Remedies, Sanctions and Judicial Review in Japan
-- A brief overview of the Antimonopoly Act procedures --

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1. Introduction

The procedures of the Japanese Antimonopoly Act (AMA) have some interesting characteristics. For example, most cases are dealt with in the administrative procedures, and administrative measures are taken against anti-competitive conduct, while in some cases criminal sanctions are possible against serious violations of the AMA. The JFTC has much discretion as to remedies, while it has no discretion as to the amount of the administrative surcharges. What is notable in court proceedings is that the JFTC is characterized as a kind of “the court of first instance,” thus being treated as a quasi-judicial organization.

In this presentation, I will give you an overview of the procedural side of the AMA, focusing on remedies, sanctions and court proceedings. First, I will show you the standard procedures of the AMA cases, followed by the objectives and contents of the remedies and sanctions stipulated in the AMA. Next, I will move on to the procedure other than the JFTC: procedures for parties concerned when they are not satisfied with the decision by the JFTC, and functions of the courts will be discussed. The last section concludes.

For more details regarding procedures explained in this presentation, please refer to the provisions of the AMA in Appendix 3.

2. Procedures in the Antimonopoly Act

(1) Standard procedures in the Antimonopoly Act

As I mentioned above, most cases are handled in the administrative procedures, and not many cases go through the criminal procedures. Please see Appendix 1 for a flow chart of the standard AMA procedures.

(2) Surcharges

If the fact was found that there was a cartel or a bid-rigging (in the AMA it is called “undue restraint of trade”) affecting prices, surcharges are levied (in principle 6% of the sales of the goods/services that were “the target” of the cartels). The amount of surcharges can also be subject to the administrative hearing procedure and (if necessary) the court procedure if the firm concerned does not agree with the calculation of the surcharges.

3. Objectives and Contents of Remedies and Sanctions
(1) Remedies

a) Objectives

There are two major objectives to be achieved through remedies ordered by the JFTC. One is “restoring competitive environment,” and the other is “deterrence of future violations.” The former is obviously important, but the latter is as important as the former, since competition law enforcement would be meaningless if it has no deterrence effect. Of course, sanctions play a major role in deterrence of future violations, but the JFTC’s stance is that making violating firms pledge observance of the AMA through remedies is also meaningful and effective.

You should also note that remedies are ordered irrespective of the existence of negligence liability, since the objectives of the remedies are recovery of market mechanism impaired by the anticompetitive conduct and its maintenance.

b) Contents

The JFTC has much discretion as to the contents of the remedies, as long as they are necessary for restoring competition (Sections 7, 8-2, and 20). The standard contents of remedies and other types of remedies are as follows.

<Standard contents of the remedies>
* Elimination of the anti-competitive conduct (or confirmation that the anti-competitive conduct has ceased to exist)
* Prohibition of the similar anti-competitive conduct in the future
* To make the concerned parties (buyers, general consumers, etc.) known that the anti-competitive conduct has ceased to exist, and that the firms concerned will not engage in similar anti-competitive conduct in the future.

<Examples of other remedies>
* Enforcement of stricter compliance program of the AMA in the firms
* Dissolution of the trade association to which the cartel participants belong

Besides remedies ordered to the firms concerned with the AMA violations, the JFTC has a power to request to take measures to other public organizations in the cases of bid-riggings where officials in charge of procurement indicate who should be the winning bidder, or encourage the bid-rigging: that is, if this type of bid-rigging was found, the JFTC can request the ministries, prefectures, local governments, etc., to take
necessary measures to eliminate such conduct by the officials of these public organizations.

You may think that, especially in cartel cases, ordering decrease in price might be directly effective for restoring competition. However, the JFTC does not request such a remedy, since this means the JFTC’s intervention in the price level, and this kind of price control is inconsistent with the philosophy of competition policy. Price decision should be left to market mechanism.

c) Urgent injunction orders by the court

In accordance with the Section 67 of the AMA, the JFTC can ask for “an urgent injunction order” to the Tokyo High Court, if leaving the concerned conduct in the market until the JFTC reaches its decision seems to make competitive order irrecoverable and injunction is urgently necessary. So far, urgent injunction orders have not been sought very often, but this can sometimes be effective for cases such as predatory pricing, where victims might be forced to exit out of the market if the alleged conduct remains, and re-entering the market might be very hard for firms because of the high fixed costs.

(2) Sanctions

a) Administrative Surcharges

*Objective

As we have seen in 2, the JFTC can order the firms participated in “undue restraint of trade,” including cartels and bid-rigging, to pay administrative surcharges. Strictly speaking, the surcharge is not a “sanction,” in the sense that the JFTC does not intend to “punish” the violating firms by ordering surcharge payment.

The objective of the administrative surcharge system is to “confiscate undue profit” gained by the undue restraint of trade, and punishing violators is not included in the purpose of surcharges. This has been declared in some court rulings, as well as statements by the JFTC officials in the proceedings of the Diet.

* Contents

The calculation of the amount of surcharges is based on the AMA and the Cabinet Ordinance, and there are no discretions by the JFTC regarding the amount of surcharges.

The amount of surcharges is the sales amount of the goods/services subject to undue restraint of trade affecting price for the duration of the violation, multiplied by
the fixed percentage in accordance with the scale of the firms and the type of the businesses (Section 7-2).

<table>
<thead>
<tr>
<th></th>
<th>Large firms</th>
<th>Small and medium-sized firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>wholesaling</td>
<td>1%</td>
<td>1%</td>
</tr>
<tr>
<td>retailing</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Others</td>
<td>6%</td>
<td>3%</td>
</tr>
</tbody>
</table>

Please also note that the firms engaged in unfair trade practices are not subject to surcharge payment.

b) Criminal penalty

* Objectives

The objective of the criminal penalty is i) punishment against violations, and ii) deterrence of future violations. In principle, the AMA cases are dealt with through the administrative procedure mentioned above, but in cases where the violation is grave and the impact on the economy is serious so that administrative measures are not enough, the JFTC will make criminal accusation to the Prosecutors Office to seek for criminal penalty.

