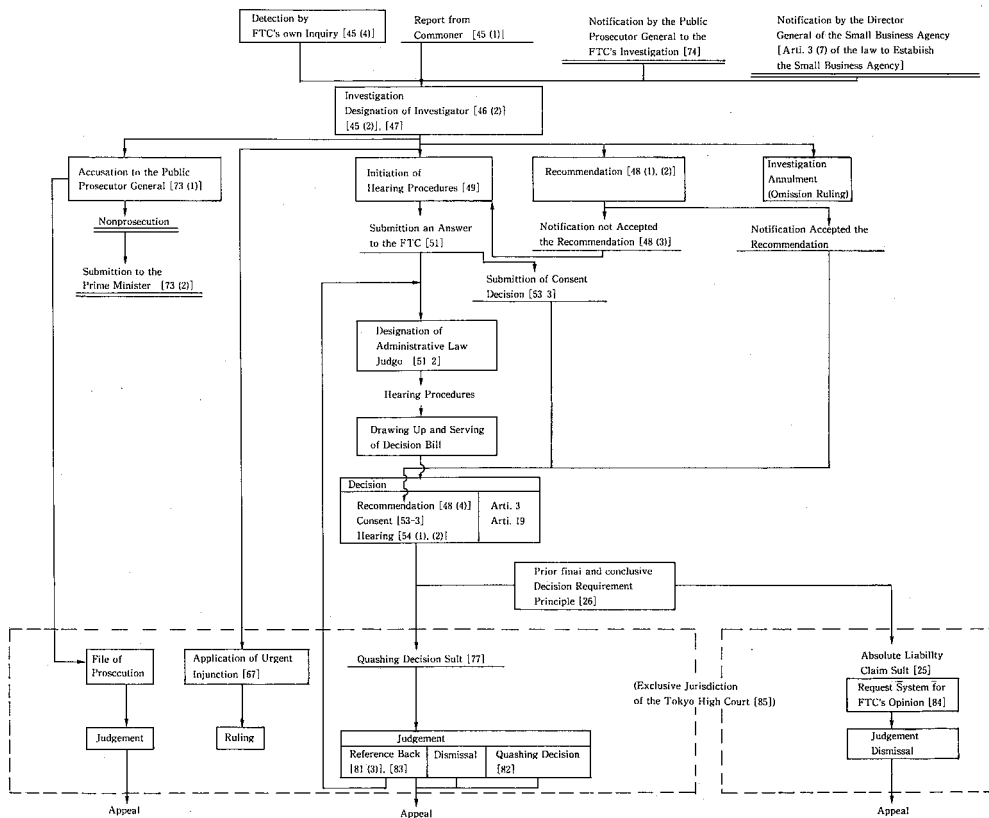
The recommendation means that, the FTC, when it finds that there exists any act in violation of the provisions and admits that it is reasonable to dispose without the hearing proceedings, may recommend the person who has committed such violation to take the appropriate measures to eliminate it [Article 48 (1)]. The recommendation shall be a written one. Any person who has received a recommendation shall notify without delay to the FTC whether or not she will accept it [Article 48 (3)]. In the case of acceptance, the FTC may render a decision on the line of the said recommendation without resorting to the hearing proceedings [Article 48 (4)]. In the case of non-acceptance, the FTC may initiate the hearing proceedings on the said case.

The Tokyo High Court has supported such FTC's investigation attitude⁶⁾. "—because an early recovery of the fair and free competition is always desired—as a general rule, the FTC should recommend to all affairs except when it can be understood from the outset that it is difficult to expect the acceptance of recommendation. When the recommendation is accepted, the FTC may render a decision on the line of the said recommendation. When it is not accepted, the FTC should initiate the hearing proceedings. Such a disposal procedure is realistic and reasonable. These facts are within the FTC's discretionary authority. Moreover, they conform the public interest and the purpose of AML"([2]pp.191-192).

Furthermore, as a result of the investigation, the FTC may,

- 1) when it is confirmed that the fact of violation didn't exist,
- 2) when the violator took voluntarily (self-) elimination measures and so the fact of violation disappeared (the Self-Elimination),
- 3) when it could not get the perfect evidence and so annulled the investigation (the

Figure 1. Disposal Procedure of Violation



Notes: 1) The Federal Trade Commission or the Court.

The underline = is the other agency.

2) The figure is the article concerned.

Source: Revised [4, p.6].

Evidence Imperfectness),

declare the investigation annulment ruling (or the omission ruling) and, at the same time, as the Japanese Administrative Guidance (Gyoseishido in Japanese), order either the warning or the caution to the said case. Although these measures are not necessarily prescribed within the AML, they are a part of the FTC's discretionary authorities. These authorities are also an important feature of the FTC's investigation activities.

The FTC may, when the recommendation is not accepted or when the violation is admitted, and when it finds it to be in the public interest, decide to initiate the hearing procedures⁷⁾ on the said case [Article 49 (1)]. The hearing procedures shall be initiated by serving a certified copy of complaint against a respondent [Article 50 (2)]. A respondent shall, upon receipt of the certified copy of complaint, submit an answer without delay to the FTC [Article 51].

The FTC shall, after issuing a complaint, designate the administrative law judges⁸⁾ from among its personnel and cause them to entrust a part of the hearing procedures [Article 51-2]. That is to say, the FTC shares the function of the hearing proceedings with the administrative law judges.

Virtually, this system forms the triple relationship between the investigator, the administrative law judge which passes the administrative disposition and a respondent who is passed its disposition. The administrative law judge has the authority to draft the Decision Bill and serves it on a respondent. These procedures are useful to keep the fairness of the hearing proceedings⁹⁾.

When the Commission approves the content of the decision bill, it can pass the same decision as the decision bill. It can pass the following three kinds of decisions¹⁰⁾: the Recommendation Decision, the Consent Decision and the Hearing Decision.

Any respondent who has an objection to a FTC's decision should file a suit to quash this decision within thirty days [Article 77]. The original jurisdiction over this suit shall lie in the Tokyo High Court [Article 85]. Any respondent who also has an objection to the decision in the High Court shall appeal to the Supreme Court. The point of this suit is to re-examine whether the substantial evidence on a FTC's decision exists or not. This suit means a process in which the reasonability of a FTC's decision is re-examined by the Court.

B) The Number of Investigation Cases

Table 1 shows the movement of the number of investigation cases from 1947 to 1988. When we examined the number of newly investigated cases of each initiation, we noticed that, from 1947 to 1957, there were more cases detected by the FTC's own inquiry than those detected thanks to reports by the commoners. But from the middle of 1950's to toward 1976, the number of the latter cases became more numerous than that of the former cases. The number of newly investigated

Table 1. The Number of Investigation Cases

	Newly Investigated Cases Within The Year (Items)				Cases Carried from Previous Year	Total
	Report	Detection by FTC's Own Inquiry	Notification	Subtotal		
1947-57	259	456	7	722	240	962
1958-67	339	192	—	531	455	986
1968-76	658	370	—	1,028	581	1,609
1977-88	—	—	—	1,685	1,113	2,798
Total	1,256	1,018	7	3,966	2,389	6,355
				62.4	37.6	100%

Sources: The data from 1947 year to 1976 year is [6], and after 1977 year is [7].

