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Impediments to Effective Enforcement of Competition Law
―Institutional Flaws in the Antimonopoly Act of Japan and Its Enforcement―

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I. Introduction--Structural Impediments Initiative (SII) and Its Aftermath

This essay aims at examining causes and consequences of ineffective enforcement of the Antimonopoly Act of Japan (AMA), focusing on its institutional aspects, and proposing some measures to improve effectiveness.

Let me start by recalling my experiences some 20 years ago during my working at the Japan Fair Trade Commission (JFTC). Those who are about 40 years old or more may remember the Structural Impediments Initiative (SII) Talk in late 1980s and early 1990s between the United States and Japan, which was a symbol of serious trade and economic frictions between the two largest economies. The U.S. Government focused on Antimonopoly and competition policy issues in Japan, as clear indications of closed and exclusionary nature of Japanese markets and Japanese firms.[1] During the SII Talk, I was a First Secretary at the Japanese Embassy in Washington D.C. until the Final Report came out, and after returning to Tokyo I assumed a Director, International Office of the JFTC and engaged in the follow-up dialogues for two years.

[1] *See* Joint Report of the U.S.-Japan Working Group on the Structural Impediments Initiative (SII), June 28, 1990.

At the SII, each side proposed the other side what to do to alleviate the huge economic imbalances and resolve the serious trade disputes. During the severe confrontation between the two Governments, I always felt that it was clear for both sides what to do. Japanese side should employ what the U.S. side has done and Japanese side has not done, and refrain from employing what Japanese side has done and the U.S. side has not done, and vice versa for the U.S. side.

Many tasks were requested by the U.S. side to Japanese side, particularly to the JFTC, on competition law and policy issues. To name a few, they include strengthening sanctions against violations of the AMA, such as surcharge and criminal penalty; strengthening enforcement activities by the JFTC, resorting more to formal measures, that is, rendering cease-and-desist orders and surcharge payment orders instead of issuing informal warnings, and filing criminal accusations with the Prosecutor General; and promoting private suits by injured parties.[2] The SII was a turning point in the history of the AMA and the JFTC, and many reforms in competition law and policy issues have been examined and implemented since the SII. It has been almost unanimously accepted that competition law and policy in Japan has changed significantly since the SII.[3] This essay provides some assessments on the developments of competition law and policy in Japan since the SII. Has competition law and policy in Japan really changed since the SII? It seems to me that although the AMA has been amended frequently in the last 2 decades,[4] the core of the system or regime in which the AMA is promulgated has not so much changed.

[2] *Id.* Only several tasks were requested to the U.S. side by Japanese side, as far as competition law is concerned. One of them was de-trebling of joint collaborative activities even if they are antitrust violations. De-trebling of joint research and development activities under the National Cooperative Research Act of 1984 was expanded to include production joint ventures under the National Cooperative Research and Production Act of 1993.

[3] *See generally* Makoto Kurita, Recent Developments of Competition Policy in Japan and Their Implications for International Harmonization of Competition Laws, *in* C. J. Cheng et al. eds., International Harmonization of Competition Laws, Martinus Nijohoff Publishers, 361 (1995).

[4] Before the SII the original AMA was amended in 1949, 1953 and 1977 (technical amendments omitted). Since the SII the AMA was amended in 1991 (surcharge), 1992 (criminal penalty), 1996 (organization of the JFTC), 1998 (business combination), 1999 (exemption cartel), 2000 (injunction), 2002 (criminal penalty), 2005 (surcharge, leniency, and criminal investigation), and 2009 (surcharge and prior filing of business combination).

II. Summary

There exist serious institutional flaws in the AMA from a viewpoint of effective enforcement mechanism. The JFTC has made significant efforts to reform them, but has not yet fully succeeded. My findings on these flaws, which I will examine in turn, are as follows.

Firstly, surcharge system provides no discretion of the JFTC, which deprives the AMA of its effectiveness. Surcharge system has been strengthened and expanded several times since its introduction by 1977 Amendment, but has been consistent in its non-discretionary nature[5].

Secondly, the proposed abolishment of hearing procedure (adjudication at the JFTC) in 2010 Bill to amend the AMA[6] may result in insufficient procedural fairness and deterioration of fact-finding and rule-making functions of the JFTC. We have to carefully watch the future developments on this issue.

Thirdly, frequent utilization of informal enforcement measures by the JFTC tends to result in over-enforcement against rule-of-reason type practices.[7] Under-development of jurisprudence under the AMA may be partly attributed to informal enforcement by the JFTC.

[5] Non-discretion was required to avoid "double jeopardy (double punishment)" with criminal penalty against cartels.

[6] A Government Bill to Amend the AMA, submitted to the Diet on March 12, 2010 (Cabinet Bill No. 49 to 174th Ordinary Session), was carried over to the next Diet session.

[7] "Rule-of-reason type practices" here include collaborations among competitors, vertical restraints, and intellectual property licensing contracts.

And fourthly, it is apparent that the enforcement of the AMA is dependent too much on public enforcement by the JFTC, institutionally and practically. It is called as "JFTC-Centralism." Other prospective plaintiffs, particularly injured parties, have played few roles.