* Contents

For the Prosecutors Office to prosecute regarding the AMA case, it is necessary for the JFTC to make criminal accusation in advance, and only the JFTC can make criminal accusation in the AMA case (Sections 73 and 96). This is because, the expertise the JFTC has regarding the AMA and the market economy is highly valued.

Now, the question is in which case the JFTC will make criminal accusations. In 1990, the JFTC issued a policy statement on criminal accusations, and made clear that it will seek criminal penalties against the following:

i) Violations that substantially restrain competition in a particular field of trade, such as price cartels, supply restricting cartels, market allocation agreements, bid-rigging, boycotts and other serious violations that are likely to have a widespread influence on consumers.

ii) Violations that involve firms or industries that are repeat offenders, or that do not abide by the measures to eliminate violations, and where the administrative measures of the JFTC alone are not considered to fulfill the aims of the AMA.

The fine or penal servitude against major types of criminal offenders is as
follows.

<table>
<thead>
<tr>
<th>Types of violations</th>
<th>Offenders (natural persons)</th>
<th>Offending firms or trade associations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private monopolization, undue restraint of trade, restraint of competition by a trade association (Section 89)</td>
<td>Penal servitude of up to three years or fine up to five million yen</td>
<td>Fine of up to 500 million yen</td>
</tr>
<tr>
<td>Violations of final decision (Section 90)</td>
<td>Penal servitude of up to two years or fine up to three million yen</td>
<td>Fine of up to three million yen</td>
</tr>
</tbody>
</table>

Just as in the other criminal cases, guilty intent or negligence liability is necessary for criminal punishment in the AMA cases, too. Note that this makes sharp contrast with the administrative procedure, where guilty intent or negligence liability is not necessary for ordering remedies or sanctions, and that this puts higher hurdles to the JFTC investigators regarding the level of proof than in the usual administrative cases.

As you can see in the provisions of the AMA, only private monopolization and undue restraint of trade may be subject to criminal penalty. On the other hand, the unfair trade practices, such as resale price maintenance and unfair low pricing which may impede fair competition but does not substantially restrict competition like private monopolization or undue restraint of trade, are dealt with only by administrative measures (cease-and-desist order). However, if the firms failed to comply with the decisions issued by the JFTC, including decisions related to unfair trade practices, they are subject to criminal penalty: penal servitude for not more than two years or by a fine of not more than three million yen (Section 90).

c) Recent developments

In the current Diet session the bill to amend the AMA has been submitted by the Cabinet to change the administrative surcharge system and other procedures substantially. The followings are some of its contents.\(^1\)

i) Introduction of “leniency system”

In Japan there are currently no “leniency systems,” where firms participating in a cartel can get reductions in surcharges if they truthfully report the fact of the cartel to

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\(^1\) Please refer to the following webpage of the JFTC for more information: http://www2.jftc.go.jp/e-page/press/2004/october/041014.html.
the JFTC. The bill intends to introduce this leniency system; in particular it plans to allow firms to get reductions in surcharges of 100%, 50%, 30%, in accordance with the order and the timing of the report to the JFTC.

ii) A raise in surcharge percentage and other reviews on the surcharge system

Also in the bill to amend the AMA is the plan to raise the percentage of surcharges as follows.

<table>
<thead>
<tr>
<th></th>
<th>Large firms</th>
<th>Small and medium-sized firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>wholesaling</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Retailing</td>
<td>3%</td>
<td>1.2%</td>
</tr>
<tr>
<td>Others</td>
<td>10%</td>
<td>4%</td>
</tr>
</tbody>
</table>

Moreover, the following revisions, among others, are planned in the bill.

(a) Enlarging the scope of violations subject to surcharges (other types of undue restraint of trade and some of private monopolization)

(b) 20% reduction of surcharges if firms concerned voluntarily stopped illegal conduct (before the start of the investigation by the JFTC)

(c) 50% addition of surcharges if firms concerned had a history of paying surcharges in the past ten years

4. Appeal Procedures for Parties Affected by Remedies and Surcharges

(1) Administrative hearing proceedings

If firms subject to a recommendation do not accept it, or if firms subject to surcharges have objections to the calculation of the amount of surcharges, the case will be dealt with in the administrative hearing proceedings in the JFTC (Sections 49 and 51-2). The procedure is similar to that of the court procedure. The administrative hearing examiners will handle the proceeding, the investigators will play a role similar to that of prosecutors, and the firms concerned will act like defendants in the proceedings.

If, in the process of the proceedings, the firms concerned propose to the JFTC that they will admit the existence of the violation and the application of the law, then the JFTC will issue the decision (called “consent decision”) at this stage (Section 53-3).

(2) Appeal for withdrawal of JFTC decisions

After the administrative hearing proceeding, the JFTC will issue the decision (called “hearing decision”: Section 54). If the firms concerned accept the result, the decision is finalized. If not, the firms can appeal the court seeking for withdrawal of
the decision of the JFTC (see 5(1) for details).

(3) Statistics

As you can see below, the number of cases that goes to hearing proceedings is skyrocketing in recent years. This is partly because the Japanese firms are trying more and more to avoid paying surcharges in the current economic situation with a low growth rate, as well as because the JFTC is recently struggling to challenge more difficult cases.

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases in hearing proceedings in the JFTC (as of the end of each FY)</th>
<th>Cases in the Tokyo High Court proceedings (as of the end of each FY)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>43</td>
<td>2</td>
</tr>
<tr>
<td>2000</td>
<td>22</td>
<td>4</td>
</tr>
<tr>
<td>2001</td>
<td>61</td>
<td>5</td>
</tr>
<tr>
<td>2002</td>
<td>83</td>
<td>4</td>
</tr>
<tr>
<td>2003</td>
<td>140</td>
<td>3</td>
</tr>
</tbody>
</table>

5. Functions of the Courts

(1) Filing a lawsuit to the Tokyo High Court

If the firms concerned are not satisfied with the hearing decision, they can file a lawsuit to quash the decision to the Tokyo High Court (Sections 77 and 85). The court proceedings usually start from the District Court level, but the AMA cases are some of the few exceptions. This is because the administrative hearing proceedings in the JFTC are deemed as something similar to the “court of first instance.”