We could not get the number of items from 1977 year to 1988 year.

The data in the following tables is calculated from [6], [7], provided that we will not notify.

cases increased remarkably after 1965. The total number of cases, which adds the number of new cases to the number of cases carried from the previous year, also have continuously increased. The total number of cases has been extremely increasing after 1965. The detection rate, which is the rate of the number of newly investigated cases to the total number of cases in 1947-88, was about 62 percent. The number of newly investigated cases was about 131 cases per year as an average, and that of cases carried from the previous year were about 83 cases per year as an average.

The distinguished increase in the number of reports, suggests that the AML popularizes or fixates¹¹⁾ among the general public in Japan.

C) The Number of Recommendation, Hearing Proceedings (Complaints) and Investigation Annulment Cases

Table 2 shows the trend of each investigated case. The number of recommendation cases has increased since 1947.

On the other hand, the number of the initiation of hearing proceedings cases has extremely decreased since 1968. The number of hearing proceedings cases, when the recommendation is not accepted, were not necessarily numerous. The rate of the number of recommendation cases (655) to the total number of investigation cases (6,355) was about 10 percent. Similarly, the rate of the number of initiation of hearing proceedings cases to the total number of investigation cases was about 3 percent. The rate of the number of hearing proceedings cases, when the recommendation is not accepted, to the total number of investigation cases, was only about 0.6 percent. The number and the percentage of hearing proceedings cases were very small. This is due to the fact that almost all respondents have accepted the recommendation (see the following Table 4).

On the other hand, the number of investigation annulment, warning and

caution cases, tends to increase. The rate of the number of investigation annulment cases (3,226) to the total number of investigation cases was about 51 percent. The investigation annulment cases consist of two categories. The first one is the self-elimination case. The second is the evidence imperfectness case. The rates of the number of the first and the second cases to the total number of annulment cases were about 54 and about 16 percent respectively.

In addition to these facts, when we examined the warning cases (see Table 3), their number tended to increase since 1980, the time when it was published firstly. The number of cases (A + B) that adds the number of warning cases (A) to the number of caution cases (B) was about 143 cases per year as an average (during the period 1982-88). The rate of the total number of cases (A + B) to the total number of investigation cases (C) was about 52 percent (during the period 1982-88). The average value of (A + B)/C was about 53 percent. These figures show that more than half of the number of investigation cases was disposed by such convenient measures every year.

In the self-elimination, warning and caution cases, a priori, there seem to be proof of violation, but these cases have been admitted by the FTC's discretionary authority. A special case where this investigation attitude itself will not be approved is when, at the initial stage of investigation, and though the existence of violation was made certain, an investigator passes over it by commanding the warning and caution to the violator, or permits it tacitly by means of other ground. The increasing number of such disposed cases suggests that the FTC's disposal

Table 2. The Number of Recommendation, Initiation of Hearing Proceedings (Complaints) and Investigation Annulment Cases

	Recommendation	Initiation of Hearing Proceedings	Investigation Annulment ²⁾		
			Self-Elimination	Evidence Imperfectness	Subtotal
1947-57	35	172	—	—	476
1958-67	141	21 (9) ¹⁾	288 ³⁾	274 ³⁾	562
1968-76	367	1 (22)	588	166	754
1977-88	112	1 (8)	882	552	1,434
Total	655	195 (39)	1,758	992	3,266

Notes: 1) (): This figures is the number of cases that initiated the hearing proceedings when any person did not accept the recommendation.

2) According to the annual report [7], the investigation annulment cases are expressed as the "Fumon Shobun" (in Japanese) in the period 1947-60. Furthermore, among the investigation annulment cases, the evidence imperfectness are expressed as the "Annulment" (include the Caution) in the 1979-83, and the self-elimination are expressed as the "Warning + Caution" in the period 1984-88.

3) This figures is the number of cases in the period 1961-67.

Table 3. The Number of Warning and Caution Cases¹⁾

	A Warning	B Caution	C Investigation	A/C (%)	(A + B)/C (%)
1961	21		57	36.8	
62	52		70	74.3	
63	33		53	62.3	
64	48		53	90.6	
65	52		222	23.4	
66	46		190	24.2	
67	36		162	22.2	
68	62		201	30.8	
69	52		176	29.5	
1970	75		211	35.5	
71	57		166	34.3	
72	48		166	28.9	
73	47		184	25.5	
74	55		176	31.3	
75	52		158	32.9	
76	63		171	36.8	
77	78		137	56.9	
78	26		94	27.7	
79	22		113	19.5	
1980	39		194	20.1	
81	91		344	26.5	
82	151	49	431	35.0	46.4
83	118	60	329	35.9	54.1
84	94	66	297	31.6	53.9
85	80	62	259	30.9	54.8
86	88	37	226	38.9	55.3
87	84	28	194	43.3	57.7
88	65	17	180	36.1	45.6

Note: 1) It was 1980 year that an accurate number of warning cases was published firstly in the annual report.

Before that year, the warning are expressed as the self-elimination or the violation suspicious fact etc.

Similarly, the caution have published since 1982 year, and before that year, it was included in the expression, the annulment etc.

attitude on affairs became gradually cautious, and a result of this attitude is the underestimation of the number of AML affairs in Japan. As far as the primary objective in Japanese AML is to eliminate the violation, the increasing number of such disposed affairs serves to reduce the administrative cost which the FTC would expend at the hearing procedures. Furthermore, as these disposal methods are enforced elastically and flexibly by the investigator himself at the initial stage of investigation, they serve to achieve more smoothly the primary objective of the law than the hearing procedures. Though the FTC does not necessarily follow the prescribed procedures to achieve that objective, it should apply the recommendation decision to these affairs. Therefore, we have inevitably question to the increase of such convenient procedures.

D) The Number of FTC's Decision Cases

The FTC's decision is an order to direct the respondent to take elimination measures of the violation. An administrative law judge executes the hearing proceedings function.

Table 4 shows the trend of three kinds of decisions. There were numerous cases of recommendation decisions. The rate of their number to the total number of decisions (808) was about 75 percent. The number of recommendation decisions was 14 cases per year as an average, and has extremely increased during the period 1968-76. On the other hand, the number of consent decisions has been gradually decreasing. The reason behind it is that, since the recommendation began to be passed to the violator in advance, any person who had no intention that contends the hearing proceedings, would tend to accept the said recommendation. In fact, the number of the hearing decisions was the least among the three kinds of decisions.

