

**The Friendship Commission Public Policy Series  
Session V: Antitrust Policy and Reform**

Presents

***Japan's Flawed Antitrust Regime***

*A Japan Information Access Project Working Paper*

*By*

*Michael L. Beeman, D.Phil.*

**Working Paper**

*Presented for Discussion at*

The Friendship Commission Public Policy Series

**October 28, 1999 (Revised November 11, 1999)**

**Japan Information Access Project 1999©**

Washington, DC

*Session V: Japan's Flawed Antitrust Regime* continues the Friendship Commission Public Policy Series. The Series, a collaborative initiative of the Japan-US Friendship Commission and the Japan Information Access Project, will present future sessions on various security, technology, economic, and social issues. For more information, contact the Japan Information Access Project.

#### ***About the Series***

**The Friendship Commission Public Policy Series** provides a forum for research and discussion among leading American scholars, policymakers and business leaders. The Series' mission is to engage a dialogue among scholars, policy professionals, and citizens on critical issues between the United States and Japan. The goal is to apply policy-relevant discourse to academic research to foster an enlightened perspective on global issues and their domestic impact.

#### ***About the Sponsors***

**The Japan-U.S. Friendship Commission** is an independent Federal agency dedicated to promoting mutual understanding and cooperation between the United States and Japan through: the issuing of grant programs in Japanese studies in the U.S.; policy-oriented research; public affairs and education; the study of the United States, and the arts. The U.S. Congress established the Commission in 1975. See: <http://www.jusfc.gov>

**The Japan Information Access Project**, founded in 1991, is a trusted member of the U.S. policy community interested in Japan and Asia. The Project is a nonprofit research center strengthening international understanding of Japanese and Northeast Asian science, technology, finance, security and public policy. Through a range of programs and publications, the Project educates its members and the public to use a knowledge of Japan and Asia to increase national strategic competitiveness and security.

**Disclaimer.** This report does not imply any endorsement by the Japan-US Friendship Commission, Japan Information Access Project, nor by Oxford University and Johns Hopkins University or any of their affiliate organizations.

#### **About the Author**

**Dr. Michael Beeman** received his doctorate at St. Antony's College, Oxford, in 1998 where he completed a thesis on Japanese antitrust politics. Dr. Beeman was a Fulbright Graduate Research Fellow at the MITI Research Institute (1991-92), a Monbusho Research Fellow at the University of Tokyo (1996-97), and an Advanced Research Fellow at Harvard University's Program on U.S.-Japan Relations (1997-98). Over the past year, Dr. Beeman was a Research Fellow at the Reischauer Center for East Asian Studies at the Nitze School of Advanced International Studies, Johns Hopkins University. His publications include a chapter in a forthcoming book on comparative antitrust policy regimes as well as the forthcoming publication of his thesis. Email: [mbeeman@msn.com](mailto:mbeeman@msn.com)

#### ***For More Information***

##### **Japan Information Access Project**

2000 P Street, NW, Suite 620, Washington, DC 20036

(202) 822-6040, Fax (202) 822-6044

e-mail: [access@nmjc.org](mailto:access@nmjc.org)

Website: <http://www.jiaponline.org/>

**1999© Japan Information Access Project, All Rights Reserved**

Additional copies of this report can be ordered for \$10 plus \$2 shipping and handling (DC residents must add 5.75% sales tax). Please send all orders, prepaid to the address above.

**The Friendship Commission Public Policy Series  
Session V: Antitrust Policy and Reform**

*Japan's Flawed Antitrust Regime*

**Contents**

<b>Executive Summary</b> .....	4
I. Japan's Flawed Antitrust Regime.....	5
II. The "Little Old Lady of <i>Kasumigaseki</i> " .....	6
III. The Political Dimension.....	13
IV. Conclusions and Recommendations.....	17
V. Selected Bibliography and References.....	19
VI Tables.....	21
VII. Acknowledgements.....	22
VIII. Biography.....	22

## **Executive Summary**

On October 7, 1999, the Japan Fair Trade Commission (JFTC) and the U.S. Department of Justice signed a historic antitrust cooperation agreement. This agreement is designed to help strengthen cooperation in antitrust enforcement affecting both countries. While the agreement was considered a routine matter in the United States, Japan heralded the event as a significant demonstration of its expanding commitment to provide an open, fair and competitive market.<sup>1</sup>

To be sure, during the past decade the JFTC has stepped up efforts to counter its long-standing image of benign neglect in antitrust matters. The JFTC has collected record fines, sought criminal punishment for cartel behavior, and boosted its weak stature within the government. Japan's antitrust enforcers, however, still fail to gain respect abroad or create a perception that they are improving market access and supporting free competition.

The reason is simple: Japan's antitrust regime is flawed and in need of substantial reform. Indeed, reform of Japan's antitrust system is key to the success of the recent U.S.-Japan antitrust cooperation agreement. Without reform to fix idiosyncrasies in Japan's antitrust regime, the utility of the agreement is destined to fall short for American companies seeking to do business in Japan. In addition, reforms are needed to ensure that the current Japanese efforts to restructure and deregulate the economy are successful.

On paper, Japan's antitrust regime appears formidable. In practice, a range of institutional and political factors limit policy development and institutional effectiveness. Shortfalls in mission, motives, mechanics, and political mandate compromise its regulatory clout. The JFTC is currently a parochial, bureaucratic authority—itsself a monopoly—with little motive to pursue certain important cases and limited latitude in prosecuting those it does. These factors have created an antitrust regime that lacks transparency, fails to provide suitable deterrence for many illegal acts, and tends to emphasize enforcement patterns that lean toward outdated notions of “fair” competition rather than “free” competition.

This Friendship Commission Working Paper reviews the historical development of current conditions, identifies and discusses the most important factors that must be addressed before significant improvements can be realized, and points to six areas of necessary reform. Recommendations are:

- 1. Secure a clear, unambiguous commitment from Japan's cabinet that stronger antitrust policy and more vigorous antitrust enforcement is a top national economic priority.*
- 2. Aggressively pursue reforms that will help end the near total monopoly that the JFTC has over antitrust enforcement and remedies.*

---

<sup>1</sup> See speech “No Longer ‘a Dog That Never Bites,’” delivered to the Center for Strategic and International Studies, Washington, DC on October 6, 1999 by Yasuchika Negoro, Chairman, Fair Trade Commission of Japan.

3. Urge legal reforms that help address institutional limitations on the JFTC and that boost deterrence of illegal behavior.
4. Urge reforms that help improve internal processes in the JFTC and that support the agency's independent status.
5. Urge reforms that will help limit the impact of government-business relations on antitrust enforcement.
6. Consider and promote more radical ideas to re-make Japan's antitrust regime.

## **I. Japan's Flawed Antitrust Regime**

On October 7, 1999, the Japan Fair Trade Commission (JFTC) and the U.S. Department of Justice entered into a historic antitrust cooperation agreement.<sup>2</sup> Nearly 20 years in the making, this agreement signals a strengthening of America's longest-standing bilateral consultative relationship with a foreign regulatory authority. Japan heralded the event as a significant demonstration how far its Japan Fair Trade Commission (JFTC) has come in improving competitive market conditions for foreign and domestic companies.