(2) Substantial evidence

Given the fact that the JFTC is the foremost expert body in competition issues, and the decision is made after careful administrative procedures (including hearing procedures), lawsuits to quash a decision are given special treatment. The special character of the Tokyo High Court has already mentioned, and another special character is that the Tokyo High Court is bound by the JFTC’s findings of fact as long as they are supported by substantial evidence (Section 80). “Substantial evidence” is interpreted as “evidence that can be a reasonable foundation for fact found in the JFTC decision."
That is, if evidence can lead a rational person to a particular fact-finding by thinking reasonably, then the evidence is “substantial evidence” (The Tokyo High Court ruling in 1953).

This system is based on the expertise the JFTC has regarding the economic issues. Just as it is described in the criminal accusation procedure, this expertise is so highly valued that finding of fact is in principle left to the JFTC, and the court in principle concentrates on legal issues.

The court cancels a JFTC’s decision if it judges that the decision lacks substantial evidence or that the decision is contrary to the Constitution or other laws (Section 82). In those cases, the court will remand the case to the JFTC when it judges that further hearing procedures are required.

(2) Roles the court plays in private lawsuits in competition cases

a) Injunction Relief

Any person whose interests are infringed by conduct that falls within unfair trade practices and thereby suffering serious damages is entitled to demand the suspension of such infringements (Section 24). When such a lawsuit is filed, a court in charge can inform the JFTC of the suit and seek opinions. The JFTC is also empowered to express its opinions to the court with the permission of the court.

b) Damage lawsuits

The AMA sets forth the absolute liability of victims of firms that engaged in undue restraint of trade, private monopolization or unfair trade practices (Section 25). This system aims to facilitate the claim for damages by victims as a means of deterring violation of the AMA. The right to claim for damages based on Section 25 of the AMA cannot be exercised until the JFTC has reached a final decision that makes clear the existence of the violation (Section 26). This civil damage lawsuit is in the exclusive jurisdiction of the Tokyo High Court (Section 85), and the Court must request an opinion of the JFTC without delay when such a claim is raised.

6. Conclusions

As there are many countries, there are many social and legal backgrounds, and there will be diverse procedures in competition laws. What I introduced to you is one of the examples in the world, but I hope that this will give you a hint on the improvements in the Indonesian competition law.
<Appendix 1: Standard Procedures in the Antimonopoly Act>

Investigation

- Warning, Caution, Closure
- Recommendation
  - Decision to initiate hearing
    - Refusal
  - Administrative Hearing
    - Consent Decision
    - Hearing Decision
    - Recommendation Decision

- Application for an urgent injunction order
  - Acceptance
  - Refusal

- Appeal for withdrawal

Tokyo High Court

- Appeal

Supreme Court
<Appendix 2: Case Examples of Proceedings>
The following is one of examples of the proceedings.

* A bid-rigging case on procurement of water meters by the Tokyo Metropolitan Government

1. Criminal procedure
   - Criminal Accusation: February 1997
   - Ruling on the criminal case: December 1997 (Finalized)

2. Administrative procedure
   - Recommendation: March 1997
   - Recommendation Decision: April 1997 (All the firms concerned accepted the recommendation.)
   - Surcharge Order: December 1997

3. Private damage recovery lawsuit
   - AMA Section 25 lawsuit for damage recovery (filed by the Tokyo Metropolitan Government in April 1998)
   - Composition: (June 2002)
   (The result has not been disclosed.)

(Note: The manufacturers of water meters again engaged in bid-rigging in the Tokyo Metropolitan Government procurement, and four of the firms and five persons were subject to criminal accusation in 2003.)
Appendix 3

Provisions of the Antimonopoly Act on Sanctions, Remedies and Court Proceedings (excerpt)

Sec.7 [Elimination measures]
(1) In case there exists any act in violation of the provision of Section 3 [prohibition of private monopolization or undue restraint of trade], or the preceding section, the Fair Trade Commission may, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, order the firm concerned to cease and desist from such acts, to transfer a part of his business, or to take any other measures necessary to eliminate such acts in violation of the said provisions.

(2) The Fair Trade Commission may, when it finds it particularly necessary, even when an act in violation of the provisions of Section 3 [prohibition of private monopolization or undue restraint of trade], or the preceding section has already ceased to exist, order the firms concerned, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, to take measures to publicize that the said act has been discontinued and order any other measures necessary to ensure elimination of the said act: Provided, That the foregoing shall not apply to cases where one year has elapsed since the date of discontinuation of the said act without recommendation being given to the firm concerned or without the hearing procedures being initiated with respect to the said act.

Sec.7-2 [Surcharges]
(1) In case any firm effects an undue restraint of trade or enters into an international agreement or an international contract containing such matters as constitute an undue restraint of trade, which pertains to the price of goods or services or results in affecting in effect the price of such goods or services by curtailing the volume of supply thereof, the Fair Trade Commission shall order the firm concerned, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, to pay to the Treasury a surcharge of an amount equivalent to an amount arrived at by multiplying the sales amount of such goods or services, computed in accordance with the method prescribed by a Cabinet Ordinance, for the period from the date on which the firm was engaged in the business activities as implementation of such conduct to the date on which the firm ceased to engage in the business activities as implementation of such conduct (in case such period exceeds three years, the period shall be for three years retroactively from the date on which the firm ceased to engage in the business activities as implementation of such conduct: hereinafter referred to as "period of such implementation") by six percent (or by two percent for retail or by one percent for wholesale business): Provided, That in case the amount thus computed falls below five hundred thousand yen, the Commission shall not order the payment of such a surcharge.
(2) In the case of the preceding subsection, the term "six percent" appearing in the preceding subsection shall be "three percent" and the term "two percent" shall be "one percent," if the firm falls under any one of the following paragraphs:

(i) Any company whose capital or subscription is not more than 300 million yen and any company or individual whose pay-roll employees are not more than 300 persons, whose main activity is to carry on business in the fields of manufacturing, construction, transportation and other kinds of business (excluding the kinds of business stipulated in paragraph from (ii) to (ii)-3 of this subsection and the kinds of business stipulated by the Cabinet Ordinance pursuant to paragraph (iii) of this subsection);