These facts show that many respondents have accepted the recommendation to avoid the cost of the hearing procedures. The conviction rate, which means the respondent accepting the FTC's decision, was about 12 percent of the total number of investigation cases (during the period 1947-88).

The reasons why the number of recommendation decisions were many compared to the number of hearing decisions are three:

- 1) As mentioned above, the FTC has restricted its hearings to only the affairs where it could certainly presume the fact of violation and has ordered the violator to the recommendation. Accordingly, though a respondent who did not accept the recommendation may file a suit to quash a FTC's decision, his possibility of success is small. As a result, it is obvious that the recommendation would be easily accepted.
- 2) The next reason is that the Japanese FTC itself cumulates both the prosecutive function and the hearing proceedings function. For example, the Federal Trade Commission¹²⁾ in the United States employs the administrative law judge who belongs to the Office of Personal Management, which is independent from the Commission. Thus, he can execute the hearing proceedings without interference

Table 4. The Number of FTC's Decision Cases

	Hearing (Arti. 54)	Recommendation (Arti. 48)	Consent (Arti. 53-3)	Subtotal	The others	Total
1947-57	38	35	81	154	0	154
1958-67	4	123	16	143	0	143
1968-76	22	343	8	373	11	384
1977-88	8	103	7	118	9	127
Total	72 8.9	604 74.8	112 13.9	788 97.5	20 2.5	808 100%

Table 5. The Number of Each Article Decision

	Latter of Arti. 3	Arti. 8	Arti. 19	Subtotal	The Others	Total
1947-57	54	13	38	105	137	154
1958-67	14	104	23	141	1	143
1968-76	119	200	23	342	44	384
1977-88	37	47	34	118	11	127
Total	224 31.7	364 51.6	118 16.7	706 100%	193	808

Note: A reason that the figures (subtotal + the others) in this table is more than the total, is due to applied the two kind of articles to the same case.

from the Commission.

On the other hand, the Japanese FTC appoints both the investigator and the administrative law judge from among its personnel. Therefore, it is difficult for the investigator and the administrative law judge to take an independent position from the FTC. As the Japanese FTC itself has the prior elimination attitude of violation, it is obvious that the number of recommendation decisions would increase.

3) The third reason is that, if a respondent accepts the recommendation, both the FTC and the respondent himself may not be burdened the cost of the hearing procedures.

Table 5 shows the number of decisions related to the violations of each Article of the AML. From 1947 to 1957, there were many decisions on the latter of Article 3 violation. After the latter half of 1960's, the number of decisions on violations of Article 8 increased distinguishly but decreased remarkably after 1977. There were few changes in the number of decisions on violations of Article 19. The subtotal number of the three decisions has increased distinguishly during the period 1968-76.

The rate of the number of decisions on violations of Article 8 to the number of subtotal (706) was about 52 percent.

The decision rate, which is the rate of the number of decisions (the latter of Article 3 + Article 8 + Article 19 + the others) to the total number of investigation

cases (6,355), was about 13 percent. This number of decisions increased after 1965. This movement was similar to the movement of investigation cases (see Table 1).

E) The Item of Investigation Cases

Table 6 classifies the investigation cases by type of violation. Most of the recommendation cases were related to violations by the price-fixing cartels. The rate of this number of cases to the total number of recommendation cases was about 71 percent.

This suggests that the investigation attitude of the "prior recommendation requirement principle" is remarkably related to the price-fixing cartel.

There were many self-elimination cases related to the price-fixing cartel and the unfair trade practices, and the rate of each number of cases to the total number of self-elimination cases was about 42 and 43 percent respectively.

Several investigation cases were annulled by the FTC due to evidence imperfection. These were mostly related to the price-fixing cartel and the unfair trade practices. The rate of the number of cases to the total number of evidence imperfection cases was about 33 and 52 percent respectively.

When we examined the movement of each number of cases, the price-fixing cartel and the other cartels were the most frequent in the recommendation and investigation annulments during the period 1968-76.

The unfair trade practices and the others were also the most frequent in the recommendations during the period 1968-76, and these numbers of investigation annulment occurred mostly during the period 1978-88.

When we remember that there were few changes in the number of Article 19 decision (Prohibition of unfair trade practices) in Table 5, the increasing number of investigation annulment cases on the unfair trade practices causes us to be doubtful about the FTC's investigation attitude and hearing procedures.

Similarly, when we conjecture from the remarkable decrease in the number of Article 8 decision during the period 1977-88 (see Table 5), we can say that the increasing number of self-elimination cases in the other types of cartels may suggest that the trade association is intensifying precautions against the FTC's investigation activity.

The results of this section can be summarized as follows.

- 1) The primary objective of the FTC's investigation activity is to eliminate the violation, and thereby to promote or maintain the fair and free competitive market. To achieve this objective, the FTC has used two methods: the prior recommendation requirement principle and the investigation annulment ruling. As a confirmation of these matters, we noticed the increasing number of the recommendation and its decision. We also noticed the increasing number of the investigation annulment, warning and caution cases, which are the cases disposed by the FTC's discretionary authority. This latter method is called the "Administrative Guidance" in the

Table 6. The Item of Investigation (Each Action Type) Cases

	<Total>				<Price-Fixing Cartel>				<The other Cartel>			
	Recommendation	Investigation Annulment		Subtotal	Recommendation	Self-Elimination	Evidence Imperfectness	Subtotal	Recommendation	Self-Elimination	Evidence Imperfectness	Subtotal
		Self-Elimination	Evidence Imperfectness									
1947-57	35	—	—	476	—	—	—	—	—	—	—	—
1958-67	106	182	172	354	70	106	84	190	1	9	3	12
1968-76	367	588	166	754	283	358	105	463	30	55	15	70
1977-88	120	882	552	1,434	68	233	107	340	7	38	27	65
Total	593 100%	1,652 100%	890 100%	2,542 100%	421 71.0%	697 42.2%	296 33.3%	993 39.1%	38 6.4%	102 6.2%	45 5.1%	147 5.8%

<Unfair Trade Practices>				<The Others>			
Recommendation	Self-Elimination	Evidence Imperfectness	Subtotal	Recommendation	Self-Elimination	Evidence Imperfectness	Subtotal
—	—	—	—	—	—	—	—
27	53	70	123	8	14	15	29
37	169	41	210	17	6	5	11
34	489	352	841	11	122	66	188
98 16.5%	711 43.0%	463 52.0%	1,174 46.2%	36 6.1%	142 8.6%	86 9.7%	228 9.0%

Note: Except for the total number of recommendation, we could not get the figures concerned in the period 1947-63.

Therefore, this table shows an each figures after 1964 year.

The Total column shows, different from the Table 2, the figures that added up an each four action type.