Those who are not familiar with the AMA and its enforcement in Japan may have the following responses to the above-mentioned findings. As to the first point on surcharge, what silly the surcharge system is! No discretion of the JFTC is ridiculous. As to the second point on procedure at the JFTC, at any rate due process for respondents is respected, isn't it? It does not matter whether administrative adjudication is employed or not. As to the third point on informal enforcement, what are "informal enforcement measures"? If they are administrative guidance or persuasion, it is incredible of informal measures to have over-enforcement effect. And as to the fourth point on the JFTC-Centralism, even if the JFTC is powerful and energetic in Japan, its activities have been not so outstanding from international perspectives. This essay may provide some explanations and answers to these questions and comments.

Based on the findings on institutional flaws in the AMA and its enforcement, I would like to propose to take next steps to establish effective enforcement regime under the AMA. As regard to surcharge, it is necessary to introduce discretionary surcharge (administrative fine) system, modeled after administrative fine system under EU competition law. As regard to due process, procedural fairness has to be secured, whether the existing hearing procedure will be abolished or not. As to informal enforcement, the JFTC should improve its guidelines and prior consultation system, and publish its deliberations on cases and surveys more clearly and minutely. And as to the JFTC-Centralism, it is desirable to promote private suits, thereby increasing deterrence by means of financial burdens on offenders as well as alleviating the dependence on the JFTC as a means of resolving private disputes.

III. Basic Understandings--Prerequisites for Analysis

Before addressing 4 issues identified-above, I would like to explain

several basic understandings on which 4 findings of institutional flaws mentioned-above are rested.

First of all, the AMA is composed of the following 4 categories of provisions. The first category is "substantive provisions", which define anticompetitive practices and prohibit them. The second category is "sanction provisions", which provide sanctions against offences or offenders of substantive provisions. The third category is "procedural provisions", which prescribe a series of actions to follow to investigate and find violations and to impose sanctions on offenders, including provisions for securing the right of defense for respondents. And the fourth category is "organizational provisions", which establish competition authorities (JFTC in case of Japan) and embody their organizations and enforcement powers.

These 4 categories of provisions are mutually inter-wined and lack of balance among these 4 categories reduces effectiveness of competition law regime as a whole. Various reforms of the AMA in the last 2 decades might have examined these 4 categories of provisions separately, and have lacked coherence and totality as a system or regime. It is time to grasp these 4 categories totally and restructure them in order to establish effective enforcement regime.

There exist various stakeholders who act and react with each other concerning competition law and policy issues. Interactions between or among various stakeholders have to be identified to analyze competition cases. Alleged offenders and injured parties are the most important stakeholders. Competition authorities (sometimes foreign competition authorities are included) are also indispensable. In case of criminal enforcement, prosecutor's office is involved. Transacting parties, trade associations, and ministries and agencies concerned are frequently involved in various ways. Check-and-balance among stakeholders and plurilateral and competitive enforcement mechanism is desirable and it is crucially important to orderly establish mutual relationships between or among stakeholders.

By the way, it is inevitable for competition authorities to make errors during their enforcement activities. Under the theory of decision,

there are 2 types of errors. One is type I error, or false positive and the other is type II error, or false negative. Type I error here is the one finding a violation when it should not have been found, and this type of error results in over-enforcement. On the other hand, type II error here is the one failing to find a violation when it should have been found, and this type of error results in under-enforcement. It is necessary to minimize the total cost of errors, but it is not so simple, because to reduce one type of error generally results in increasing the other type of error. One type of error may be more serious than the other, but the cost of error is different among various stakeholders.

According to public choice theory, each stakeholder behaves to maximize its own self-interest, and the JFTC or its officials can not escape this behavioral pattern. Suppose that Company A files an application of prior consultation on its business plan, and that JFTC Official B has been commissioned to examine and decide whether the business plan has competitive problems or not. For Official B, the cost of type I error (deciding wrongly that the business plan has competitive problems and shall not be implemented) is minimal, but the cost of type II error (deciding wrongly that the business plan has no competitive problem and can be implemented) is significant.[8] For Company A, the cost of type I error by Official B (cost of abandoning the business plan) is enormous, but Official B is insensitive to this cost on Company A.

According to the theories of decision and public choice, the JFTC tends to under-evaluate the cost of type I error and be sensitive to the cost of types II error, and thereby tend to wrongly find competitive problems on cases before them, particularly during the course of informal enforcement activities, including prior consultation, because *ex post* review of informal measures is not feasible, type I error will not come to the surface.[9]

[8] Suppose that after implementation of the business plan, competitive problems came out. Official B would have to pay for his type II error.

[9] In case of formal enforcement activities, respondents may file requests of hearing and then file suits with courts.

IV. Sanctions against Violations

A. Effective Sanction System

In this essay, “sanction” means any measures against offences or offenders of competition law. They include both *de jure* measures and *de facto* measures (such as bad reputation by news report), and both under competition law and other laws or regulations (such as suspension and debarment in public procurement).