(ii) Any company whose capital or subscription is not more than 100 million yen and any company or individual whose pay-roll employees are no more than 100 persons, whose main activity is to carry on business in the fields of wholesale trade (excluding the kinds of business stipulated in the Cabinet Ordinance pursuant to paragraph (iii) of this subsection);

(ii)-2 Any company whose capital or subscription not more than 50 million yen and any company or individual whose pay-roll employees are no more than 100 persons, whose main activity is to carry on business in the fields of service (excluding the kinds of business stipulated in the Cabinet Ordinance pursuant to paragraph (iii) of this subsection)

(ii)-3 Any company whose capital or subscription not more than 50 million yen and any company or individual whose pay-roll employees are no more than 50 persons, whose main activity is to carry on business in the fields of retail trade (excluding the kinds of business stipulated in the Cabinet Ordinance pursuant to paragraph (iii) of this subsection)

(iii) Any company whose capital or subscription is not more than that specified by the Cabinet Ordinance for each kind of business and any company or individual whose pay-roll employees are not more than that specified by the Cabinet Ordinance for each kind of business, whose main activity is to carry on business in fields specified by such Cabinet Ordinance.

(3) Any person who has received an order under the provisions of subsection (1) shall pay the surcharges as provided for in subsection (1) and (2) of this section.

(4) In case the amount of surcharge calculated in accordance with the provisions of subsection (1) or (2) of this section contains a fraction less than ten thousand yen, such fraction shall be disregarded.
(5) In the case the firm who has committed an act in violation of the provision of subsection (1) above is a company and if such company has ceased to exist through a merger with another company, the violation of such company shall be considered as a violation of the merging company or consolidated company as a result of the merger, and the provisions of the preceding subsections shall apply thereto.

(6) When a period of three years has elapsed from the date of expiration of the period of such implementation (or when a period of one year has elapsed from the date on which the hearing procedures ended in case such hearing procedures had been initiated with respect to such a violation (in case the expiration of the three-year period following the expiration of the period of such implementation, then the date on which the three-year period expired), the Fair Trade Commission shall not order such firm to pay a surcharge for such violation: Provided, That the foregoing shall not apply to cases where the Fair Trade Commission has ordered to pay the surcharge for the said violation to the Treasury under the provisions of Section 48-2(1) [surcharge payment order] and thereafter.

Sec.8-2 [Elimination measures against prohibited acts of trade associations]
(1) When there exists any act in violation of the provisions of the preceding section, the Fair Trade Commission may, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, order the trade association concerned to file a report, or to cease and desist from such act, to dissolve the said association, or to take any other measures necessary to eliminate the said act.

(2) The provisions of Section 7(2) [measures against already ceased violation] shall apply mutatis mutandis to any act in violation of provisions of subsection (1) of the preceding section.

(3) The Fair Trade Commission may, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, in ordering a trade association to take any of the measures set forth in subsection (1) above or Section 7(2) applicable mutatis mutandis under the provisions of the preceding subsection, when it finds it particularly necessary, at the same time order an officer, manager or constituent firm (including other firm when a constituent firm is acting for the benefit of the firm; the same shall apply in Section 48 [recommendation to the violator to take elimination measures] (1) and (2)) of the said association to take measures necessary to ensure the measures provided for in subsection (1) above or Section 7(2) applicable mutatis mutandis under the provisions of the preceding subsection.
Sec.8-3 [Surcharges against constituent firms]
The provisions of Section 7-2 [Surcharge] shall apply mutatis mutandis to cases where an act is committed in violation of the provisions of Section 8(1) [prohibited acts of a trade association] (i) or (ii) (applying only to such an firm who is a party to an international agreement or an international contract which contains such matters as constitute an undue restraint of trade). In this case, the term "any firm" appearing in subsection (1) of Section 7-2 shall read "any trade association", the term "firm concerned" appearing therein shall read "the constituent firm" (other firm when a constituent firm is acting for the benefit of the firm; the same shall apply hereinafter in this section) of the trade association concerned and the term "such firm" appearing in subsection (2) of the said section shall read "the constituent firm of such trade association concerned."

Sec.20 [Measures against unfair trade practices]
(1) When there exists any act in violation of the preceding section, the Fair Trade Commission may, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, order the firm concerned to cease and desist from the said act, to delete the clauses concerned from the contract and to take any other measures necessary to eliminate the said act.

(2) The provisions of Section 7(2) [measures against already ceased violations] shall apply mutatis mutandis to an act in violation of the preceding section.

Sec.24 [Injunction rights]
A person, whose interests are infringed or likely to be infringed by act in violation of Section 8(1)(v) or Section 19 and thereby suffering or likely to suffer serious damages, is entitled to demand the suspension or prevention of such infringements from an firm or a trade association who infringes or is likely to infringe such interests.

Sec.25 [Absolute liability]
(1) Any firm whose act has infringed in violation of Section 3, 6, or 19 ((Firms whose act have infringed in violation of Section 6 are limited to those who have effected undue restraint of trade or employed unfair trade practices on the international agreements or contracts concerned.) and any trade association whose act has infringed in violation of Section 8(1) shall be liable to indemnify the person injured.

(2) No firm and trade association may be exempted from the liability as prescribed in the preceding subsection by proving non-existence of willfulness or negligence on his part.
Sec.26 [Restriction on exercise of the right to claim for damages in court, prescription]

(1) The right to claim for damages in the preceding subsection may not be exercised in court until the decision pursuant to the provisions of Section 48(4) [recommendation decision], Section 53-3 [consent decision], or Section 54 [hearing decision] has become final and conclusive (until the decision (One against the constituent firms of the trade association whose act has infringed in violation of Section 8(1) or(2) is excluded.) pursuant to the provisions of Section 54-2(1) has become final and conclusive in case no decision has been made pursuant to the provisions above.)

(2) The right under the preceding subsection shall, upon expiration of three years from the date on which the decision in the said subsection became final and conclusive, be extinct by prescription.