According to the annual report, after 1980 year, it have expressed the self-elimination as the warning, and the evidence imperfectness as the annulment.

The “other cartel” consists of the following: quantity, market, prohibition of price reduction, prohibition of customer movement, restrictive equipment etc.

The “unfair trade practices” consists of the following: resale price maintenance, other restraint terms, trade rejection, the others.

The “others” means that the trade association is to restrict the business activity of its member.

broadest sense of the term. On the other hand, the number of initiation of hearing procedures cases was very small. Such investigation attitude serves to smoothly achieve the legal objective which is to eliminate the violation. It will also cause both the FTC itself and the respondent to reduce the cost of hearing procedures. The increasing number of cases by the above two methods, however, causes the number of violations of Japanese AML to be underestimated.

2) Examining each decision case, we found that there were many cases related to Article 3 around the year 1957, and many cases related to Article 8 during the period 1958-76. However, the number of the latter cases decreased extremely in recent years. On the other hand, there were few changes in decisions related to Article 19.

3) Classifying the number of violation cases by type, we found that there were several recommendation cases related to the price-fixing cartel, and several investigation annulment cases related to the unfair trade practices. From this fact, we can understand that the prior recommendation requirement principle was a distinguished feature in the price-fixing cartel. The number of investigation annulment cases of the unfair trade practices and the others (affairs of the trade association) have extremely increased since 1977. The number of Article 8 violation decreased extremely in recent years, but the number of self-elimination cases undertaken by the trade association have increased.

These results suggest that the trade association intensified precautions against the FTC's investigation activity. Furthermore, though there were few changes in the number of decisions related to Article 19, the increasing number of investigation annulment cases on the unfair trade practices causes us to be doubtful about the FTC's investigation attitude.

3. The Performance

A) Appeal against the FTC's Decision

A suit to quash a decision of the FTC shall be filed within thirty days (statute of limitation¹³⁾) from the date on which the decision became effective, i.e., when the certified copy of the complaint was received [Article 77]. The original jurisdiction over this suit shall be under the exclusive jurisdiction¹⁴⁾ of the Tokyo High Court [Article 85, 86].

In the hearing of a suit to quash a FTC's decision, the distinctive feature is the following prescription: Findings of fact made by the FTC shall, if established by substantial evidence, be binding upon the Court. Whether such substantial evidence exists or not shall be determined by the Court [Article 80]. This prescription is called the "Substantial Evidence Rule¹⁵⁾".

The court may quash a decision of the FTC if the decision falls under any one of the following paragraphs:

1) if the facts on which the decision is based are not established by substantial

evidence, or

2) if the decision is violating the constitution, or other laws or orders [Article 82].

Furthermore, the court may, when it finds it necessary that further hearing proceedings shall be conducted in a case where it shall quash a decision of the FTC, refer the case back to the FTC giving the reasons therefor [Article 81 (3), 83]. Excepting the prescriptions of these Articles, the court admits the reasonability of the FTC's decision and shall dismiss or overrule the suit.

Table 7 shows the filed number of quashing decision suits and their determination in every year. At present (1988), the number of suits were 31 cases. The items were 6 cases (during the period 1945-54), 4 cases (1955-64), 13 cases (1965-74), 8 cases (1975-84), and in total 31 cases.

Among the 31 cases, 15 were determined in the High Court. Among these 15 cases, 4 ended by a withdraw decision (voluntary non-suit), 5 ended by dismissal, and 4 resulted in parcel avoidance, reference back and dismissal. In the other 16 cases, the appeal was dismissed in the Supreme Court.

The decisions were the following: the hearing decisions (21 cases), the recommendation decisions (9 cases), and the consent decision (only 1 case).

The number of determinations in the Supreme Court were the following: the hearing decisions (7 cases), the recommendation decisions (8 cases) and the consent decision (only 1 case).

All 5 cases that were dismissed in the High Court were under the hearing decision, and the others were under the recommendation decision. Both the latter of Article 3 and the Article 19 were each 10 cases, which were the most numerous among the articles that the FTC passed.

Next, the suit period between the FTC's decision and the final decision in the Court was the following: Under 1 year were 2 cases, 1-3 years were 10 cases, 3-5 years were 13 cases, and 5-10 years were 6 cases.

Among the 16 cases where the appeal was dismissed in the Supreme Court, the suit period of the 10 cases were 3-5 years and that of the 6 cases were 5-10 years. Excepting the appeal to the Supreme Court, naturally, the suit period grew short.

The quashing decision suit rate [(the number of suits ÷ the total number of decisions) × 100 percent], was about 4 percent [(31 ÷ 808) × 100%]. Excepting the withdraw, and the parcel avoidance, reference back and dismissal cases, the FTC's success rate was about 52 percent [(the number of dismissed appeal cases ÷ the number of suited cases) × 100%]. Adding the numerator to the number of dismissed cases (5) in the High Court, the FTC's success rate was about 68 percent.

In the following, we will consider the reason why the number of quashing decision suits is small and its occurrence rate is very low. As mentioned above, the Commission has restricted to only the affairs in which it could certainly presume the fact of violation, and has ordered the violator to the recommendation. Accordingly,

though the respondent who did not accept the recommendation filed a suit to quash a FTC's decision, the possibility of success was small. In section 1, we noticed as a confirmation, the increasing number of recommendation decisions.

As the more significant reason, we will consider the acceptance of the Substantial Evidence Rule. As a reasonable ground for this rule, the following has been considered: "entrusting the findings of fact of violations to the FTC's (which has the specialized authority of the antimonopoly law enforcement) hearing judgment is more appropriate than the court. Furthermore, as the findings of fact by the FTC will be practiced with the quasi-judicial procedures which are treated the same way as the judicial procedures, there should be no lack of protection of an opponent's right" ([2] p.211). Therefore, the court shall, upon receipt of a suit, request the FTC without delay, to transmit the records of the case concerned (including the interrogation records of persons concerned in the case, witnesses or expert witnesses, stenographic records, and any other matters that may be used as evidences in court)[Article 78], and then the court shall determine with the records whether such substantial evidence exists or not. That is to say, "the court shall not newly re-examine the findings of fact from an independent standpoint, but it shall only investigate whether the findings of fact concerned from the evidence examined by hearing proceedings are rational or not" ([2] p.212. This quotation is the Supreme Court Decision to the "Wakodo Ikujiyo Konamilk case", July 10, 1975). When the court finds that it is necessary to re-examine an evidence, it shall refer the case back to the FTC and order it to take the appropriate measures after examining such evidence [Article 81 (3)]. As far as the findings of fact shall be under the exclusive jurisdiction of the FTC, it is natural that the respondent will not be permitted to file new evidence against the court.

When the court hears a case with such procedures, the occurrence possibility of the legal error¹⁶⁾ will be small. The possibility of filing suit to quash a decision may increase, provided that the conviction's decision (the final decision in the FTC) will be judged innocent (the final decision in the court).