Many remain skeptical. The JFTC is viewed both at home and abroad as a puppet authority hamstrung by institutional idiosyncrasies, political agendas, and parochial interests. Even a former JFTC chairman, Tanimura Hiroshi, described the watchdog agency as having "the appearance of strength, but in fact it exists without any power as though it was just an impoverished noble of the Imperial Court."<sup>3</sup> In light of continuing criticism of JFTC performance, many in Washington believe that little has changed or can change.<sup>4</sup>

For the last 20 years, American policymakers have cajoled Japanese officials to strengthen the JFTC. The United States urged Japan to take action and transform the JFTC into a proactive and progressive enforcement agency capable of paving the way for an open flow of foreign-made goods into the country's markets. Despite continuing efforts that have ranged from cooperative to confrontational, the bedrock issue of JFTC effectiveness remains intractable in this long-standing bilateral economic relationship.

As Japan and the United States embark on the next phase of this relationship with the recent antitrust cooperation agreement, questions arise on JFTC's actual ability to make the agreement work. Doubts linger that the JFTC is able to perform sufficiently to make the agreement advantageous to both Japanese and Americans. Even with a dramatic lessening in traditional political opposition to the Commission and its mandate, the JFTC, short of substantial reform,

---

<sup>2</sup> The full agreement and related documents are available on the U.S. Department of Justice website: [http://www.usdoj.gov/atr/public/press\\_releases/1999/3739.htm](http://www.usdoj.gov/atr/public/press_releases/1999/3739.htm) (downloaded 10/27/99).

<sup>3</sup> *Asahi Shimbun*, August 28, 1973, p.11.

<sup>4</sup> The most recent *U.S. National Trade Estimate on Foreign Trade Barriers* notes improvement by the JFTC yet argues that the body's efforts "fall short of those needed to ensure that Japanese markets are open to (foreign) competition...." United States Trade Representative, "1999 National Trade Estimate Report on Foreign Trade Barriers," p.246.

will continue to perform at levels that fail to satisfy most minimum expectations in the United States.

## II. The 'Little Old Lady of Kasumigaseki'

When one speaks of perceived weakness in antitrust enforcement, the following summary of a report on institutional failures highlights the basic themes:

*"The FTC...systematically failed to detect violations, relying instead upon consumer and competitor complaints; failed to establish priorities, relying instead on voluntary enforcement; and failed to seek the necessary resources and authority, remaining instead content with its nearly worthless efforts."*<sup>5</sup>

The irony, however, is that these critical conclusions refer to the U.S. Federal Trade Commission (USFTC), not the JFTC. The report being paraphrased is the 1969 *Nader Report*, an effort that was soon followed by a similar report by the American Bar Association.<sup>6</sup> The result was a variety of legal and internal reforms that transformed America's "Little Old Lady of Pennsylvania Avenue" into a more formidable institution.

The purpose of raising the historical legacy of the USFTC is not to compare its effectiveness with the JFTC. Rather, it is intended to point out that aspects of the structure and mandate of the USFTC that were grafted onto the JFTC in 1947 came to be recognized 20 years later in the United States as inefficient and ineffective for the needs of modern, more consumer-oriented antitrust policy enforcement. Although important differences exist between the two institutions, it is relevant that criticisms of the JFTC today closely mirror those of the USFTC of yesterday. This fact represents more than coincidence.

And where differences do exist, they have been even more damaging to antitrust enforcement in Japan than in the United States. Some examples are enumerated as follows.

### ***Muddled Mandates***

In a year when substantial time and effort to reform the Japanese bureaucracy was spent deciding whether to re-name the Ministry of Finance and other bureaus, it is noteworthy that the JFTC escaped similar attempts to cut bureaucratic egos down to size. Either the agency was simply overlooked as unimportant or it was determined that the name *Fair Trade Commission* continues to reflect a desirable political mandate for the body.

From the U.S. perspective, however, the JFTC's continuing preoccupation with emphasizing "fair" trade represents one of the more problematic aspects of Japan's antitrust regime. Concretely, U.S. officials consistently point to as shortcoming the JFTC's support for fair trade

---

<sup>5</sup> Kenneth W. Clarkson and Timothy J. Muris, eds., *The Federal Trade Commission since 1970* (Cambridge: Cambridge University Press, 1981), p.2.

<sup>6</sup> Edward Finch Cox, Robert C. Fellmeth, and John E. Schultz, *The Nader Report on the Federal Trade Commission* (New York: R.W. Baron, 1969); and American Bar Association, Commission to Study the Federal Trade Commission, *Report* ((Chicago?, 1969).

organizations, excessive attention to premium and lottery regulations, enforcement against loss leader sales, and other efforts to stabilize competition in the small business sector.

These complaints also center on areas that historically had been policy priorities of the USFTC. The USFTC and its 1914 enabling legislation, the complementary 1914 Clayton Act and the 1936 Robinson Patman Act, represented efforts to regulate “unfair” business practices--and protect small business from larger, more efficient competitors. Parochial consumer welfare was given little consideration in this process.<sup>7</sup>

In order to give business a direct voice in defining fair trade, the USFTC created and dramatically expanded the trade practice submissions procedure, which became known as Trade Conferences, during the 1920s and 1930s.<sup>8</sup> The Trade Conferences eventually were eliminated, in part due to criticism that they were catalysts for illegal behavior. Yet as late as 1969, the USFTC continued to emphasize enforcement against price discrimination and other practices that today are considered “pro-consumer.” It was not until the 1970s that the USFTC overcame criticism that it focused on narrow, arcane cases by adopting an enforcement strategy centered on consumer welfare (recast as economic welfare/efficiency from 1981).

As the recipient of the basic antitrust mandates and procedures accorded to the USFTC, the JFTC inevitably looked to USFTC history and precedent for guidance.<sup>9</sup> What the JFTC found in the 1950s and 1960s was a U.S. commission that had dedicated substantial time and resources to the protection of small business over the interests of consumers. It had undertaken efforts to set industry guidelines and rules of behavior that today have been discarded as anti-competitive and anti-consumer, and it had taken action against business practices that are permitted today as pro-consumer.<sup>10</sup>

The JFTC learned well from its sister agency in Washington and, after measuring up the political realities at home, followed a similar course. The JFTC encouraged the passage of legislation in 1962 to regulate premiums and lotteries, oversaw the creation of Fair Trade Councils modeled on the U.S. example, and focused enforcement on small business protection. The Councils have championed the JFTC's small business protection agenda by policing businesses and referring objectionable behavior such as price-cutting to the JFTC for action.<sup>11</sup>

In the United States, a combination of staff turnover, changing ideas (including an emphasis on economic analysis in antitrust), and strong external criticism enabled the USFTC to shift its enforcement agenda and target goals. This allowed the agency to avoid becoming responsive to

---

<sup>7</sup> See e.g. Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change* (Second Edition) (New York: Oxford University Press, 1996), pp.147-154; Bernice Rothman Hasin, *Consumers, Commissions, and Congress* (New Brunswick: Transaction Books, 1987), pp.35-39; and Thomas C. Blaisdell, Jr., *The Federal Trade Commission* (New York: Columbia University Press, 1933), p.84.

<sup>8</sup> On the history of these conferences, see e.g. Gerard C. Henderson, *The Federal Trade Commission* (New Haven: Yale University Press, 1924), pp.79-80; and Blaisdell, Jr., pp.93-94.

<sup>9</sup> U.S. occupation officials also encouraged the JFTC staff to study the U.S. example, including sending some of the staff to Washington on a study trip.

<sup>10</sup> See e.g., Clarkson and Muris, pp.37-39.