Sec.48 [Recommendation to the violator to take elimination measures, Recommendation decision]

(1) The Fair Trade Commission may, when it finds that there exists any act in violation of the provisions of Section 3 [prohibition of private monopolization or undue restraint of trade], Section 6 [prohibition of particular international agreements or contracts], Section 8 [prohibited acts of a trade association], Section 9(1) [prohibition of a particular company] or (2)[prohibition of operation as a particular company],(5) [reporting requirement of a particular company] or (6) [filing requirement of a particular company], Section 10 [prohibition of particular stockholding by a company], Section 11 [restriction on stockholding rate by a banking or insurance company],Section 13 [prohibition of particular interlocking directorates], Section 14 [prohibition of particular stockholding by a person other than a company], Section 15 (1) [prohibition of particular mergers], Section 15-2(1) [prohibition of particular divisions], Section 16 (1) [prohibition of particular acquisitions of business, etc.], Section 17 [prohibition of evasion] or Section 19 [prohibition of unfair trade practices], recommend the persons who have committed such violation (including the officers and managers of a trade association and its constituent firms when the violating act relates to the provisions of Section 8) to take appropriate measures.

(2) The Fair Trade Commission may, if it finds that any act in violation of the provisions of Section 3 [prohibition of private monopolization or undue restraint of trade], Section 6 [prohibition of particular international agreements or contracts, filing requirement], Section 8(1) [prohibited acts of a trade association] or Section 19 [prohibition of unfair trade practices], has already ceased to exist, and if it finds it particularly necessary, recommend to the person who committed such violation (including the officers and managers of such trade association and its constituent firms when the violating act relates the provisions of Section 8(1) to take appropriate measures.
(3) Any person who has received a recommendation under the provisions of the preceding subsection shall notify without delay to the Fair Trade Commission whether or not he accepts the said recommendation.

(4) The Fair Trade Commission may, when the person receiving the recommendation under the provisions of the preceding two subsections has accepted it, render a decision on the line of the said recommendation without resorting to the hearing procedures.

Sec.48-2 [Procedures for surcharges]

(1) The Fair Trade Commission shall, when it finds there exists a fact as provided for in subsection (1) [surcharges] of Section 7-2 (including cases where this provision is applicable mutatis mutandis under Section 8-3 [surcharges against constituent firms]; hereinafter the same in this section), order the firm or the constituent firms of the trade association (or other firm in case a constituent firm is acting for the benefit of the other firm; hereinafter the same in this section) to pay to the Treasury a surcharge as prescribed in Section 72(1) or (2): Provided, That in case hearing procedures have been initiated with respect to such violating act, such order shall not be issued by such time as such procedures have been completed.

(2) An order prescribed in the preceding subsection (hereinafter referred to as "payment order") shall be made by serving to such firm a certified copy of such payment order which states the amount of the surcharge to be paid, the basis of calculation of such amount, the violating act responsible for such surcharge and deadline for payment.

(3) The deadline for payment of such surcharge as prescribed in the preceding subsection shall fall on a date two months after the date on which such payment order is issued.

(4) The Fair Trade Commission shall, when it contemplates issuing a payment order, give in advance, the firm or the constituent firm of the trade association concerned, an opportunity to present his views and to submit evidence in support thereof.

(5) If any person is dissatisfied with the payment order, he may, in accordance with the Rules of the Fair Trade Commission and within thirty days from the date on which the certified copy of such order was served, request the Commission to initiate hearing procedures on the said case.

(6) Except in cases where such a decision was rendered pursuant to the provisions of subsection (4) of the preceding section, Section 53-3 [consent decision] or Section 54 [hearing decision] with
respect to the said violating act, a payment order (One against the constituent firms of the trade association whose act has infringed in violation of Section 8(1) or (2) is excluded.) shall be deemed final and conclusive for the purpose of applying the provisions of Section 26 [restriction on exercise of the right to claim for damages in court, prescription], after the lapse of the period prescribed in the preceding subsection.

Sec.49 [Initiation of hearing procedures]
(1) The Fair Trade Commission may, in the case of Section 48(1) or (2) [recommendation to the violator to take elimination measures] or in the case where there exists a monopolistic situation (excluding the case provided for in the proviso to Section 8-4(1) [measures against a monopolistic situation]. The same shall apply in Section 54(1) [hearing decision], and if it finds that it would be in the public interest to initiate hearing procedures on the case, initiate hearing procedures on the said case.

(2) When a request as prescribed in subsection (5) of the preceding section is filed, the Fair Trade Commission shall, except in cases where it rejects the said request as unlawful by a decision, without delay initiate the hearing procedures on the case which is the subject of such request.

(3) In case hearing procedures have been initiated pursuant to the provisions of the preceding subsection, the payment order issued relating to such case shall lose effect.

(4) The Fair Trade Commission shall, when it contemplates initiating hearing procedures on a case relating to Section 8-4(1) [measures against a monopolistic situation], consult with the competent minister having jurisdiction over the business in which such firm is engaged.

Sec.51-2 [Entrusted proceedings by hearing examiners]
The Fair Trade Commission may, after issuing a complaint, entrust hearing examiners to conduct a part of the hearing procedures (excluding the decision) in addition to taking the measures under each paragraph of Section 46(1) [compulsory measures for investigation], in accordance with the Rules of the Fair Trade Commission: Provided, That this shall not apply to such person or persons who have performed the duty as the investigator of the said case or those who have intervened in the investigation of the said case.

Sec.53-3 [Consent decision]
The Fair Trade Commission may, after determined to initiate the hearing procedures, when the respondent, admitting the findings of fact and the application of law stated in the complaint, submits
to the Fair Trade Commission a written statement setting forth that he will accept the decision without resorting to subsequent hearing proceedings, and files a plan setting forth concrete measures which he proposes voluntarily to take in order to eliminate such violation, or to ensure the elimination of such violation, or to restore competition with respect to the goods or services involved in the monopolistic situation, if the Commission finds it appropriate, render a decision on the line of the concrete measures as stated in such plan without subsequent hearing proceedings.