Sanctions have the following multiple functions or purposes to achieve: To eliminate illegal practices by means of administrative cease-and-desist order or civil injunction, to punish offenders for the purpose of general and special deterrence by means of administrative or criminal penalties, to compensate victims by means of civil remedies, and to deter illegal conduct by means of these functions.

Various measures for sanction have to be optimally combined and systematized in order to accomplish multiple functions of sanctions. Prohibited practices under competition law include various types of conduct, and proper sanction system has to be established according to types of violations. For example, hardcore cartels shall be severely punished, and cease-and-desist orders themselves have almost no significance. On the opposite, it is sufficient for problematic mergers to be restructured in order to eliminate competitive concerns. At the same time, type of sanction and its degree (for example, the amount of monetary sanction or jail terms) shall be properly fixed according to respective offences and offenders.

Various factors have to be examined to design and establish optimal sanction system. Firstly, effectiveness is the most important factor. Secondly, systematization and inclusiveness has to be secured. Sanctions pyramid[10] can be drawn to locate criminal penalty at the top and persuasion at the bottom and there should be no contradiction with each other. Thirdly, simplicity is desirable and others being equal, the simpler, the

[10] *See* Robert Baldwin and Martin Cave, Understanding Regulation—Theory, Strategy, and Practice, Oxford University Press, 1999, Fig. 1 at 100.

better. Fourthly, efficiency should be pursued. Sanctions have been internalized by offenders so as to prevent from recurrence and the operating cost for enforcement should be minimal. And fifthly, substantial equality and fairness should be secured.

B. Surcharge without Discretion under the AMA

Based on these factors, the existing sanction system under the AMA has to be scrutinized. Under the AMA, the most important sanctions are "elimination order" and "surcharge payment order." Elimination order is so-called cease-and-desist order and available for any violations of the AMA. On the other hand, surcharge payment order is a kind of monetary penalty imposed by administrative procedure and its coverage is limited to major types of violations (surcharge-eligible type of violations). Theoretically speaking, it is desirable to differentiate between illegality and surcharge-eligibility. Alleged practices under investigation can be classified in the following 3 categories: Practices which are illegal and to be imposed surcharge; practices which are illegal but not to be imposed surcharge; and practices which are not illegal (and therefore not to be imposed surcharge).[11] The AMA, however, provide no discretion of the JFTC on whether and how much amount of surcharge shall be imposed according to cases and offenders, if the JFTC find an alleged practice falling under surcharge-eligible violations. Finding of surcharge-eligible violations automatically means imposition of surcharge.[12]

Because of non-discretionary nature of surcharge system, actual enforcement practices by the JFTC may be "biased." Formal measures are to be taken against cases where imposition of surcharge is rational and justified, and if a case is considered to be inappropriate to impose surcharge, the JFTC usually find non-surcharge-eligible type of violations or issue informal warnings to avoid imposing surcharge. For example, under the AMA, collaborative activities among competing firms may fall under unreasonable restraint of trade. Unreasonable restraints of trade include both hardcore cartels and other types of collaborations among competitors. Other types of collaborations shall be prohibited if they are anticompetitive, but there is usually no need to punish them by imposing surcharge. The AMA, however, does not permit this type of discretion on surcharge and the JFTC has to impose surcharge on them as far as they are surcharge-eligible.[13]

After the 2009 Amendment of the AMA, the surcharge system extended its coverage to exclusionary private monopolization and some types of unfair trade practices. As far as unreasonable restraint of trade is concerned, non-discretionary surcharge has few, if any, serious problems. In case of exclusionary private monopolization, however, no discretion may bring about serious consequences. It is almost always quite difficult to distinguish between aggressive business behaviors and undue exclusionary practices, and mandatory imposition of surcharge against exclusionary private monopolization may discourage competitive business strategies. This means that the JFTC might become more cautious about applying private monopolization provision to alleged monopolization cases. One example is JASRAC case[14], pending before the JFTC hearing proceeding. JASRAC is a dominant collecting society of music performance and the alleged practice in this case is a method of calculating loyalties under blanket license contracts between JASRAC and TV stations, and the same or similar method has been employed for a long time and probably in many countries. This type of practice is quite new as a means of exclusion in private monopolization cases. Even if the method employed by JASRAC would fall under exclusionary private monopolization, it might be inappropriate to impose surcharge on JASRAC. The

[11] In addition to surcharge-eligibility, it is important to fix the amount of surcharge to be imposed on respective offenders in each case.

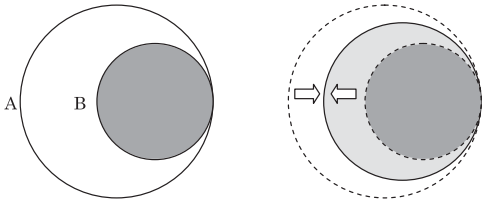
[12] The similar issue does exist under the U.S. antitrust laws, because of automatic trebling of damages under Section 4C of the Clayton Act.

[13] Surcharge eligibility is specified in the AMA to the effect, roughly speaking that mutual restraint among participants is related to price or output. Most of collaborations among competitors other than hardcore cartels are not surcharge-eligible, but some types are surcharge-eligible.

[14] JFTC Elimination Order, February 27, 2009 (hearing pending).