As a factor to increase this possibility, the 1977 amendment is worth of notice. Namely, after this amendment¹⁷⁾, the respondent pleaded to the court to introduce new evidences, under the condition that he provides a reason that comes under any one of the following situations:

- 1) where the FTC failed to adopt the evidence without good reason; or
- 2) where it was impossible to adduce at hearing proceedings of the FTC, and there was no gross negligence on the part of the party in failing to adduce such evidence [Article 81 (1)].

It is recognized that this amendment will tend to increase the number of files of quashing decision suit. However, as the court has not the authority of hearing of fact, when it finds it necessary to examine such evidence, it shall refer the case back

Table 7. The Quashing Decision Suit

	Newly Occured Cases (Decision Year)	Withdraw (Settlement)	Final Decision Court	
			High	Supreme
1950	3			
51	2		1	
53	1		3	
54	—			1
55	2			
56	—		1	
57	1		1	
1960	—			1
61	—			1
62	1			
63	—	1		
68	3			
69	1			
1970	1			
71	—	1		
73	1			1
74	7			
75	—			3
77	3			
78	—	1		7
79	1	1		
1980	2	1		
81	1		1	
82	—		1	1
83	—		1	
84	1		1	
85	—			
88	—			1
Total	31	5	10	16

to the FTC and order it to take the appropriate measures after examining such evidence [Article 81 (3)].

But, as far as it does not come under a gross negligence, where the respondent have the negligence and was impossible to adduce evidence to the FTC, again the initiating of hearing procedures may not be much useful to the party, which will end in imposing more costs. In addition, by this amendment “as it becomes easier to offer an evidence, at the time of practical enforcement, it is necessary for the court to examine carefully whether investigating the evidence concerned will be necessary or not” ([2] p.214). Under such circumstances, “according to the way the re-investigation will be enforced, for example if it results only in the delay of the

procedures" ([14] p.665), it may cause the costs to increase, and is due to lengthen the suit period. As far as the possibility of increasing such enforcement costs¹⁸⁾ remains, "in order to perform accurately the findings of fact at the FTC's hearing procedures, special attention should be paid to the respondent's defence which should be focused on during the hearing procedures" ([1] p.278).

To date, however, the number of quashing decision suits were few and its occurrence rate was also very small. This fact shows that the FTC's hearing is reasonable enough. Furthermore, the fact that the FTC's success rate is more than about 50 percent, suggests that the court believes in the reasonability of FTC's hearing. Generally speaking, we can appreciate that the FTC's hearing ability is high enough.

B) Relations between the Investigation Ability and its Performance

We used the regression method to analyze the relations between the investigation ability index¹⁹⁾ (total number of staff in FTC: X_1 , investigation activity expenditure in FTC: X_2) and its performance (Y_1), which we already examined in Section 1.

Table 8 shows the results of this regression analysis. We consider these results from the standpoint of policy means to deter the violation²⁰⁾.

The detection rate of the FTC's own inquiry (Y_1) and the disclosure rate (Y_2) are similar concepts to an arrest rate at the criminal offense investigation. These two investigation activities have a positive correlation with the number of staff. This result coincides with the thinking in the Economics of Crime that, as a means to increase an arrest rate at the initial search, it is effective to increase the staff of the searcher party.

To enrich the contents of the investigation, and thereby to reduce the total evidence imperfectness rate (Y_5), it is effective to increase both the number of staff and the expenditure. This result is obvious.

Next, when we examined the recommendation rate (Y_7), which is regarded as a line in the chain of administrative guidance (gyoseishido), it had a positive correlation with two independent variables. This fact shows the prior recommendation requirement principle. We can not, however, conclude that this principle was proved with this result only. We must also examine the recommendation rate of each violation type which is analyzed in the following.

Y_8 to Y_{11} show the decision rate with every applied article. To increase the decision rate of the latter of Article 3 (Y_8), it is effective to increase the number of staff. On the other hand, both Article 8 (Y_9) and Article 19 (Y_{10}) had the reversed sign against Article 3. This fact suggests that, to increase the decision rate of Article 8 and Article 19, alternative policy means are necessary except for the independent variables adopted in this paper. We must also give special attention to the fact that the decision rate of trade association (Article 8) decreased with the increasing number of staff.

Table 8. The Investigation Ability and its Performance

	Constant	X ₁	X ₂	R ²	Period
Y ₁	-8.56 (-1.298)	2.188 ^a (1.737)	-0.367 (-0.637)	0.144	1953-76
Y ₂	1.394 ^a (1.398)	0.447 ^b (2.647)	0.055 (1.228)	0.177	1953-88
Y ₃	8.978 ^b (2.65)	-0.85 ^a (-1.502)	-0.087 (-1.168)	0.11	1964-88
Y ₄	4.258 ^a (1.363)	-0.133 (-0.254)	0.011 (0.164)	0.006	1964-88
Y ₅	19.524 ^b (2.546)	-2.828 ^c (-2.208)	-0.305 ^d (-1.802)	0.216	1964-88
Y ₆	3.629 (0.933)	-0.294 (-0.446)	0.262 ^e (1.513)	0.093	1953-88
Y ₇	0.471 (0.113)	0.211 (0.298)	0.366 ^d (1.967)	0.101	1953-88
Y ₈	-18.947 ^a (-3.462)	3.625 ^a (3.91)	0.294 (1.207)	0.317	1953-88
Y ₉	11.466 ^a (3.231)	-1.317 ^c (-2.191)	-0.114 (-0.722)	0.127	1953-88
Y ₁₀	6.215 (1.088)	-0.571 (-0.591)	-0.631 ^b (-2.478)	0.159	1953-88
Y ₁₁	4.145 (1.105)	-0.378 (-0.595)	0.302 ^d (1.805)	0.131	1953-88
Y ₁₂	3.867 ^e (1.525)	0.014 (0.033)	0.215 ^a (3.846)	0.434	1964-88
Y ₁₃	13.634 ^a (3.186)	-1.733 ^c (-2.423)	0.327 ^a (3.464)	0.555	1964-88
Y ₁₄	28.313 ^a (2.994)	-4.203 ^b (-2.66)	0.002 (0.009)	0.27	1964-88
Y ₁₅	14.206 ^a (5.559)	-1.814 ^a (-4.248)	0.236 ^a (4.196)	0.716	1964-88
Y ₁₆	16.062 ^a (1.401)	-2.184 (-1.14)	-0.746 ^a (-2.951)	0.284	1964-88
Y ₁₇	-5.726 ^d (-1.769)	1.603 ^a (2.963)	-0.201 ^b (-2.814)	0.542	1964-88
Y ₁₈	-0.94 (-0.076)	0.689 (0.332)	0.106 (0.387)	0.009	1964-88
Y ₁₉	-3.943 ^a (-1.491)	1.312 ^a (2.97)	-0.194 ^a (-3.327)	0.585	1964-88

Notes. Figures in parentheses are t statistics.