Sec.54 [Hearing decision]

(1) The Fair Trade Commission shall, when it finds after hearing proceedings that violation of the provisions of Section 3 [prohibition of private monopolization or undue restraint of trade], Section 6 [prohibition of particular international agreements or contracts], Section 8 [prohibited acts of a trade association], Section 9(1),(2) [prohibition of establishment of a company which may cause excessive concentration of economic power, etc.], (5) [reporting requirement of a particular company] or (6) [filing requirement of a particular company], Section 10 [prohibition of particular stockholding by a company], Section 11(1) [restriction on stockholding rate by a banking or insurance company], Section 13 [prohibition of particular interlocking directorates], Section 14 [prohibition of particular stockholding by a person other than a company], Section 15(1) [prohibition of particular mergers], Section 15-2(1) [prohibition of particular divisions], Section 16 (1) [prohibition of particular acquisitions of business, etc.], Section 17 [prohibition of evasion] or Section 19 [prohibition of unfair trade practices] exists or that a monopolistic situation exists, order the respondent by a decision to take such measures as provided for in Section 7(1) [elimination measures], Section 8-2(1) or (3) [elimination measures], or Section 8-4(1) [measures against a monopolistic situation].

(2) The Fair Trade Commission shall, when it finds after hearing proceedings that such act in violation of the provisions of Section 3 [prohibition of private monopolization or undue restraint of trade], Section 6 [prohibition of particular international agreements or contracts], Section 8(1) [prohibited acts of a trade association] or Section 19 [prohibition of unfair trade practices] no longer exists and if it finds it particularly necessary, order, by a decision, the respondent to take the measures provided for in Section 7(2) [measures against already ceased violations](including cases to which the said subsection is applicable mutatis mutandis in Section 8-2(2) and Section 20(2)).

(3) The Fair Trade Commission shall, when it finds after hearing proceedings that such acts or a monopolistic situation as provided for in subsection (1) did not exist at the time when it issued the complaint, that such acts as provided for in the said subsection or a monopolistic situation existed by the time of the issuance of the complaint, but the said acts or a monopolistic situation have already ceased to exist (excluding the decision under the preceding subsection), or that a monopolistic
situation exists and falls under the proviso to Section 8-4(1), make clear the said fact by a decision.

Sec.54-2 [Surcharge payment order]
(1) The Fair Trade Commission shall, when it finds after hearing proceedings a fact as provided for in Section 7-2(1) [surcharges] (including cases where this provision is applicable mutatis mutandis by Section 8-3 [surcharges against constituent firms]), order, by a decision, the respondent to pay to the Treasury a surcharge levied on such violation.

(2) The provisions of Section 48-2(3) [deadline for payment of surcharges] shall apply mutatis mutandis to a decision provided for in the preceding subsection.

Sec.67 [Urgent injunction]
(1) The court may, upon application of the Fair Trade Commission, when it finds the matter to be one of urgent necessity, order the person doing an act suspected of violation of the provisions of Section 3 [prohibition of private monopolization or undue restraint of trade], Section 6 [prohibition of particular international agreements or contracts], Section 8(1) [prohibited acts of a trade association], Section 9(1) or (2) [prohibition of establishment of a company, which may cause excessive concentration of economic power, etc.], Section 10 (1) [prohibition of particular stockholding by a company], Section 11(1) [restriction on stockholding rate by a banking or insurance company], Section 13(1) or (2) [prohibition of particular interlocking directorates], Section 14 [prohibition of particular stockholding by a person other than a company], Section 15(1) [prohibition of particular mergers], Section 15-2(1) [prohibition of particular divisions], Section 16 (1) [prohibition of particular acquisitions of business, etc.], Section 17 [prohibition of evasion] or Section 19 [prohibition of unfair trade practices], temporarily to cease and desist from the said act, the exercise of voting rights or the execution of duties as an officer in a company, or may rescind or modify such order.

(2) The provisions of Section 62(2) [mutatis mutandis application of the Act of Procedures on Non-contentious Matters] shall apply mutatis mutandis to the court ruling under the provisions of the subsection (1).

Sec.73 [Accusation, report on non-prosecution]
(1) The Fair Trade Commission shall, when it considers that a crime violating the provisions of this Act exists, file an accusation with the Public Prosecutor General.

(2) The Public Prosecutor General shall, when he has taken measures not to prosecute in a case
which is the subject of an accusation under the provisions of the preceding subsection, without delay, submit to the Prime Minister through the Minister of Justice a written report stating the said fact and reasons therefor.

**Sec.77 [Filing of a suit to quash a decision]**

(1) A suit to quash a decision of the Fair Trade Commission shall be filed within thirty days (three months in case of the decision under the provisions of Section 8-4(1) [measures against a monopolistic situation]) from the date on which the decision became effective.

(2) The time period stated in the preceding subsection shall be peremptory.

**Sec.80 [Binding authority of the Fair Trade Commission's findings]**

(1) Findings of fact made by the Fair Trade Commission shall, if established by substantial evidence, be binding upon the court in regard to the suit provided for in Section 77(1) [filing of a suit to quash a decision].

(2) Whether such substantial evidence as provided for in the preceding subsection exists or not shall be determined by the court.

**Sec.81 [Offering of new evidence, reference back of the case to the Fair Trade Commission]**

(1) A party may plead to the court for offer to introduce new evidence relevant to the case: Provided, That any such offer to introduce new evidence relating to the facts found by the Fair Trade Commission shall have the reason which come under any one of the following paragraphs:

(i) Where the Fair Trade Commission failed to adopt the evidence without good cause; or
(ii) Where it was impossible to adduce evidence at hearing proceedings of the Fair Trade Commission, and there was no gross negligence on the part of the party in failing to adduce such evidence.

(2) In the cases prescribed in proviso to the preceding subsection, the onus shall be on the party concerned to show either of the reasons provided for in the preceding subsection.

(3) When the court finds there is a reason for offer to introduce new evidence under proviso to subsection (1) and it is necessary to examine such evidence, it shall refer the case back to the Fair Trade Commission and order it to take appropriate measures after examining such evidence.
Sec.82 [Quashing decisions]
The court may quash a decision of the Fair Trade Commission if the decision falls under any one of the following paragraphs:

(i) If the facts on which the decision is based are not established by substantial evidence, or
(ii) If the decision is violating the Constitution, or other laws or orders.

Sec.83 [Reference back of a decision]
The court may, when it finds it necessary that further hearing proceedings shall be conducted in a case where it shall quash a decision of the Fair Trade Commission, refer the case back to the Fair Trade Commission giving the reasons therefor.