AMA, however, does not permit the JFTC to exercise such discretion. To avoid imposing surcharge, the JFTC has to apply unfair trade practices provision or issue informal warning.

To illustrate the issue, suppose the following 3 categories of exclusionary private monopolization: Set A indicates exclusionary private monopolization as a whole which is eligible for elimination order; Set B indicates exclusionary private monopolization on which surcharge should be imposed; and Set C indicates vicious and serious exclusionary private monopolization against which criminal enforcement can be initiated under the JFTC criminal accusation policy.[15] Set A⊃Set B⊃Set C is desirable. Some practices shall be eliminated by cease-and-desist order as exclusionary private monopolization but should not be punished by surcharge. The AMA, however, does not permit such outcomes, and to find an exclusionary private monopolization in order to cease-and-desist automatically leads to imposing surcharge. Under the AMA, Set A equals Set B. This surcharge system inevitably results in under-enforcement from a viewpoint of eliminating illegal practices and over-enforcement from a viewpoint of punishing offenders.



The method of fixing the amount of surcharge is also problematic. The AMA provides mechanical formula to calculate the amount of surcharge based on sales amount. The amount of surcharge is automatically fixed by multiplying sales amount of goods or services covered by the

[15] Criminal enforcement against exclusionary private monopolization may theoretically be available (in such cases as coercive boycotts), but not practically imaginable. Set C is omitted in the Figure.

conduct during implementation period (up to 3 years) by a specific ratio.[16] Respective conditions in cases and offenders can not be considered to fix the amount of surcharge, except those prescribed in the AMA. In practice, however, the JFTC may exercise discretion in various ways, including finding of violations, calculation of sales amount. In bid-rigging cases, for example, sales amount of unsuccessful bid-riggings in respective bids is excluded from the total sales amount on which 10% ratio would be multiplied.

C. Needs for Reform

From my viewpoint, the existing surcharge system has serious flaws. Non-discretionary surcharge system is ineffective. For cartel participants, surcharge is the cost of cartel and pre-calculated because of a fixed ratio of surcharge. It is unequal or unfair because of "too heavy or too light," according to cases and cartel participants. It is inconsistent partly because the existing system is a kind of patchwork after several amendments. It is also too complicated to operate. Accurate calculation of sales amount is required, and specific ratios are provided in the AMA, according to type of violation, type of business, size of firm, early termination, repetition, ringleader, and so on. As a result, it is inefficient and it costs much for the JFTC.

The original surcharge system was designed as a measure against simple price-fixing cartels. While maintaining basic framework of the system, it has been extended to other types of illegal conduct. Drastic reforms are required to establish effective surcharge system. EU-type administrative fine system may be preferable, and the JFTC should have large discretion on whether and how much surcharge shall be imposed under a high upper limit of the amount. Needless to say, procedural safeguard for respondents is all the more important. Such legal environments would also be necessary for the future introduction of discretionary surcharge system that trust and confidence on the JFTC and its ex-

[16] 10% in principle in case of unreasonable restraint of trade by large companies and 6% in case of exclusionary private monopolization.

pertise would be fostered and that judicial infrastructure (resources and expertise) would be sufficiently provided.[17]

V. Adjudication at the JFTC

A. History of Hearing Proceedings

Since its enactment, the AMA has employed administrative adjudication procedure (usually called as "hearing proceedings" in Japan), modeled after the U.S. Federal Trade Commission. This procedure, characterized as "quasi-judicial" one, has a high reputation for its openness and fairness.[18] The JFTC (Commission) designates usually 3 hearing examiners to preside over each hearing case. Hearing examiners are staff of the JFTC and no official who has been involved in the investigation of that case may be designated as a hearing examiner. After the conclusion of hearing proceedings, hearing examiners submit their initial decisions to the Commission and respondents. The Commission, after its own deliberations, renders decisions, usually adopting and citing hearing examiners' initial decisions. Respondents may file suits with Tokyo High Court to quash the JFTC decisions and the Court examines the cases under substantial evidence rule.

Until about the end of 1990s, hearing cases were not so many and litigation cases were all the more few. Because of the increasing enforcement activities by the JFTC since the SII and heavy financial burdens of surcharge, however, more and more respondents had requested hearing proceedings both on the merit and on surcharge. Before the 2005 Amendment of the AMA, surcharge payment orders against cartel participants were issued after a decision finding an illegal cartel was rendered. It took several years for the JFTC to render decisions after hearing

[17] At this moment the JFTC appears to be reluctant to introduce discretionary surcharge system. This may be the reflection of insufficient confidence of the JFTC in its enforcement activities.

[18] Various criticisms and attacks on the JFTC hearing proceedings will be analyzed later.

proceedings, and it took additional years for the JFTC to issue surcharge payment orders. There was no need for respondents to pay interests during hearing proceedings on the merit and surcharge. This flaw allegedly accelerated respondents to request hearing proceedings frequently. Heavy caseloads for hearing examiners and other reasons resulted in taking a long time to conclude hearing proceedings and to render final decisions. To resolve the situation, the JFTC proposed to streamline advance procedures before issuing orders.