<sup>11</sup> See e.g., Mark C. Tilton, “Regulatory Reform and Market Opening in Japan,” in Lonny E. Carlile and Mark C. Tilton, eds., *Is Japan Really Changing Its Ways?* (Washington, D.C.: Brookings Institution, 1998), pp.179-180. Trade Practice Conferences also served as important conduits for complaints to the USFTC. Blaisdell, Jr., p.95.

the agency's differing mandates and operate from a more relevant, market-based perspective. In Japan, the JFTC's strong institutional interest in continuing to protect its "fair" trade agenda plus the absence of strong domestic pressure to shift its enforcement emphasis has meant limited progress thus far.<sup>12</sup> As a result, conflicting mandates continue to muddle antitrust enforcement goals and process in Japan.

### *The Antimonopoly Monopolist*

The point of departure for any discussion of the JFTC's role must be the fact that the Commission essentially maintains a monopoly on antimonopoly services in Japan. This fact also represents perhaps the most significant difference with the antitrust regime in the United States. Analysis, investigation, and enforcement is splintered among the USFTC, Department of Justice, the state attorneys general, and an extremely active antitrust bar. One Japanese scholar has labeled the JFTC's commanding position over antitrust enforcement the "original sin."<sup>13</sup>

One effect has been to hand to the JFTC the discretion to use its administrative "cease and desist" order in lieu of criminal actions to address potential criminal violations. Should the JFTC desire to pursue criminal remedies for naked cartel behavior, its only option is to have the Tokyo Public Prosecutors Office to take up the case. For most of its history, however, the Public Prosecutors have been hostile toward taking up such cases.<sup>14</sup> It was not until 1977 that the JFTC was granted the ability to deal with cartels in a somewhat more meaningful way, by assessing administrative surcharges. Because of the "double jeopardy" implications of assessing punitive surcharges as well as criminal fines, however, surcharges were limited in scope to recoup only the approximate gains from cartel behavior.

At the urging of the U.S. Government, the JFTC and Public Prosecutors Office have developed a closer working relationship through the 1990s that has resulted in a smattering of criminal cases. In reality, continued dependence on prosecutors with limited resources and, arguably, limited will to try antitrust cases implies the JFTC will continue to deal with the vast majority of flagrant illegal behavior through administrative rather than criminal means. The JFTC's broad authority over all kinds of antitrust cases creates additional problems.

One example is the JFTC hearing process, a review panel of five appointed officials that serves as the appeals board of first resort for Commission decisions.<sup>15</sup> In this process, civil-level antitrust cases only require a standard of proof that equates with a "preponderance of the evidence." As legal expert and author Masahiro Murakami argues, however, the panel's

<sup>12</sup> Scaling back these functions would entail loss of bureaucratic jurisdiction. In addition, a sizable number of former JFTC employees move on to second careers that involve oversight of the Fair Trade Councils.

<sup>13</sup> Murakami Masahiro, *Dokusen kinshi-hô (Antimonopoly Law)*, (Tokyo: Kôbundô, 1996), pp.80-83.

<sup>14</sup> The JFTC's famous referral of oil cartels in 1973 was greeted with strong disdain by the prosecutors. A previous attempt to refer a paper cartel in 1972 was met with a flat refusal. On the former, see the memoirs of a former prosecutor in Itô Shigeki, *Shûsô Retsujitsu* (Tokyo: Asahi Shinbun-sha, 1988), pp.163-167. On the latter point, interview, former JFTC official, September 26, 1996. After 1977, it was understood between the JFTC and prosecutors that the Commission would make use of its new surcharge power rather than seek criminal indictments. It was not until U.S. officials did raise the lack of criminal antitrust actions in 1990 that the Prosecutor's Office began to take a more amenable stance.

<sup>15</sup> It is also possible for the Commission to decline to make a decision and instead refer a case to the hearings panel for an initial ruling. In practice, however, this procedure has rarely been used. As a result, the hearings panel in Japan is best thought of as a first stage in the appeals process.

simultaneous jurisdiction over appeals of JFTC rulings pursued as criminal prosecutions has resulted in a hybrid of civil as well as more rigorous criminal procedures and rules of evidence for cases before the panel.

This trend, developed in the early years of the JFTC, has had a deleterious impact by unnecessarily tightening the levels of proof and evidence considered by the Commission when making initial rulings.<sup>16</sup> One result has been to increase the JFTC's reliance on warnings and other techniques to dispose of cases rather than render a formal decision that may not meet the more demanding review of the hearing panel.

Another important consequence of making the JFTC a "one-stop-shop" antitrust regulatory authority has been to deny Japan the competition among enforcement agencies and with the private antitrust bar. In the U.S., this competition has allowed a vibrant antitrust climate to flourish.

Except for what is, in essence, only a theoretical possibility of obtaining private relief under the Civil Code, all antitrust business must first be investigated and formal steps taken by the JFTC before any relief can be offered or penalties assessed.<sup>17</sup> In practice, this means that public prosecutors must await a formal JFTC decision before pursuing a criminal antitrust case and potential plaintiffs also must await formal JFTC action before civil suits can be brought. Meanwhile, several aspects of the Japanese civil procedure and tort law, such as limited powers of discovery and strict court interpretations of damages, continue to limit the ability of private parties to be successful in their suits.<sup>18</sup>

While the concentration of powers in the JFTC may have been intended to bring rationality and consistency to enforcement, it has had unintended effects as well. Primarily, it has increased substantially the JFTC's discretionary power and supported the Commission's tendency to deal with cases administratively and informally. Lacking competition, the JFTC appears to have found this arrangement highly desirable over the years. It was not until 1998 that the JFTC, for the first time, indicated that it might be amenable to making certain antitrust relief measures more accessible to the public. For example, it is considering allowing aggrieved parties the right to petition the courts for injunctions that do not require the action of the Commission first.<sup>19</sup>

While Japan is just beginning to consider opening new channels of access to antitrust relief, a number of additional efforts were made in the United States during the reforms of the 1960s and 1970s that stand in stark contrast to Japan. These include the introduction of class action suits,

<sup>16</sup> Murakami Masahiro, *Dokusen kinshi-hô no nichibei hikaku – ge (A Comparison of Japanese and American Antitrust Law – Volume 3)* (Tokyo: Kôbundô, 1991), pp.136-139.

<sup>17</sup> Cases under Section 25 of the Civil Code are possible but have been nearly uniformly unsuccessful. See H. Iyori and A. Uesugi, *The Antimonopoly Laws and Policies of Japan* (New York: Federal Legal Press, 1994), pp.242-243.

<sup>18</sup> On these barriers, see e.g. Mitsuo Matsushita, *International Trade and Competition Law* (Oxford: Oxford University Press, 1993), pp.114-116; and J. Mark Ramseyer, "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan," *The Yale Law Journal*, 94(1985), pp.604-645.

<sup>19</sup> This effort, ironically, was spearheaded by the Ministry of International Trade and Industry. Previous efforts by consumer groups to gain broader public access to antitrust actions and relief have not been supported by the JFTC. On an effort in the 1970s, see e.g. Takeuchi Akio, "Dokkin-hô kaisei to shôhisha: kôtorii shian no ichi hihan (Antimonopoly Law Revision and Consumers: One Criticism of the FTC's Framework Bill)," *Jurisuto*, 560 (February 1, 1975): 76-82.

reduced court fees, and steps to allow state attorneys general to sue on behalf of consumers. Lack of access in Japan continues to limit unnecessarily antitrust enforcement, keeps cases out of the courts thereby reducing transparency, and reduces incentives for the JFTC to be aggressive in its efforts.