Significant level: a = 1%, b = 2%, c = 5%, d = 10%, e = 20% (Two-tail test)

$\text{Log}(Y_i) = a_0 + a_1 \cdot \text{Log}(X_1) + a_2 \cdot \text{Log}(X_2) + U_i$

Y₁ = Detection Rate of FTC's own Inquiry; (The Number of Detection by FTC's own Inquiry/The Number of Newly Investigated Cases)

Y₂ = Disclosure Rate; (The Number of Newly Investigated Cases/The Total Number of Investigation Cases)

Y₃ = Investigation Annulment Rate; (The Total Number of Investigation Annulment Cases/The Total Number of Investigation Cases)

Y₄ = Self-Elimination Rate; (The Number of Self-Elimination Cases/The Total Number of Investigation Cases)

Y₅ = Evidence Imperfectness Rate; (The Number of Evidence Imperfectness Cases/The Total Number of Investigation Cases)

Y₆ = Conviction Rate; [(Hearing + Recommendation + Consent Decisions)/The Total Number of Investigation Cases]

Y₇ = Recommendation Rate; (The Number of Recommendation Cases/The Total Number of Investigation Cases)

Y₈ = Decision Rate of Latter of Arti. 3; (The Number of Arti. 3 Decisions/The Total Number of Decisions)

Y₉ = Decision Rate of Arti. 8; (The Number of Arti. 8 Decisions/The Total Number of Decisions)

Y₁₀ = Decision Rate of Arti. 19; (The Number of Arti. 19 Decisions/The Total Number of Decisions)

Y₁₁ = Decision Rate; [The Number of Decisions (Y₈ + Y₉ + Y₁₀ + The others)/The Number of Investigation Cases]

<Price-Fixing Cartel>

Y₁₂ = Recommendation Rate; (The Number of Recommendation Cases/The Total Number of Recommendation Cases)

Y₁₃ = Self-Elimination Rate; (The Number of Self-Elimination Cases/The Total Number of Self-Elimination Cases)

Y₁₄ = Evidence Imperfectness Rate; (The Number of Evidence Imperfectness Cases/The Total Number of Evidence Imperfectness Cases)

Y₁₅ = Investigation Annulment Rate; [(Y₁₃ + Y₁₄)/The Total Number of Investigation Annulment Cases]

<Unfair Trade Practices>

Y₁₆ = Recommendation Rate

Y₁₇ = Self-Elimination Rate

Y₁₈ = Evidence Imperfectness Rate

Y₁₉ = Investigation Annulment Rate; [(Y₁₇ + Y₁₈)/The Total Number of Investigation Annulment Cases]

X₁ = The Total Number of Staff in FTC

X₂ = Investigation Activity Expenditure Rate (Investigation Activity Expenditure/The Total Budget of FTC)

The expenditure item in the periods 1953-76 and 1986-88 is "the antimonopoly law enforcement expenditure". Its item in the period 1977-85 is "the investigation activity expenditure" + "the fair trade consignment research expenditure".

Sources: The data source from 1953 to 1976 is [6. pp.554-555], and after 1977 is [7].

While Y_{12} to Y_{19} show the results of every violation type, Y_{12} to Y_{15} show the result of the price-fixing cartel. There is a positive correlation between the recommendation rate (Y_{12}) and the two independent variables, and the correlation with the expenditure was stronger than the other. We conclude that the prior recommendation requirement principle is a remarkable feature of the price-fixing cartel. To increase the self-elimination rate (Y_{13}), increasing the expenditure will be more effective than to increase the number of staff. To enrich the contents of investigation, and thereby to reduce the evidence imperfectness (Y_{14}), it is effective to increase the number of staff. This same result is seen on the investigation annulment (Y_{15}).

Y_{16} to Y_{19} show the results of the unfair trade practices. All the signs of the coefficients are just the reverse of what we examined in the price-fixing cartel (except Y_{18}). The significant level of correlation was high similar to the price-fixing cartel. That is to say, to reduce the recommendation rate (Y_{16}), both independent variables should be increased. To induce many respondents to increase the self-elimination (Y_{17}), it is effective to increase the number of staff. When we examined the evidence imperfectness rate (Y_{18}), both independent variables had no correlativity, but their positive sign suggests that it does not enrich the contents of investigation of the unfair trade practices. This fact also suggests that alternative policy means are necessary except for the independent variables adopted in this paper. To enrich the contents of investigation, and thereby to reduce the total number of annulment rate (Y_{19}), it is effective to increase the expenditure.

Such reverse of sign between the two violation types suggests that the FTC has a different investigation attitude to these.

4. Concluding Remarks

The main results of this paper can briefly be summarized as follows.

1) The FTC's investigation activity is based on the prior recommendation requirement principle. As a confirmation of this principle, the number of recommendation and its decision has increased. The number of cases (the investigation annulment, the warning and caution) the FTC can dispose by its own discretionary authority has also increased. These two methods mean a line in the chain of the Administrative Guidance (Gyoseishido). On the other hand, the number of initiation of hearing proceedings cases were very small. The increasing number of cases that the FTC itself has disposed by its discretionary authority causes the number of AML violation cases to be underestimated. Such an investigation attitude of the law has, as long as the FTC's primary objective is the elimination of violation, reached its objective. But, while the number of Article 8 violation decision cases has decreased, the number of self-elimination cases by the trade association has increased. This fact suggests that, originally, the trade association itself has evaded the violation to

be subjected to legal measures.

2) When we examined the quashing decision suit, which is to re-examine the reasonability of the FTC's hearing, the number of occurrence cases was very small and the FTC's success rate was more than 50 percent. To date, we can conclude that the FTC's hearing is reasonable enough.

3) After having tried the regression analysis on the relation between the investigation activity and the investigation abilities, we concluded that the violation deterrence effect depended on one of the two investigation abilities. An effective way to increase the detection rate by the FTC's own inquiry and the disclosure rate is to increase the number of staff. An effective means to keep control over the latter of Article 3 cases, is also to increase the number of staff. To keep control over Article 8 and Article 19, it is necessary to adopt an alternative means except for the means used in this paper. We can conclude that the recommendation requirement principle comes under the price-fixing cartel. This result is very interesting for us because this fact suggests that the price-fixing cartel has been permitted by the FTC's own authority.

One more interesting fact for us, regarding both the price-fixing cartel and the unfair trade practices, was also a reverse of the sign of the annulment rate. An effective means to induce an entrepreneur to increase the self-elimination of the price-fixing cartel and the unfair trade practices, is to increase the expenditure for the former violation type and the number of staff for the latter one. On the other hand, to enrich the contents of its investigation, and thereby to reduce the number of evidence imperfectness cases, the FTC should increase the number of its staff for the price-fixing cartel, but it is necessary to accept the policy means except for the independent variables used in this paper for the unfair trade practices. Such reverse of sign suggests that the FTC has a different investigation attitude between these two violation types.