The 2005 Amendment of the AMA introduced *ex post* hearing proceedings after the issuance of elimination orders and surcharge payment orders. Under the new procedure, the JFTC renders both orders usually at one time in each cartel case. These orders take effect immediately, and respondents of surcharge payment orders have to pay interests if they request hearing proceedings and defer the payments during hearing proceedings. Hearing proceedings are reexamination of the JFTC orders and respondents may not file suits to quash the JFTC orders directly with courts, and special litigation procedures before Tokyo High Court was kept intact.

This amendment was unpopular among economic and judicial circles since its proposal by the JFTC, and during the legislative process, reexamination of the AMA procedure within 2 years after the amendment was agreed upon among parties concerned, and the Advisory Panel on Basic Issues Regarding the AMA was established in July 2005. After the intensive deliberation, the Advisory Panel submitted its Report to the Minister of Cabinet on June 26, 2007 and recommended employing again *ex ante* hearing proceedings, although admitting status quo for the time being. Business circles and lawyers associations strongly criticized the Report and argued for abolishing hearing proceedings at the JFTC and employing ordinary administrative litigation procedures under the Administrative Litigation Act to quash the JFTC orders.

Informal legislative coordination concerning hearing proceedings between the JFTC and parties concerned including the LDP (then ruling party) was conducted and it was reported in early 2008 that both sides had agreed to abolish hearing proceedings as regards to cartels and some

types of practices and to maintain it as regards to M&A and private monopolization. The Government, however, could not reach consensus on the issue and postponed its handling to the next year. On the other hand, Democratic Party (opposition party at that time) insisted on complete abolishment of hearing proceedings at the JFTC, probably based on their distrust of bureaucracy, without careful examination on the merit.

After the Regime Change in September 2009, the Democratic Government decided to abolish hearing proceedings completely and introduced a Bill to amend the AMA in March 2010. The Bill, however, without deliberation during the Ordinary Session of the Diet, was carried over to the next Session. The Bill would abolish existing *ex post* hearing proceedings at the JFTC. *Ex post* review of the JFTC orders would be conducted by Tokyo District Court exclusively under the Administrative Litigation Act. Advance procedure at the JFTC to render orders would be established, modeling after "hearing" under the Administrative Procedure Act, much simpler procedures compared to the existing hearing proceedings at the JFTC.[19] In this sense, the JFTC orders would be treated as equally as ordinary administrative orders rendered by ordinary administrative Ministries and Agencies.

Simple advance procedure provided in the Bill may be a natural consequence, once the politician-initiated Government decided to abolish hearing proceedings. It is unsurprising that the JFTC, particularly Investigation Bureau, does not like prudent and lengthy advance procedures.

B. Pros and Cons on the Bill

Various reasons have been enumerated by the proponents to abolish hearing proceedings at the JFTC. According to them, hearing proceedings at the JFTC is pre-modern, because the Commission works both as a prosecutor and a judge. Hearing examiners, who preside over hearing proceedings and prepare initial decisions, are staff of the JFTC and not necessarily qualified lawyers, and their independence from the Commission or Investigation Bureau is not fully secured. It also takes much time for hearing proceedings to conclude, usually for 2-5 years. *Ex post* hearing proceedings has few, if any, meaning for respondents, because the Commission has already decided and rendered orders and no respondent can expect different conclusions after *ex post* hearing proceedings. Judicial review of the JFTC decisions is restricted and right of defense for respondents is unduly hampered, because respondents have to file suits with Tokyo High Court, where substantial evidence rule is employed and submission of new evidences is restricted.

The JFTC side may have some arguments for accepting the abolishment of hearing proceedings, putting emphasis on expeditious execution of the JFTC orders. Before Tokyo District Court, plaintiffs have to prove illegality of the JFTC orders and the JFTC investigators need not to prove violations but to offer rebuttals to plaintiff's arguments before courts. Filing suits with courts to quash the JFTC orders, in principle, has no suspension effect.

On the other hand, there are 2 types of arguments against abolishing hearing proceedings at the JFTC, both are closely related. One type of arguments puts emphasis on the existence and organizational features of the JFTC. Many academic scholars argue that hearing proceedings is the core of the JFTC procedures and deeply rooted in the JFTC's existence and organizational structure. They are concerned that the abolishment of hearing proceedings would result in the weakening of the JFTC. They fear that because there is no need to maintain a collegial body (Commission) to render orders without adjudication, the JFTC would be reorganized into agency-type organization, such as Financial Services Agency and Consumer Affairs Agency.

The other type of arguments focuses on the functions of fact-findings and rule-making during adjudication at the JFTC. It argues that without adjudication, fact-findings based on evidences and legal reasoning can not be well implemented and that because of their serious impact on respondents, elimination orders and surcharge payment orders shall be rendered after prudent advance procedures. It also claims that various problems listed by the proponents for abolishment can be re-

[19] JFTC press release, Submission of the Antimonopoly Act Amendment Bill to the Diet, March 12, 2010.

solved by means of taking additional measures, without hastily abolishing hearing proceedings.