### ***Powers and Precedents***

Other criticisms of USFTC effectiveness could only be remedied through changes in the agency's powers. One problem centered on the USFTC's strongest enforcement power—the “cease and desist” order, which by the 1960s was widely considered no more than a “slap on the wrist.”<sup>20</sup> The “cease and desist” order was not backed by strong penalties and was implemented more as an administrative directive than as a sanction.<sup>21</sup> To correct this, several reforms were made to ensure that the order carried more weight, could be more easily enforced by the USFTC through the courts via penalties and injunctions, and, for consumer protection cases, introduced a civil penalty system as a deterrent. Meanwhile, in Japan, the JFTC continues to possess what are essentially the USFTC's original “cease and desist” powers.<sup>22</sup>

The limitations of the “cease and desist” order have special meaning in the case of the JFTC. One reason is that because of limited effectiveness and lack of strong deterrence, JFTC officials appear to feel justified in arguing that formal and informal means of enforcement against unfair business practices are roughly equivalent. If, as was the underlying philosophy of the 1914 USFTC system, the goal of enforcement is simply to end unfair acts, rather than punish and create deterrents, a warning to take an action may appear as effective as entering a formal “cease and desist” order if a party agrees to take remedial measures. From the point of view of transparency in antitrust enforcement and access to remedies for private parties, however, the results are less than desirable.

Another major implication of the limitations of the “cease and desist” order becomes obvious when one considers that the JFTC, due to early Japanese antitrust case law, essentially treats all vertical restraints as unfair trade practices, as opposed to the more serious category of “unreasonable restraints of trade.”<sup>23</sup> The result is that this order has been the strongest possible JFTC measure against major competitive vertical restraints (except as they relate to monopolization) such as tying, exclusive dealing arrangements, territorial restrictions, and vertical price-fixing through resale price maintenance schemes. Moreover, should a violating company implement the necessary formal measures such as contract changes to comply with a JFTC “cease and desist” order, it becomes difficult for the JFTC to take further actions against informal practices used to continue the anti-competitive behavior.<sup>24</sup> Lacking anything more serious than a “cease and desist” order for vertical restraints, the JFTC gives little incentive for companies to not implement such restraints in the first place.

---

<sup>20</sup> Clarkson and Muris, p.13.

<sup>21</sup> See e.g., Cox, et.al., p.67.

<sup>22</sup> One significant difference is the power to seek temporary court injunctions that was provided to the JFTC upon its creation.

<sup>23</sup> Major cases were the 1953 Newspaper Route and the 1953 Tōei Shin Tōei decisions by the Tokyo High Court that in effect eliminated vertical arrangements from consideration as unreasonable restraints of trade. See e.g. Murakami Masahiro, *Dokusen kinshi-hō (Antimonopoly Law)*, pp.87-91.

<sup>24</sup> Interview, former senior JFTC official, November 13, 1996.

Another structural weakness of the JFTC system has been its limited powers of investigation. This is an issue that has become the recent focus of U.S. demands for reform. Although the JFTC has sole jurisdiction over investigations of all potential civil and criminal violations in the first instance, the Commission does not possess all of the investigative powers that can be brought to bear by the public prosecutors or other administrative bodies such as the National Tax Agency.

The rather broad compulsory investigative powers granted to the JFTC--including the ability to require the surrender of related documents and demand testimony--are essentially those used by the USFTC on lesser civil violations. These fact-finding powers often fall short of basic search warrant powers needed to prove criminal behavior or uncover necessary documents.<sup>25</sup> This handicap makes it even more difficult for the JFTC to meet its own strict standards of proof when investigating and deciding whether to pursue criminal sanctions or settle for something less. This is particularly relevant to the JFTC, which lacks the USFTC's extensive powers of discovery and is even more dependent on evidence collection gained through its surprise, on-site inspections.<sup>26</sup>

### ***Motives, Mission, and Manpower***

Beyond institutional limitations, reforms of the USFTC in the 1970s also centered on another critical component affecting agency performance – personnel. Criticized for “good old boy” relations with Southern Congressmen, preferences for graduates of southern law schools, and general indolence, USFTC staffing was reformed through a purge of much of the legal staff.<sup>27</sup> According to some accounts, the purge enabled the USFTC to bring in more motivated staff lawyers who took a deeper personal and professional interest in antitrust law and consumer causes.<sup>28</sup>

It also is relevant that these personnel changes began to take place at approximately the same time legal reform was allowing greater access to antitrust litigation and beginning to create a vibrant market for experienced antitrust attorneys. As a result, the USFTC became a “revolving-door,” a training ground for lawyers who eventually would seek a more lucrative career in private practice.<sup>29</sup> Staff lawyers with such personal motives are believed to be more aggressive, pursue challenging and path-breaking cases, and strive to win in order to enhance advancement and job opportunities upon departure from the agency.<sup>30</sup>

By contrast, JFTC employees appear to have a rather different set of motives and incentives by virtue of their lack of professional qualifications, the antitrust environment in which they work,

<sup>25</sup> Negishi Akira, “Dokkin-hô jô no tachiiri kensa no seishitsu to genkai (The Character and Limitations of Antimonopoly Law Enforcement On-Site Inspections),” *Kigyô-hô kenkyû*, 216 (May 1973):8-13.

<sup>26</sup> John O. Haley, “Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?” in John O. Haley and Hiroshi Iyori, eds., *Antitrust: A New International Trade Remedy?* (Seattle: Pacific Rim Law & Policy Association, 1995), p.312.

<sup>27</sup> The purge turned out over half of the senior staff and approximately one-third of the working-level attorneys. Harris and Milkis, p.167.

<sup>28</sup> See e.g., Clarkson and Muris, pp.2-6 and chapter 15.

<sup>29</sup> Annual attorney turnover in the USFTC by the mid-1970s was nearly 20 percent while the vast majority of legal staff interviewed expected to stay for two years or less. Clarkson and Muris, pp.299-300.

<sup>30</sup> See e.g., Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* (Princeton: Princeton University Press, 1981), pp.148-152. Also on motives of Department of Justice attorneys, see Suzanne Weaver, “Antitrust Division of the Department of Justice,” in James Q. Wilson, ed., *The Politics of Regulation* (New York: Basic Books, 1980).

and personnel practices within the organization. JFTC personnel are career employees hired directly out of the universities with some introductory knowledge of law or economics. Only a handful may possess licenses to practice as attorneys. Moreover, in conformity with the Japanese civil service tradition, new staff in mid-career such as acting attorneys are taken into the JFTC only on the rarest of occasions. The lack of professional qualifications, coupled with the lack of an active market in private antitrust litigation, forecloses the kind of opportunities for JFTC staff to move into antitrust practice that their American counterparts enjoy.<sup>31</sup>

In fact, rather than viewing enforcement activism as an opportunity, the JFTC staff sees it primarily entailing substantial risks of failure before court appeals. Thus, it can be a risk to the standing of the agency and its personnel. Several former JFTC bureaucrats have noted that cases are selected with great care, in part because riskier cases could be lost on appeal, ultimately damaging the JFTC and reflecting poorly on those in charge of the investigation. Failure, in turn, can negatively affect promotions and opportunities for advancement.<sup>32</sup> One former JFTC senior official termed American federal antitrust enforcement style, in which significant numbers of cases are lost before the courts, patently “irresponsible.”<sup>33</sup>

Although a serious misstep is no longer likely to mean political suicide for the JFTC, concern remains about drawing criticism and what they may mean for the Commission. Even growth of foreign support to ensure that the JFTC is not abolished does not appear to bring much comfort to JFTC officials. These views speak volumes about why the JFTC has taken up relatively few cases that tend to be judged on less clear criteria than obvious price cartels. Enforcement statistics bear this out—the JFTC on average cites only three or four non-price restraints in a given year. The cause and effect relationship is clear. Enforcement suffers because JFTC staff members simply do not build successful careers within or outside of the agency by pursuing vigorous antitrust enforcement in the American understanding of the word.