Sec.85 [Original jurisdiction]
Original jurisdiction over any suit coming under any one of the following paragraphs shall lie in the Tokyo High Court:

(i) A suit concerning a decision of the Fair Trade Commission;
(ii) A suit concerning indemnification of damages under the provisions of Section 25 (absolute liability); or
(iii) A suit concerning offenses as provided for in Sections 89 to 91 inclusive.

Sec.86 [Exclusive jurisdiction of the Tokyo High Court]
Any case stipulated in Section 62(1) [stay of execution of the Fair Trade Commission's decision by deposit], Section 63(1) [forfeitures of deposit] (including cases where the said provisions are applied mutatis mutandis by Section 68(2) [stay of urgent injunction]), Section 67(1) [urgent injunction], Section 97 [administrative fines for contraventions of decisions] and Section 98 [administrative fines for disobeying urgent injunction] shall be under the exclusive jurisdiction of the Tokyo High Court.

Sec.87 [Special panel in the Tokyo High Court]
(1) A panel of judges invested with the jurisdiction to hear exclusively the suit provided for in Section 85 [original jurisdiction] and such cases as stipulated in the preceding section shall be established within the Tokyo High Court.

(2) The number of judges in the panel under the preceding subsection shall be five.

Sec.89 [Penalties against private monopolization or undue restraint of trade, or substantial
restraint of competition by a trade association]

(1) Any person committing any one of the following offenses shall be punished by penal servitude for not more than three years or by a fine of not more than five million yen:

(i) Any person who, in violation of the provisions of Section 3 [prohibition of private monopolization or undue restraint of trade], effected private monopolization or undue restraint of trade; or

(ii) Any person who, in violation of the provisions of Section 8(1) [prohibited acts of a trade association] (i), effected substantial restraint of competition in any particular field of trade.

(2) An attempt to commit an offense falling under the preceding subsection shall be punished.

Sec.90 [Penalties against prohibited international agreements or contracts, prohibited acts of a trade association, or non-observance of final and conclusive decision]

Any person committing any one of the following offenses shall be punished by penal servitude for not more than two years or by a fine of not more than three million yen:

(i) Any person who, in violation of the provisions of Section 6 [prohibition of particular international agreements or contracts] or Section 8(1)(ii) [prohibition of particular international agreements or contracts by a trade association] entered into an international agreement or an international contract which contains such matters as constitute undue restraint of trade;

(ii) Any person who violated the provision of Section 8(1) (iii) [limiting the number of firms by a trade association] or (iv) [restriction on function or activity of the constituent firm by a trade association]; or

(iii) Any person who failed to comply with the decision as provided for in Section 48(4) [recommendation decision], Section 53-3 [consent decision] or Section 54(1) or (2) [hearing decision], after it has become final and conclusive.

Sec.95 [Double punishment]

(1) When a representative of a juridical person, or an agent, an employee or any other person in the service of juridical person or of an individual has, with regard to the business or property of the said juridical person or individual, committed a violation as provided for in each of the following paragraphs, the said juridical person or the said individual shall be punished by such fine as provided for in the said paragraphs in addition to the punishment of the offender.

(i) Section 89 [penalties against private monopolization or undue restraint of trade, or substantial
restraint of competition by a trade association] Fine of not more than 500 million yen.

(ii) Section 90 [penalties against prohibited international agreements or contracts, prohibited acts by a trade association, or non-observance of final conclusive decision], Section 91 (excluding (iii)) [penalties against prohibited stockholding, etc.], Section 91-2 [penalties against failure to file reports, etc.], Section 94 [penalties against interference with inspection, etc.] Fine as provided for in each of the above sections.

(2) Where a representative, a manager, an agent, an employee or any other person in the service of a non-juridical organization has, with regard to the business or property of the said organization, committed a violation as provided for in each of the following paragraphs, the said non-juridical organization shall be punished by such fine as provided for in the said paragraphs in addition to the punishment to the offender.

(i) Section 89 [penalties against private monopolization or undue restraint of trade, or substantial restraint of competition by a trade association] Fine of not more than 500 million yen.

(ii) Section 90 [penalties against prohibited international agreements or contracts, prohibited acts by a trade association, or non-observance of final and conclusive decision], Section 91(iv) or (v) (limited to only those relating to (iv)), or Section 91-2 (i) or (xi). Fine as provided for in each of the above sections.

Sec.96 [Exclusive accusation by the Fair Trade Commission]

(1) Any offense under Section 89 to 91 inclusive [penalties against private monopolization or undue restraint of trade, prohibited acts of a trade association, prohibited international agreements or contracts, non-observance of final and conclusive decision and prohibited stockholdings, etc.] shall be considered only after an accusation of the Fair Trade Commission has been filed.

(2) The accusation under the preceding subsection shall be made in writing.

(3) The Fair Trade Commission, in filing the accusation under subsection (1) may, when it considers it appropriate that the declaration under subsection (1) of the preceding section or Section 100(1)(i) [revocation of patent rights or patent licenses] should be made with respect to an offense under the accusation, state the said effect in the said accusation.

(4) The accusation under subsection (1) shall not be withdrawn after public prosecution has been instituted.
Abuse of Dominance (Japan)

Case: MDS Nordion Inc. (1998)

<Summary>
MDS Nordion Inc., a manufacturer of Molybdenum-99, prevented its competitors from entering the Japanese market, by concluding exclusive contracts, effective for ten years, with two companies that are the sole purchasers of Molybdenum-99 in Japan.

I. Detailed facts
   1. MDS Nordion and other manufacturers of Molybdenum-99
      MDS Nordion, a Canadian firm, is the largest manufacturer of Molybdenum-99 in the world. Most of the Molybdenum-99 in the world is supplied by MDS Nordion.
      The second largest manufacturer of Molybdenum-99 is IRE, a Belgian firm, and there are only several firms manufacturing Molybdenum-99 in the world. There are no manufacturers of Molybdenum-99 in Japan.

   2. Molybdenum-99
      Molybdenum-99 is used as a material for a diagnostic product. In Japan the buyers of Molybdenum-99 are firms A and B, which buy all the Molybdenum-99 they use from MDS Nordion.