Finally, we will summarize the conclusions of this paper from the standpoint of an efficient enforcement of AML. The primary objective of the FTC is to eliminate the violation concerned, and thereby to promote or maintain the competitive market. The "prior recommendation requirement principle", which means that the Commission is dealing only with the affairs where it can reasonably presume the fact of violation, may serve to increase the number of recommendation decisions. The Commission's discretionary authority, for example, the investigation annulment ruling, the warning and caution, are also efficient methods to achieve the primary objective of the AML which is to eliminate the violation. Thanks to these methods, the number of quashing decision suit decreased, allowing the enforcement procedures of AML to be more efficient. However, some problems remains. These are the facts that the number of self-elimination cases by the trade association tends to increase, and the price-fixing cartel has only disposed by the recommendation order.

We can say that these methods are efficient to achieve the primary objective but may connive truly guilty affairs.

Footnotes

- 1) Miwa [9], who is an economist, tried to interpret the Japanese Antimonopoly Law from an economical standpoint. Nagou [11] tried to analyze the surcharge system [Article 7-2] from the theoretical standpoint. This kind of study has already been practiced in the United States which is the homeland of Antimonopoly Law. For example, see Block, Nold & Sidak [17], Gall, Craycraft & Bush [18], Posner [20], [21], Snyder [24], Stigler [25]. Murakami [10] tried the comparative analysis on the differences of policy, legal system, enforcement of Antimonopoly Law between Japan and the United States. Translating the Japanese Articles into English, we referred to Nakagawa [12].
- 2) Apart from these Articles, there are the following important provisions:
 - i) The provisions of Chapter 4 (Stockholdings, Interlocking Directorates, Mergers And Acquisitions of Business: [Articles 9-18], which order an entrepreneur to a definite restriction when he will carry out such behavior;
 - ii) Measures against monopolistic situations [Article 8-4];
 - iii) Reporting requirement on parallel price increases [Article 18-2]. These provisions are only related to the specific situation and behavior of big-scale industries or corporations, which are called oligopolistic industries. In recent years, there are many opportunities for the surcharge system against an entrepreneur and the trade association [Article 7-2] to become the topic of conversation in relation with the Structural Impediment Initiative (Mutual Agreement in June 28, 1991). When we examined the number of surcharge payment order cases (1977-88) by the cumulative number, the latter of Article 3 violation were 31 cases and the number of entrepreneurs involved was 251 persons. Article 8-(1)-1 violation were 30 cases and the number of entrepreneurs involved was 710 persons. In total, there were 61 cases and 961 persons. We will analyze in detail this system in an another paper.
- 3) Article 1 of the Japanese AML sets forth the purpose of the law and states as follows.

“This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combination, agreements and otherwise, aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development

of the national economy as well as to assure the interests of consumers in general”.

This purpose is based on the conviction that the maintenance of competition is the best way to promote the democratic and sound development of the national economy. In this sense, we call the aim to promote free and fair competition the primary objective of the AML.

- 4) To achieve this objective, the FTC has also been given many comprehensive authorities. For example, the FTC has the following authorities:
 - i) The Commission can order elimination measures in the case of violation of the said articles etc, and has also the authority to impose the surcharge [Article 7-2] over the violators of the latter of Article 3 and the Article 8;
 - ii) To enforce the absolute liability suit (that is, Article 25 suit), the AML has adopted the “prior decision requirement principle” [Article 26], and the “request system for FTC’s opinion” on the amount of damages [Article 84];
 - iii) To the application of penal provisions [Article 73], the FTC’s accusation has the conditions of lawsuit;
 - iv) On the juridical review (that is, a suit to quash an FTC’s decision, Article 77), the FTC’s findings of fact is admitted, by the “substantial evidence rule” [Article 80], to binding upon the court. From the facts mentioned above, we can recognize that the Japanese AML is completely enforced by the “FTC’s leading principle”.
- 5) Refer to Becker [16], Pyle [22].
- 6) This opinion is the Tokyo High Court Decision (September 29, 1975). This quashing decision suit was prosecuted by the Petroleum 6 Companies (Sekyu 6 sha in Japanese) against the fact that they were determined by the FTC’s recommendation decision.
- 7) It takes a considerable time to order the elimination measures by the decision after the hearing procedures. If at all the violation concerned continues to exist, it is necessary to stop it because the social harm becomes huge. As that measure, the FTC applies the urgent injunction order to the Tokyo High Court [Article 67 (1)]. Up to the present (1991 year), 6 cases were received in this order, and 5 cases out of the 6 cases involved the newspaper business. The other case was the merge case between Yahata Seitetsu and Fuji Seitetsu, which became the Japan Steel Corporation.

Similarly, up to the present, the number of accusation cases filed to the Public Prosecutor General [Article 73 (1)] were, formally 7 cases. A case in most recent year (November 1991), after seventeen years (the petroleum industry hidden cartel case), was brought against the packing-wrap industry (8 companies) hidden cartel. See [7] (1992 year).

- 8) An administrative law judge shall be appointed from among the personnel of the Executive Bureau. The personnel who has the requisite to be appointed is the personnel whom the FTC finds to have the necessary knowledge and experience in

law and economics to conduct the hearing procedures and to be capable of making a fair judgement [Article 51-2]. The number of regular staff does not exceed 5 including the chief administrative law judge who will supervise and arrange the office work for the hearing proceedings. See [3], p.560.

Practically, as an appointment custom, the personnel with more than twenty years of continuous service is chosen from the Executive Bureau. When we examined the cases where the hearing procedures were practiced, almost all the cases were judged by the administrative law judges. We had ever four cases which were judged by the Commission's trial since 1953. In the most recent year, the Commission's trial was the Yahata Seitetsu-Fuji Seitetsu Merger case in 1969.

- 9) We can make, however, the following criticism: This procedure is lacking in the procedural fairness because all the staff that will practice both the investigation and the hearing proceedings are the personnel of the Commission. This criticism originates from the fact that the FTC cumulates both prosecution and hearing proceedings functions.
- 10) The recommendation decision [Article 48 (4)]: The FTC may, when the person receiving the recommendation has accepted it, render a decision on the line of the said recommendation without resorting to the hearing procedures.

The consent decision [Article 53-3]: The FTC may, after deciding to initiate the hearing procedures, and when the respondent admits the findings of fact and application of law stated in the complaint, submits to the FTC a written statement setting forth that he will accept the decision without resorting to subsequent hearing proceedings, and files a plan setting forth concrete voluntary measures to eliminate such violation, to ensure the elimination of such violation, or to restore competition, if the Commission finds it appropriate, render a decision on the lines of concrete measures as stated in such a plan without subsequent hearing proceedings. This decision is similar to the juridical settlement, except for the fact that the respondent would unilaterally admit the findings of fact and the application of law stated in the complaint.