Another concern has been the limited staff resources that the JFTC can bring to bear to regulate the Japan economy, the second largest in the world. Similar concerns were expressed in the USFTC case. As a result, staff levels were raised dramatically in the 1970s (only to be scaled back somewhat after 1981). There is no question that insufficient staff levels can affect agency output. However, in terms of formal enforcement, the relationship is surprisingly unclear in the case of the JFTC. Table 1 reveals the relationship between the number of JFTC full-time investigators and the number of formal actions. The figures range widely, from one investigator per formal action in 1973 to 20 investigators per formal action in 1986.

The relationship presented in Table 2 between the number of investigations that are pursued and those that result in formal JFTC actions also reveals similar discontinuities in enforcement

---

<sup>31</sup> Upon retirement, most staff are employed by affiliated bodies of the JFTC such as the Fair Trade Association. Some of the senior staff may take up university posts, joint trade associations to advise on antitrust law issues, or enter private business. None of these positions directly reward active antitrust enforcement except for possibly careers in private business. Anecdotal evidence, however, suggests that companies that take on JFTC staff are more interested in defense against antitrust actions than in prosecution of cases against competitors. Interviews, former JFTC officials, November 13, 1996; and May 31, 1997.

<sup>32</sup> Interviews, former JFTC officials, September 9, 1996; September 26, 1996; October 1, 1996; and October 14, 1996.

<sup>33</sup> Interview, former senior JFTC official, October 14, 1996.

capabilities and actual results in terms of formal measures. Although, these figures naturally do not take into account issues of complexity of investigations or economic importance of cases, they do suggest that resources alone are not sufficient to explain JFTC performance. In this respect, they serve as a reminder that discussions about overall JFTC capabilities and institutional limitations cannot be separated entirely from issues of politics and from the interests and ideas that affect policy issues and JFTC behavior.

### **III. The Political Dimension**

Despite the range of institutional limitations on the JFTC, politics remains king when it comes to explaining antitrust policy enforcement. The political process sets the atmosphere within which the JFTC functions, appropriates funds, nominates top personnel—and controls the legislation by which the agency operates. To the extent structural and institutional deficiencies exist in the JFTC, many, if not all, could be corrected with the appropriate political commitment.

The reality remains that Japanese political parties, bureaucracy, business community, consumer groups, and others are either negative or generally ambivalent toward taking the kinds of measures that U.S. officials and American companies feel are necessary to make antitrust in Japan more meaningful. Support is growing for the kind of services that the JFTC can offer, yet opposition remains equally intransigent.

While there are numerous dimensions to how politics affects antitrust enforcement,<sup>34</sup> the following examples demonstrate how the intersection of institutional limitations and political realities negatively impacts Japan's antitrust regime.

#### ***Deregulation, the State, and the JFTC***

In theory deregulation has been implemented in Japan to boost competition and thereby economic growth. Yet little enthusiasm has been generated about the JFTC's direct involvement in policing "free" market competition to ensure that these gains are realized. From taxis to telephones to trust banking, history reveals active antitrust enforcement generally has not filled the gap left by deregulation initiatives.

Of primary concern from the viewpoint of antitrust enforcement is the continued role of the state in business sectors even after "liberalization" takes place. Above and beyond the other limitations on JFTC performance discussed above, deregulated sectors present special problems for antitrust enforcement because of close government-business relations. The involvement of regulators in industry affairs can, if implemented in certain ways, make possible anti-competitive behavior that is difficult for antitrust law to condemn. In particular, the use of vertical administrative guidance in Japan to individual companies—even though such guidance has the effect of encouraging horizontal acts—makes application of Japan's Antimonopoly Law rather difficult if not impossible. The JFTC can berate a government agency for its actions, but it can do little more as long as a clear horizontal agreement among competitors is lacking.<sup>35</sup>

---

<sup>34</sup> On these issues, see e.g. Mark Tilton, *Restrained Trade* (Ithaca: Cornell University Press, 1996); and Michael L. Beeman, *Public Policy and Economic Competition in Japan*, D.Phil. thesis, University of Oxford, March 1998.

<sup>35</sup> The original government position on the applicability of the Antimonopoly Law to such agreements came in 1974 when the Cabinet ruled that vertical implementation of price guidance to each company was allowed but that

Throughout Japan's postwar history, businesses have looked to government ministries to provide a cloak for their illegal behavior for two primary reasons: 1) to prevent intervention by the JFTC, and 2) to engage ministries to act as a neutral arbiter and enforcer of cartel behavior. Often mistaken as government fiat and bureaucratic power, this process of insertion of the public into the private is seen in a number of other areas in Japanese economic life. In the context of antitrust, however, there has been an important irony at work for 50 years that is critical to grasp—the very existence of the Antimonopoly Law has only encouraged tighter government business relations as a means to defend against antitrust enforcement.<sup>36</sup>

Recently, the JFTC has begun to initiate a greater number of cases that involve condemnation of acts that include some component of government-business relations.<sup>37</sup> The JFTC also in 1996 beefed up its guidelines on the treatment of business behavior that is subject to administrative guidance. A look at these JFTC cases, however, reveals the Commission's focus. Historically, the JFTC appears to have concentrated on correcting formal ministry regulations that encourage cartel behavior. This includes a ministry's designation of an association through which services are provided, rather than on examining the more informal practices of price and quantity signaling, such as those between state regulators and their industry clients.<sup>38</sup>

Admittedly, antitrust agencies worldwide have difficulties intervening in cases where state action is an important or determining factor in anti-competitive behavior. In contrast, the extensive scope of the problem makes it much more poignant in Japan, where the JFTC is handicapped in dealing with these cases for two reasons. First, arrangements can be managed adroitly in ways that do not constitute clear horizontal agreements among competitors, which makes intervention more difficult, if not impossible. Second, the agency has limited means of recourse against other agencies that sponsor anti-competitive behavior among businesses. Although the JFTC recently has made progress, there nonetheless is reason to believe that dramatic change will be elusive without substantial reform addressing state regulators and their role.

### ***The JFTC's Crippling Historical Legacy***

Much of the JFTC's history and behavior has been determined by the need to act defensively against credible threats from conservative business, bureaucratic, and political forces aimed at undermining the agency's authority or existence. Measures that have been both threatened and carried out include: adoption of laws to exempt cartels from the Antimonopoly Law; removal of the agency's independent status to make it more accountable politically, and the abolition of the JFTC altogether.<sup>39</sup>

---

agreement among competitors was illegal. See e.g. *Asahi Shimbun*, March 12, 1974 (evening edition), p.1. Subsequent developments have included a 1984 Supreme Court ruling that upheld this interpretation in its basic sense although provided some additional scope for administrative discretion as well as JFTC guidelines on administrative guidance in 1981 and 1996. On the former, see Hatakeyama Takemichi, "Sekuyû karuteru hanketsu to gyôsei shidô (The Petroleum Cartel Judgment and Administrative Guidance)," *Jurisuto* 813 (May 15, 1984), pp.6-9. On the latter, see "Dokusen kinshi-hô to gyôsei shidô to no kankei ni tsuite no kangaekata (Opinion on the Relationship Between the Antimonopoly Law and Administrative Guidance)," *Jurisuto* 741 (June 1, 1981), p.37.

<sup>36</sup> On this argument, see Beeman.