C. Analysis and Needs for Reform

From my viewpoint, the real issue is not whether hearing proceedings shall be abolished or not, but how to establish effective and due advance procedure for optimal enforcement of the AMA. The proponents for abolishment may have known the importance of advance procedure but were caught in a dilemma that prudent advance procedure might be equal to a revival of *ex ante* hearing proceedings under pre-2005 Amendment.

During the drafting stage of 2010 Bill, the JFTC, particularly Investigation Bureau, may have strongly argued, by using the logic of the proponents for abolishment that once hearing proceedings under the AMA had been decided to abolish, the new procedures would be the same as those of other ordinary administrative orders. The 2010 Bill, that codifies simple advance procedure, may indicate that the JFTC argument prevailed during the drafting process inside the Government. If enacted, respondents would have insufficient advance procedures at the JFTC and would face various obstacles to win at Tokyo District Court under the Administrative Litigation Act. Furthermore, from a viewpoint of effective enforcement, the JFTC would deteriorate its fact-finding function and might take reckless actions without careful examination on alleged cases. It appears to me that a fairly wide consensus among parties concerned, including the proponents for abolishment of hearing proceedings, does exist that the abolishment of hearing proceedings at the JFTC might be disadvantageous to respondents.

Prudent fact-findings based on evidences and persuasive legal reasoning is the core of competition law enforcement. Due advance procedure is indispensable both for protecting respondents' right of defense and securing effective enforcement of the AMA in the long run. The 2010 Bill does not satisfy these requirements.

Procedural issues during investigation stage is still pending among Democratic Government, the JFTC, and other parties concerned, including business circles and bar associations. It is necessary and feasible to reconsider advance procedure issues, because the 2010 Bill was carried over to the next Session. At any rate, effective advance procedure has to be established, whatever its name is.[20]

VI. Informal Enforcement Measures by the JFTC

A. Informal Enforcement Measures

The JFTC utilizes various types of informal enforcement measures.[21] During a course of its investigation, the JFTC may issue "warning" against alleged offenders in case of insufficient evidences of violations. A warning is a kind of administrative guidance to request alleged offenders to take remedial measures on a voluntary basis. In case of finding practices which may lead to violations, the JFTC may issue "caution" to parties concerned to prevent violations.

The JFTC, in addition to the disposition of cases in violation of the AMA, may conduct fact-finding surveys on specific practices or industries, and if it finds problematic practices after examination, the JFTC may provide guidance to parties concerned or trade associations to take appropriate measures to prevent violations or to ameliorate situations.

The JFTC has promulgated and published various guidelines to ensure the transparency of JFTC's enforcement and enhance the predictability for business by clarifying the JFTC's interpretation and its enforcement policy of the AMA. The guidelines are usually finalized after public consultations, where draft guidelines are published and comments and opinions are solicited, and submitted comments and opinions are carefully examined. Major JFTC guidelines include those on trade asso-

[20] *See* The Japan Association of Economic Law, The Annual of the Japan Association of Economic Law 2010 (Yuhikaku, 2010) on this issue (in Japanese).

[21] *See* 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).

ciation activities, joint research and development, distribution system and business practices, exclusionary private monopolization, unjust low price sales, franchise system, intellectual property licensing, as well as business combination.

In response to consultations from firm(s) or trade association, the JFTC provides advices or guidance on whether specific business plans would have problems under the AMA. These prior consultation cases cover both business combinations (M&A) and other types of various practices including collaborations among competitors, vertical distribution arrangements, intellectual property licensing contracts, and activities of trade associations.

These informal enforcement measures by the JFTC have tremendous significance in Japan, and business circles and their legal counsels have to pay much attention to them rather than formal orders and decisions. Most investigative cases are hardcore cartels and have no significance for the AMA-conscientious firms. On the other hand, informal measures cover grey area or problematic (but not necessarily illegal) practices and these informal measures may in fact force firms to refrain from employing problematic practices.

As regards to investigation, the more difficult a case is, the more the JFTC tends to resort to informal warnings, and new types of cases also tend to be dealt by means of informal measures. Fortunately informal measures have not been utilized in case of hardcore cartels since the SII. On the other hand, in case of rule-of-reason type practices, informal measures have been utilized frequently and functioned as *de facto* precedents.

Informal enforcement measures such as surveys, guidelines and prior consultations, have been utilized because both the JFTC and respondents and other parties concerned have their own merits. Informal measures enable the JFTC to conduct "cheap enforcement." The JFTC, by utilizing informal measures, can save investigative resources. At the same time, informal measures may be effective and efficient in a sense. For example, in case where problematic practices are prevalent in an industry, the JFTC conducts a fact-finding survey and issues guidance to

a trade association to take appropriate measures to eliminate the practices. Needless to say, it is preferable for respondents if a case would be closed without formal measures or if they would be subjects of surveys, not case investigations. Guidelines and prior consultations may provide business circles with predictability of the JFTC attitudes towards specific competition issues and enable them to take risk-avoidance behaviours.