The hearing decision [Article 54]: The FTC shall, when it finds after the hearing proceedings that violation of the provisions exists, order the respondent to take elimination measures.

- 11) Pervasion of antimonopoly law is also shown in the increasing number of consultation cases. For example, in 1990, 845 consultations were made by different kinds of trade associations (Gyokaidantai in Japanese). This was a record number in the past. The Small and Medium Sized Enterprises form about 70 percent of the total number of claimants. When we examine the percentage with every industry, the Manufacturing Industry forms about 30 percent of the total number of consultations. About 50 percent of the consultation contents may be treated as a violation, or the possibility of such violation was very high.

See [13].

12) See Matsushita [8], p.27, p.31.

13) If any person is dissatisfied with a surcharge payment order, he may, in accordance with the rule of the FTC and within thirty days (that is to say, statute of limitation) from the date on which the certified copy of such order was forwarded, request the Commission to initiate the hearing procedures on the said case [Article 48-2 (5)]. The statute of limitation to the decision under the provision of Article 8-4 (1) [measures against a monopolistic situation] is within three months [Article 77 (1)].

14) The original jurisdiction over any suit coming under any one of the following paragraphs shall lie in the Tokyo High Court:

- i) a suit concerning a decision of the FTC;
- ii) a suit concerning indemnification of damages under the provisions of Article 25 (absolute liability);
- iii) a suit concerning offences as provided for in Articles 89 to 91 inclusive [Article 85].

Except for these suits, the Tokyo High Court has the original jurisdiction on the following non-contentious matters:

- iv) Administrative fines for contraventions of decisions [Article 97];
- v) Administrative fines for disobeying urgent injunctions [Article 98]. "The original jurisdiction principle is adopted as the Tokyo High Court's leading principle at the juridical stage in correspondence with the FTC's leading principle adopted at the administrative stage" ([2] p.207).

15) The Substantial Evidence Rule is the principle which has been established by the juridical precedents in the United States. This rule means that, after the court investigated the facts, evidences and records found by the administrative agency, any reasonable man who considers reasonably those evidences would accept the findings of fact. This rule does not, however, mean that the court obeys blindly the findings of fact decided by an administrative agency. The court investigates in accordance with the entire records and can judge whether or not it is a substantial evidence. See Tanaka (ed.), [15], p.821, Matsushita [8], pp.29-30.

16) See the theoretical analysis by Polinsky & Shavell [19].

In their paper, they treated the probability of legal errors as given, and they did not analyze all reasonable efforts to reduce legal errors. On the occurrence of legal error, they give the following reasons: "evidence brought before courts often will be incomplete or subject to misinterpretation and courts sometimes will misconstrue the law" (ibid., p.99.).

17) Before the 1977 Amendment, we had the impression that the court is binded by this substantial evidence rule, but after this amendment as a respondent is permitted to introduce a new evidence to the court, the relation between the court and

the FTC became more relative. Kojo [5] studies on what degree the scope of juridical review is limited when this principle is accepted.

18) Atsuya [1, pp.277-278] arranged the pros and cons of this amendment.

19) Though, as an index of investigation ability, we fundamentally needed the number of staff who were in charge of investigation, we could not obtain the number concerned after 1977 [6. pp.554-555]. To extend the period of analysis, we could not but daringly adopt the total number of staff as one index of investigation abilities. In spite of a little increase and decrease, when we compared the total number of staff in 1947 with that in 1988, the latter increased about 1.6 times (161 person in number) relatively to the former year. The FTC's total budget has been increasing every year, and the total nominal budget in 1988 was about 400 times that in 1947. Similarly, when we compared the investigation activity expenditure in 1947 with that in 1988, the latter year's increased nominally about 45 times compared to that of the former year's. The rate of the investigation activity expenditure to the total budget began to increase since 1965, and the rate (about 8.3 percent) was at its maximum in 1973. An average value of this rate was about 6.5 percent during the period 1968-77. The increasing of this expenditure after 1965 corresponded with the increasing of many figures (see previously explained Tables).

20) See the appendix on the regression analysis of the United States.

Appendix

1) We have found a positive and significant correlation between the Antitrust Division's Budget (X) and the number of cases (Y) disposed by the Division.

$$\text{Log (Y)} = 0.491 + 0.351^a \cdot \text{Log (X)}, R^2 = 0.48$$

(1.122) (6.687)

Notes: Figures in parentheses are t statistics.

a: significant at 1% level in two-tail test.

The period of analysis: 1932-81.

Data Source: Shughart II [23], p.84, table 4.1.

2) A positive and significant correlation exists between the Antitrust Division's Annual Budget (BUDGET) and the number of price-fixing cases (DOJPF) brought by the Division.

$$\text{DOJPF} = -11.39 + 0.003^c \cdot \text{BUDGET}$$

(2.42)

Notes: c: significant at 5% level in two-tail test.

The period of analysis: 1964-76.

Source: Block, Nold & Sidak [17], p.437, footnote 22.

A similar relationship exists between the FTC's annual budget (X) and the number of restraint of trade cases brought under Section 5 of the FTC Act.

$$\text{Log (Y)} = 1.5^b + 0.142^d \cdot \text{log (X)}, R^2 = 0.06$$

(2.471) (1.982)

Notes: b: significant at 2% level in two-tail test.

d: significant at 10% level in two-tail test.

The period of analysis: 1915-81.

Data Source: Shughart II [23], p.90, Table 4.3.

3) The relationship between the Antitrust Division's Budget and the Number of Criminal Cases (Section 1) of the Sherman Act.

Dependent Variables	Constants	Log (X)	R ²
Log (Y ₁)	- 2.235 (-1.281)	0.506 ^b (2.89)	0.46
Log (Y ₂)	1.994 (0.74)	0.06 (0.27)	0.005
Log (Y ₃)	-11.838 ^b (-3.026)	1.283 ^a (3.267)	0.52

Notes: a: significant at 1% level in two-tail test.

b: significant at 2% level in two-tail test.

The period of analysis: 1970-81.

$\text{Log (Y}_i\text{)} = \beta_0 + \beta_1 \cdot \text{Log (X)} + u_i$

X: The Antitrust Division's Budget

Y₁: The number of criminal cases (Section 1) of the Sherman Act.

Y₂: The number of price-fixing cases out of Y₁.

Y₃: The number of bid-rigging cases out of Y₁.

Data Sources: Variable (X) is included in Shughart II [23], p.84, Table 4.1, and

Variables (Y_i) are included in Snyder [24], p.448, Table 1.

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