<sup>37</sup> There has been a smattering of such cases over the years, but it has not been until the mid-1990s that the JFTC has indicated a stronger willingness to pursue cases that involve a state component.

<sup>38</sup> On these practices, see Tilton, *Restrained Trade*.

<sup>39</sup> See Beeman.

When the JFTC has taken formal actions, it essentially has been in areas supported (or at least not resisted) politically, such as against blatant price-raising cartels, discriminatory acts against small business and, more recently, bid rigging to a limited extent.<sup>40</sup> Meanwhile, the JFTC generally has eschewed similar actions when they would have entailed forcing substantial changes in the postwar development of Japanese business practices and norms. In these areas, the JFTC's failure to act indicated tacit approval of several questionable practices that have prevailed during the postwar era.

The JFTC has been paralyzed in recent years by this legacy of permissiveness, particularly when it tried to address serious antitrust policy problems. Nowhere is this tendency more obvious than in distribution practices and restraints. During the 1960s and especially into the 1970s, the JFTC began to consider means of dealing with a number of restrictive distribution practices, including territorial sales restrictions, highly progressive rebates, and exclusive sales arrangements. The JFTC particularly was concerned about distribution practices apparent ability to strengthen several product market oligopolies.<sup>41</sup>

Following market surveys, the JFTC began exerting some informal pressure on manufacturers and distributors to alter their arrangements. In 1979, the JFTC went further and launched a study group to make recommendations on how the issues should be dealt with. In spite of its own concerns, the JFTC failed to adopt the group's rather rigorous recommendations in a formal guideline. Former JFTC officials cite one important reason was the fear that the strong guidelines proposed by the group, declaring several pre-existing practices illegal, would cause major economic adjustments and therefore major economic injury.<sup>42</sup>

As a result of pressure from the U.S. Government, the JFTC eventually enacted distribution guidelines in 1991. To this day, however, the Commission still takes few actions against distribution sector non-price restraints. A lack of formal cases indicates the Commission's continued permissiveness across a wide latitude of problematic acts (as judged by a less conservative reading of the 1991 guidelines). As long as it remains concerned with precedent and consistency in antitrust enforcement, the JFTC's historical baggage continues to weigh heavily on its ability to deal with serious competition problems.

### ***The Commission***

Much has been made over the years about the impact of the JFTC's patterns of appointments to its oversight commission. It has been widely argued that the practice of "stacking" commission membership skews its effectiveness. Specifically, it has been said that continually stacking the five-member Commission with former bureaucrats--in particular economic bureaucrats from the

---

<sup>40</sup> There has been a rise in bid rigging cases in recent years, particularly as bid rigging relates to providing products and services for government agencies. Progress for bid rigging for public works construction projects, however, has been more limited.

<sup>41</sup> See Kôsei Torikihiki Inkaï, Jimu-kyoku, ed., *Dokusen kinshi seisaku no shuyô kadai: dokusen kinshi konwakai shiryôshu – VI (Important Issues in Antimonopoly Policy: Volume VI of Collected Materials from the Antimonopoly Conferences)* (Tokyo: Ôkura-shô Insatsu-kyoku, 1979), p.13.

<sup>42</sup> There also were other reasons why the JFTC did not enact a clear guideline. These included the difficulties of drafting clear standards to cover practices that were extraordinarily diverse by nature. Yet former officials also noted the political difficulties of enacting guidelines that would have implied dramatic changes in distribution practices. Interviews, former senior JFTC officials, August-October, 1996.

likes of the Ministry of Finance (MOF) and the Ministry of International Trade and Industry (MITI)--has served to ensure external control over the JFTC and its activities. There can be little doubt that these appointments were intended to put a cap on the independent agency and its potential activism. These patterns, it must be noted, also were desirable for business groups as well.<sup>43</sup>

Yet beyond giving industry and the economic bureaucracy a stronger voice in JFTC output, the practice also had the collateral effect of divorcing antitrust policy from its legal roots. The predominance of economic bureaucrats in particular appeared to help move the agency away from a strictly law-based strategy toward one that more closely resembled other Japanese economic policy approaches. This implied a shift from the development of a strong body of antitrust case law toward the use of informal action and enforcement.

While these historical patterns of appointment to the Commission raise serious questions of legitimacy and independence, a belief that they alone account for perceived JFTC weakness in enforcement excludes the range of other political and institutional factors. For example, patterns of Commission appointments and other personnel exchanges with ministries, cannot explain a consistent lack of effort on anti-competitive practices in sectors where the JFTC and relevant ministries have limited or no personnel relations. Specifically, one can point to the lack of JFTC efforts on anti-competitive practices in stevedore and other port services, a topic of recent U.S.-Japan trade tension (the JFTC and Ministry of Transport have had no direct personnel relationship).

Indeed, although economic bureaucrats from the MOF and MITI have been on the minority on the Commission since 1996 (the longest such stretch since the mid-1950s), with MITI not having any formal representation since late 1998, these changes have not been accompanied by a clear shift in JFTC policies and enforcement styles. Short of reform, there is no compelling reason to believe that antitrust enforcement would change dramatically under a different set of commissioners and chairmen.

#### **IV. Conclusions and Recommendations**

This working paper has identified a wide variety of limitations, both institutional and political, that continue to work against a more meaningful role for antitrust policy and its enforcement in Japan. These factors, taken in combination, are problematic for foreign companies that may need to depend upon antitrust remedies for access and penetration in Japanese markets. They also throw doubt on the ability of a U.S.-Japan antitrust agreement to deliver substantial results for the foreseeable future.

Ten years after the U.S.-Japan Structural Impediments Initiative (SII) was negotiated, additional reform of Japan's antitrust policy and enforcement agency is still necessary. Current efforts to urge change through the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy are warranted and should be augmented to focus on broader impediments to the creation of a

---

<sup>43</sup> Keidanren actively supported the addition of these bureaucrats to the JFTC as early as 1953. Keizai Dantai Rengôkai, "Dokkin-hô kaisei no yôbô iken (Opinion on Desires for Antimonopoly Law Revision)," *Keizai Shiryô* 120 (April 18, 1953): 2.

more effective antitrust regime. Where agreement exists, joining with the European Union to urge improvements also is advisable. The following recommendations represent broad areas needing improvement as well as more specific measures that can help meet these goals.

**1. Secure a clear, unambiguous commitment from Japan's cabinet that stronger antitrust policy and more vigorous antitrust enforcement is a top national economic priority.**

**2. Aggressively pursue reforms that will help end the near total monopoly that the JFTC has over antitrust enforcement and remedies.** Breaking the JFTC's control is needed to make antitrust relief more widely available. It can help the JFTC Investigation Bureau pursue more important cases, improve transparency through expanded case law, allow actions that previously had received tacit JFTC approval be challenged in the courts, and introduce competition to the JFTC itself to encourage better agency performance and effort. Reforms should include the following measures:

- Make available to private parties injunctive and damage relief suits in the courts that forego the need to take up complaints with the JFTC, and*
- Allow central government and regional public prosecutors to bring Antimonopoly Law cases independent of JFTC action.*

**3. Urge legal reforms that help address institutional limitations on the JFTC and that boost deterrence of illegal behavior.**

Promote changes that address legal shortcomings in Japan's antitrust regime, including:

- Grant powers of investigation on par with those of the National Tax Agency;*
- Revise the Antimonopoly Law to make explicit that vertical restraints can be condemned as "unreasonable restraints of trade" (section 3) [short of this, promote the introduction of an optional administrative civil penalty system for violations of unfair methods of competition regulations];*
- Grant the JFTC the right to seek permanent court injunctions to ensure compliance with JFTC orders;*
- Secure increased penalties associated with efforts to conceal or withhold information from JFTC investigators, and*
- Secure stronger penalties for violations of JFTC formal actions.*