Resorting to informal enforcement measures, at the same time, has adverse consequences. Resorting to informal warnings and cautions may result in irresponsible case-handling at the Investigation Bureau and lead to double standards between formal and informal cases. Informal measures would be utilized based on insufficient information gathering or examination. Informal measures usually lack procedural safeguards for respondents and no judicial means before courts to argue against informal measures can be provided. Because of these deficiencies, jurisprudence on illegality would not be fully developed. As a result, business circles may lack predictability, and it may depend on individual informal negotiations between the JFTC and relevant parties.

B. Guidelines and Consultations

Both promulgation of guidelines and prior consultations are highly evaluated activities of the JFTC by business circles for the purpose of providing predictability and preventing violations. These informal enforcement measures, however, have significant adverse effects. I will examine more minutely in turn.

Since early 1980s, the JFTC has promulgated various kinds of guidelines. Purposes and contents of guidelines by the JFTC are varied in respective guidelines, but they generally aim at deterring violations and other problematic practices and saving enforcement resources for the JFTC, and providing predictability for businesses.

Many guidelines issued by the JFTC have employed so-called "form-based" approach and classified various practices by labeling "black", "grey" or "white." One reason of such approach is that Japanese business circles have requested the JFTC to provide clear guidance. It may be understandable in the early stage of competition law enforcement

to provide form-based guidance. These guidelines, however, may have excessive deterrent effect against competitively-neutral or even pro-competitive practices. So-called "effect-based" approach should be employed to provide analytical framework or roadmap for businesses and their counsels. Businesses have ample information on alleged practices and relevant facts. Respondents may predict the JFTC's attitudes towards the alleged practices by substituting relevant information into the analytical framework provided in the JFTC's guidelines.

Prior consultation has been frequently utilized in case of business combinations (almost all problematic M&As have been handled by prior consultations), collaborations among competitors (partly because of no comprehensive guidelines on competitors collaborations at this moment), vertical restraints (Distribution System and Business Practices Guidelines published in 1991 are too restrictive for businesses to adhere under the current jurisprudence), and intellectual property licensing contracts (the newest Intellectual Property Utilization Guidelines was published in 2007).

Actual implementation of prior consultations can be described as "too weak for the strong, too strong for the weak." "The strong" means firms with ample experiences and resources on the AMA, and "the weak" means firms with no or few experiences or resources on the AMA. The strong can respond smoothly and cleverly to the answers from the JFTC which indicate problems in consultation cases, and may successfully rebut the JFTC. On the other hand, the weak may accept, without careful examination, the answers from the JFTC which indicate problems in consultation cases, and may have to decline to implement the original business plan.

C. Needs for Reform

It is desirable to improve ways and means of informal enforcement measures, while maintaining their merits. First of all, it is imperative to resort more to formal enforcement measures in case of investigation cases, and publishing more minute facts, analyses, and reasons to close cases. In conducting surveys, the JFTC should utilize its compulsory power

to collect information, instead of voluntary information gathering. It is advisable to establish formal survey procedure, modeled after "market studies" conducted by the Office of Fair Trading under the UK Enterprise Act 2002.[22]

It is important to revise existing guidelines based on effect-based approach and promulgate guidelines on collaborations among competitors. It is also advisable to institutionalize prior consultation procedure, such as information gathering under legal power, instead of voluntary submission from applicants, providing binding effect of the conclusion, and publishing more minute facts, analyses, and conclusion.[23]

To realize these reforms, it is indispensable to have sufficient enforcement resources and expertise at the JFTC, and the most important but difficult issue is to change consciousness both at the JFTC and businesses, paying due cost of rule-making by means of formal procedures.

VII. Competitive Enforcement Mechanism of Competition Law

A. JFTC-Centralism

The JFTC has broad powers to enforce the AMA, not only in its administrative procedures but also in civil and criminal procedures, and this is called as "JFTC-Centralism." Tokyo High Court Concentration system, which provided Tokyo High Court with exclusive jurisdictions over any types of litigations related to the AMA, was also adopted until recently.[24] The JFTC-Centralism is manifested in the following institutional designs. The JFTC was established under the AMA as an adminis-

[22] *See* OFT, Market Studies: guidance on the OFT approach (June 2010).

[23] The JFTC has already established "Prior consultation system for activities of businesses, etc.," but the system has been rarely utilized and almost all consultations have been handled out of this system.

[24] The 2000 Amendment of the AMA introduced injunctive suits by injured parties, which are filed with district courts. The 2005 Amendment abolished exclusive jurisdiction of Tokyo High Court over criminal cases and provided jurisdiction of first instance with district courts.

trative agency in charge of achieving the purposes of the AMA. The AMA provides the JFTC as a collegial body (Commission) with both investigative and prosecutorial and adjudicative functions. The AMA also provides the JFTC with exclusive power of criminal accusation in criminal enforcement and establishes no-fault liability of damages in case where the JFTC decision has become final and binding.

Under the AMA, various enforcement powers are vested institutionally on the JFTC, more than the U.S. Federal Trade Commission. On the contrary, other enforcement entities may lack power. In reality, actual enforcement activities are all the more dependent on the JFTC than the institutional designs. The JFTC-Centralism and its implementation may have adverse effects. Public choice theory teaches us that the JFTC, like any other organizations, can not help enforcing the AMA so as to maximize its own self-interest. The JFTC enforcement activities may be insensitive to procedural fairness for respondents and other parties concerned. The JFTC-Centralism may fall into such a situation as "no action, without the JFTC action." Alternative mechanism to solve competition issues has to be prepared and utilized.