**4. Urge reforms that help improve internal processes in the JFTC and that support the agency's independent status.**

Promote reforms that will help address internal limitations that stunt JFTC activity and aggressiveness, including:

- Review by outside experts of JFTC hearing procedures and the recommendation of steps to help lower the burden of proof for civil-level cases;*
- Expand Commission size from four commissioners and a chairman to six commissioners and a chairman to encourage new appointment patterns and diversity of opinion;*
- Adopt internal measures to streamline procedures and prioritize enforcement programs, and*
- Undertake efforts to more clearly delineate the JFTC's antitrust policy and consumer protection functions and resources throughout the agency's organization (including in the Investigation Bureau).*

### **5. Urge reforms that will help to limit the impact of government-business relations on antitrust enforcement.**

Although a difficult problem to tackle in any country, the scope of anti-competitive arrangements implemented as a result of government-business cooperation has had particular significance in Japan. Measures should be taken to limit the scope for this cooperation, including:

--Introduce a requirement that all administrative guidance affecting business competition be reported to the JFTC, and

--Introduce a requirement that bureaucrats in local, national, and quasi-governmental institutions and associations report knowledge of antitrust violations to the JFTC. Failure to do so should be accompanied by reprimands/penalties by the national personnel authority (short of this, introduce into the mandates of each of the Japanese ministry and agency that they aim to support free competition and to uphold the principles of the Antimonopoly Law<sup>44</sup>).

### **6. Consider and promote more radical ideas to re-make Japan's antitrust regime.**

Beyond incremental change, other ideas should be considered fully that would entail significant changes in Japan's antitrust regime:

--Establish Trade Practices Courts in regional districts through which private antitrust and other competition and consumer issue-related suits would be channeled;

--Focus JFTC policing efforts on anti-competitive restraints more effectively, move enforcement of the ancillary law (law to protect subcontractors and the law on unjustifiable premiums and misleading advertising) to local authorities and/or to another Japanese agency;

--Eliminate criminal sanctions for antitrust violations (leaving intact criminal penalties for violations of JFTC orders and for efforts to obstruct a JFTC investigation). In its place, introduce a system of strong, punitive administrative penalties as well as improved procedures for profit recovery from illegal acts for all kinds of antitrust violation. This recognizes the JFTC's general unease to target transient individuals for company-wide, institutionalized criminal behavior, as well as its limited level of cooperation with public prosecutors (and the limited resources of public prosecutors).

--Increase transparency of state-supported competitive restraints through introduction of a mandatory register to be administered by the JFTC and General Affairs Ministry for state acts and regulations that involve forecasting and/or efforts to affect future prices, output, or other competitive conditions in a given industry. Such a register should be made public.

## **V. Selected Bibliography and References**

### **Historical/General References on Antitrust in Japan and the Fair Trade Commission**

Bisson, T.A. *Zaibatsu Dissolution in Japan*. Berkeley: University of California Press, 1954.

Beeman, Michael L. *Economic Competition and Public Policy in Japan*. D.Phil. Dissertation, University of Oxford, 1998.

Chitoshi Yanaga. *Big Business in Japanese Politics*. Yale University Press, 1968.

<sup>44</sup> The latter point according to an OECD report recommendation. Organization for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform: Regulatory Reform in Japan* (Paris: Organization for Economic Co-operation and Development, 1999), p.226.

Hadley, Eleanor M. *Antitrust in Japan*. Princeton: Princeton University Press, 1970.

Misonô Hiroshi, *Nihon no dokusen kinshi seisaku to sangyô soshiki* (Japan's Antimonopoly Policy and Industrial Organization). Tokyo: Kawade Shobô Shinsha, 1987.

Sanekta, Kenji and Wilks, Stephen. "The Fair Trade Commission and the Enforcement of Competition Policy in Japan." Doern, G. Bruce and Wilks, Stephen, eds. *Comparative Competition Policy: National Institutions in a Global Market*. Oxford: Clarendon Press, 1996.

Schoppa, Leonard J. *Bargaining With Japan: What American Pressure Can and Cannot Do*. New York, Columbia University Press, 1997. (Chapter 8)

Seita, Alex Y. and Tamura, Jiro. "The Historical Background of Japan's Antimonopoly Law." *University of Illinois Law Review*. (1994):115.

Sheard, Paul. "Keiretsu, Competition, and Market Access." Graham, Edward M. and Richardson, J. David, eds. *Global Competition Policy*. Washington, DC: Institute of International Economics, 1997.

Yamamura, Kozo. *Economic Policy in Postwar Japan: Growth Versus Economic Democracy*. Berkeley and Los Angeles: University of California Press, 1967.

#### **Legal References (with some policy focus)**

Haley, John O. and Iyori, Hiroshi. *Antitrust: A New International Trade Remedy?* Seattle: Pacific Rim Law & Policy Association, 1995.

Iyori, H. and Uesugi, A. *The Antimonopoly Laws and Policies of Japan*. New York: Federal Legal Publications, 1994.

Matsushita, Mitsuo. *International Trade and Competition Law in Japan*. New York: Oxford University Press, 1993.

----- "The Antimonopoly Law of Japan." in Graham, Edward M. and Richardson, J. David, eds. *Global Competition Policy*. Washington, DC: Institute of International Economics, 1997.

Murakami Masahiro. *Dokusen kinshi-hô no nichibei hikaku – jô, chû, ge (Comparison of Japanese and U.S. Antitrust Laws—Volumes I, II, III)*. Tokyo: Kôbundô, 1991 & 1992.

----- *Dokusen kinshi-hô (Antimonopoly Law)*. Tokyo: Kôbundô, 1996.

----- *Dokusen kinshi-hô kenkyû (Studies of the Antimonopoly Law)*. Tokyo: Kôbundô, 1997.

Rameseyer, J. Mark. "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan." *Yale Law Journal*. 94 (1985):604.

### **References Focusing on Relationship Between Industrial and Antitrust Policies**

Haley, John Owen. *Authority Without Power: Law and the Japanese Paradox*. New York: Oxford University Press, 1991.

Iyori, Hiroshi. "Antitrust and Industrial Policy in Japan: Competition and Cooperation," in Saxonhouse, Gary R. and Yamamura, Kozo, eds., *Law and Trade Issues of the Japanese Economy: American and Japanese Perspectives*. Tokyo: University of Tokyo Press, 1986.

Johnson, Chalmers. *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975*. Stanford: Stanford University Press, 1982.

Tilton, Mark. *Restrained Trade: Cartels in Japan's Basic Materials Industries*. Ithaca: Cornell University Press, 1996.

-----. "Regulatory Reform and Market Opening in Japan." Carlile, Lonny E. and Tilton, Mark C., eds. *Is Japan Really Changing Its Ways?* Washington, DC: Brookings Institution, 1998.

Upham, Frank K. *Law and Social Change in Postwar Japan*. Cambridge, MA: Harvard University Press, 1987.

Uriu, Robert M. *Troubled Industries: Confronting Economic Change in Japan*. Ithaca: Cornell University Press, 1996.

Yoshikawa, Seichi. "Fair Trade Commission vs. MITI: History of the Conflicts Between the Antimonopoly Policy and the Industrial Policy in the Post War Period of Japan." *Case Western Reserve Journal of International Law*. 15 (Summer 1983):489.