Since the SII, there have been several developments to relax the JFTC-Centralism. Firstly, various measures have been taken to extend and utilize civil remedy system (civil enforcement by injured parties). Under the Civil Code, violations of the AMA usually fall under tort under general tort provision (Article 709) and a juristic act in violation of the AMA may be void as against public policy (Article 90).[25] Damages theory under Article 709 of Civil Code has contributed to awarding damages in civil suits, utilizing Article 248 of Civil Procedure Code on the amount of damages. The 2000 Amendment of the AMA extended the coverage of no-fault damages suits under Article 25, and institutionalized civil injunctive suits under new Article 24 of the AMA, although they covers only unfair trade practices at this moment.

Secondly, criminal enforcement system has been strengthened at

[25] "Economic public order" theory advocated by prominent civil law scholars strongly supports this interpretation.

both legislative and operational levels. The JFTC published its criminal accusation policy in 1990 and since then 13 cases have been indicted and convicted. Upper limit of criminal fines for corporations were increased twice, now up to 500 million yen. The 2005 Amendment of the AMA introduced criminal investigative power by the JFTC and provided original jurisdiction with district courts around the country, instead of exclusive jurisdiction of Tokyo High Court.

The AMA has been changing its character from "administrative regulation" to "rules on business transactions" or "autonomous rules in business society" and "ordinary law finally interpreted and applied by courts." It is desirable to promote enforcement activities by various entities, including public prosecutors and injured parties. Utilizing courts by the JFTC should also be encouraged, such as aggressive enforcement activities by the JFTC and judicial reviews thereof and petitions for temporally suspension order by the JFTC during its investigation (Article 70-13).

B. Significance and Limitation of Private Enforcement

Civil remedies can be utilized in such cases as contract suits, business tort suits, and intellectual property infringement suits. During the course of these litigations, the AMA can be quoted as cause of action or defense. In addition to these civil suits, injured parties should file follow-on damages suits after the JFTC took actions. In recent years, public procurement agencies have filed damages suits after the JFTC actions against bid-riggings and a significant amount of damages were awarded. Several victims of exclusionary private monopolizations also won or settled favorably in damages suits after the JFTC took actions.

On the other hand, injunctive suit system under Article 24 of the AMA, which was introduced in 2000 Amendment, has various limitations. First of all, injunction suits are available for only unfair trade practices cases. There is no rational reason why victims of more serious violations such as unreasonable restraint of trade and private monopolization can not file injunctive suits. Article 24 also requires plaintiffs to prove "extreme damage" to them as their standings to sue. To see case records,

so far there have been not so many injunction cases and no judgment for plaintiff (there exist several settlement cases for plaintiffs).

C. Needs for Reform

It is desirable to encourage enforcement activities of the AMA by various stakeholders and to create competitive environments to enforce the AMA. Firstly, it is essential to resort more to criminal enforcement against hardcore cartels. Substantive provision on hardcore cartels has to be amended to eliminate effect requirement of "substantial lessening of competition," and the JFTC's exclusive criminal accusation power should be abolished as far as bid-riggings are concerned.

Secondly, civil remedies suits by injured parties have to be encouraged. For that purpose, it is necessary to reform injunctive suits system as well as total civil justice system, including discovery and class action.

At the same time, it is necessary to prevent adverse consequences of diversification, that is, fragmented and chaotic enforcement of the AMA. For the time being, the JFTC is the first and foremost institution where information and expertise on competition law and policy is accumulated. At this moment, it is important for the JFTC to publish its clear guidance by means of issuing elimination order and surcharge payment order as well as decisions after adjudication, which contain minute fact-findings and persuasive arguments, and conducting economic researches and surveys and publishing persuasive reports and analyses. Respondents, lawyers, academics, governmental agencies, and other stakeholders may argue for and against these JFTC orders and decisions, reports and analyses. In particular, respondents may request judicial reviews of the JFTC decisions with courts and courts are expected to render well-reasoned judgments, paying due attention to the JFTC's views but based on their expertise as legal profession.

VIII. Conclusion

In this essay, I examined 4 issues relating to enforcement system or regime under the AMA. The first issue (surcharge), the second one (administrative adjudication), and the fourth one (civil remedies) are institutional and there are many high hurdles to overcome. The third issue (informal enforcement) is rather operational and the JFTC may take actions on its own initiative.

At any rate it is quite expensive and time-consuming to enforce the AMA by means of formal procedures, and so far "cheap enforcement" by the JFTC might have been widely supported. Now is the time, however, to overcome a temptation of cheap enforcement of the AMA and to devote more resources into fights against anticompetitive practices, which distort competition and injure consumer welfare. My conclusion in Japan may be contrary to the one in the U.S., where too many resources have been wasted in antitrust disputes. This may indicate that my conclusion is correct, because, as I felt 20 years ago during the SII Talk, the U.S. and Japan should take actions in the exactly opposite directions each other.