### **Periodicals**

*Keizai-hô gakkai nenpô*. [Association of Economic Jurisprudence]

*Kôsei torihiki*. [Fair Trade]

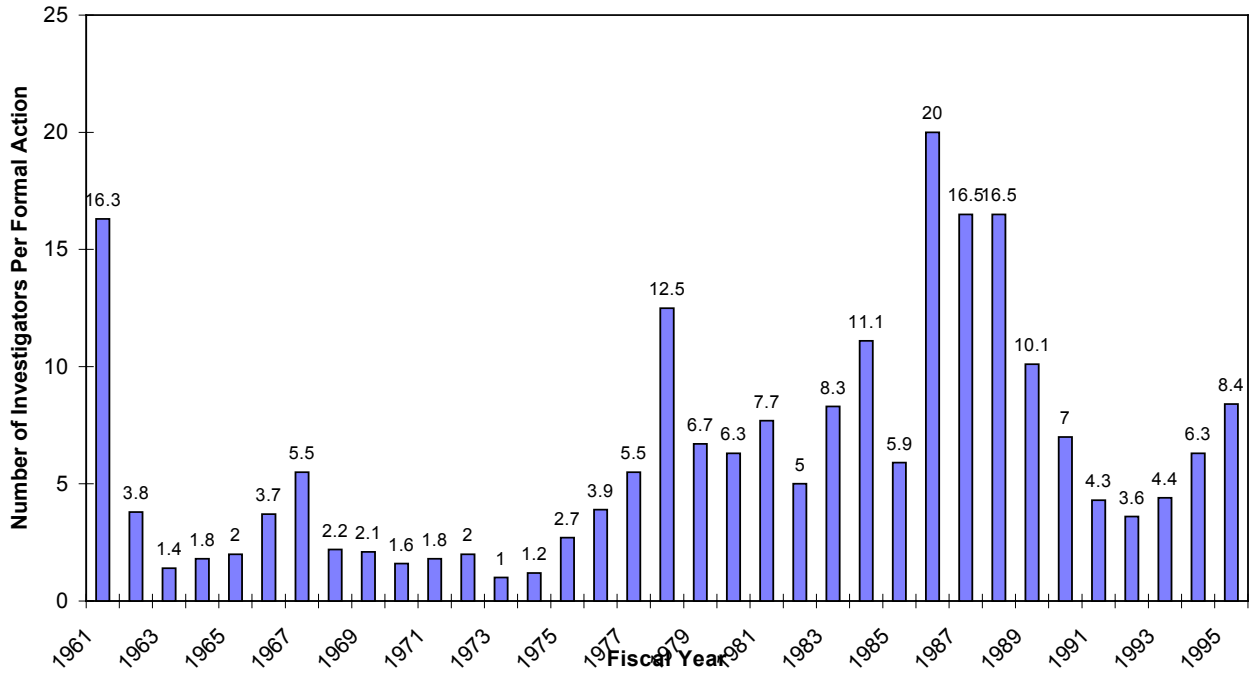
*Jurisuto*. [Jurist]

*Shukan tōyō keizai*. [Oriental Economist]

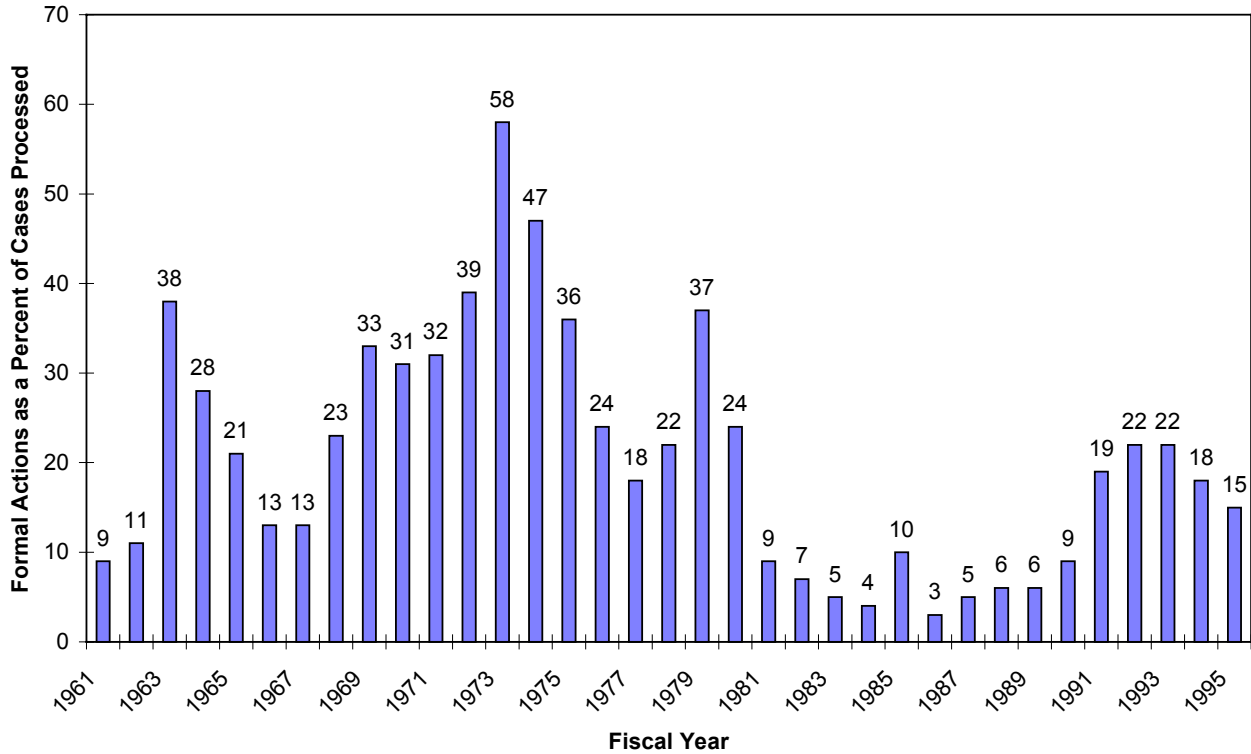
*Ekonomisuto*[Economist]

VI. Tables

**JFTC "LAZINESS" INDICATOR Table 1**  
**Do more investigators lead to more formal actions?**



**JFTC "TOUGHNESS" INDICATOR Table 2**  
**When has an investigation been more likely to lead to a formal action?**



**VII. Acknowledgements**

The author wishes to thank the Japan-US Friendship Commission and its staff for supporting this project financially as well as the Edwin O. Reischauer Center for East Asian Studies, Johns Hopkins University, for making available the institutional affiliation and university resources necessary to complete the project. An additional note of thanks to Mindy Kotler, Director of the Japan Information Access Project, and her staff for arranging an appropriate forum for the presentation of this working paper and in assisting in its production.

**VIII. Biography**

Dr. Michael Beeman received his doctorate at St. Antony’s College, Oxford, in 1998 where he completed a thesis on Japanese antitrust politics. Dr. Beeman was a Fulbright Graduate Research Fellow at the MITI Research Institute (1991-92), a Monbusho Research Fellow at the University of Tokyo (1996-97), and an Advanced Research Fellow at Harvard University’s Program on U.S.-Japan Relations (1997-98). Over the past year, Dr. Beeman was a Research Fellow at the Reischauer Center for East Asian Studies at the Nitze School of Advanced International Studies, Johns Hopkins University. His publications include a chapter in a forthcoming book on comparative antitrust policy regimes as well as the forthcoming publication of his thesis. Email: [mbeeman@msn.com](mailto:mbeeman@msn.com)