   3. A contract
      In 1995 MDS Nordion proposed to firms A and B a contract that all the Molybdenum-99 necessary shall be bought exclusively from MDS Nordion for ten years. Both A and B at first tried to make the proposed contract a non-exclusive one, and one of them negotiated with IRE to conclude long-term contract regarding supply of Molybdenum-99, but MDS Nordion insisted that its contract be the one which does not allow A or B to buy from other manufacturers. Fearing that refusing the contract might cause transaction condition disadvantageous, both A and B finally accepted the proposal and concluded the contract.

   4. What happened in the market consequently?
      The contract caused firms A and B to buy Molybdenum-99 only from MDS Nordion, not from any other firms. Only after the start of the JFTC investigation did MDS Nordion changed the contract and stopped obliging firms A and B to buy only from it.
II. The AMA clause related to abuse of dominance:
(In the Japanese Antimonopoly Act, the phrase “abuse of dominance” is not used, and the corresponding concept in the AMA is “private monopolization”.)

In the Antimonopoly Act in Japan, private monopolization refers to “business activities by which firms, individually, by combination or conspiracy with other firms or in any other means, exclude or control the business activities of other firms, thereby causing, contrary to the public interest, substantial restraint of competition in any particular field of trade.” (Section 2(5))

III. Application of the AMA

1. Private monopolization
   MDS Nordion “excluded” activities of other manufacturers of Molybdenum-99 by concluding the exclusivity contract, as a result of which it substantially restrained competition, contrary to public interest, in the field of transaction on Molybdenum-99 in Japan.

2. Remedies (Order to MDS Nordion)
   (1) MDS Nordion shall notify IRE that it stopped obliging firms A and B to buy only from MDS Nordion, and that it will not exclude other manufacturers’ sales activities in the future.
   (2) MDS Nordion shall notify firms A and B that it will not exclude other manufacturers’ sales activities in the future.
   (3) The method of the notification regarding (1) and (2) shall be approved in advance by the Fair Trade Commission.
   (4) MDS Nordion shall not exclude other manufacturers’ sales activities in the future.
   (5) MDS Nordion shall report to the Fair Trade Commission what it has done to carry out the abovementioned order.

IV. Perspectives

1. The role of economics
   (1) “Substantial restraint of competition”
In the Tokyo High Court ruling in 1953, “substantial restraint of competition” is defined as “the appearance of a situation where competition itself has decreased and whereby a certain firm or a group of firms can, according to its own will, manipulate price, quality, quantity or other various conditions, thereby controlling the market to some extent.”

This definition has been supported by the prevailing theory in academia, and the JFTC has followed this definition in its enforcement, too.

(2) MDS Nordion case

We will touch upon this issue in detail in 3. Here we will confine our interest in checking the economic structure of the Molybdenum-99 market to see whether MDS Nordion, the firm with 100% share, can really control the market.

a) What is Molybdenum-99 used for?
=> It is used solely for manufacturing a diagnostic product, for no other purposes.

b) Is it necessary to use Molybdenum-99 to manufacture the diagnostic product?
=> Yes. Without Molybdenum-99 it is impossible to manufacture the diagnostic product. (If it is possible to manufacture the diagnostic product without Molybdenum-99, and if the alternative methods of manufacturing are not too costly, monopoly of Molybdenum-99 may not be a serious problem.)

From these points above, we can see that Molybdenum-99 is indispensable for manufacturing the diagnostic product, and that market conditions of Molybdenum-99 only affects the market of the diagnostic product. This information is crucial to see whether the conduct of MDS Nordion in fact substantially restrains competition.

2. Criteria in “abuse of dominance” cases

(1) Objectives of the AMA

What is to be achieved in competition law enforcement in general? The objective of the Antimonopoly Act is stipulated as follows in Section 1.

“This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, aims to promote
free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.” (Section 1)

(2) “Contrary to the public interest”

On the other hand, the definition of “private monopolization” in Japan states that it is necessary that conduct in question is “contrary to the public interest”. Here the issue is “what is the public interest” in the context of competition law enforcement. The Tokyo High Court ruling in 1980 (which was supported by the Supreme Court in 1984) argues as follows.

“Contrary to the public interest” means contrary to the goals of the Act, and, generally speaking, it follows that the public interest is violated when economic order based on the principles of free competition is infringed. This economic order is what the Act intends to protect through its enforcement. The public interest clause is incorporated because some exceptional cases might be exempted from the application of the Act simply because they are nor deemed contrary to the public interest. For example, some acts may fall under one of the prohibited conduct in form, but in reality, the purpose of the Act is not infringed by these acts. Careful examination of related interests associated with the conduct in question and the goals of the Act will be the key factor to look at.”

As we can see, this ruling tries to keep the exception as narrow as possible. Although there are rooms that a certain anti-competitive conduct might be allowed if it is not necessarily “contrary to the public interest”, but in fact there have been no cases in Japan where anti-competitive conduct was ruled as legal because of this “contrary to the public interest” clause.

Thus, economic, social and political issues can be taken into consideration only in exceptional circumstances, and prevailing theory in academia supports this enforcement.

(3) MDS Nordion case

In the MDS Nordion case, MDS Nordion had a plan to pay most of the expenses for rebuilding a nuclear reactor which is necessary to manufacture a material
for Molybdenum-99, and it wanted to conclude the contracts so that it can secure ways to collect fund. However, such economic purpose does not justify anti-competitive conduct by MDS Nordion when we base our criteria on the Supreme Court decision mentioned above.

3. Standards of proof
   (1) “Firm” in the AMA

   “A firm” is defined in the AMA as “a person who carries on a commercial, industrial, financial or any other business.” (Section 2(1)) This definition does not preclude the possibility of foreign firms being included in the definition here, and MDS Nordion, a Canadian firm, is of course included in the definition of “firms,” as long as it carries on any types of business in Japan.

   (2) Delineating “a particular field of trade” (i.e. “a relevant market”)

   Generally speaking, delineation of a relevant market (in the AMA phrase “a particular field of trade”) consists of the following elements: field of goods/services, geographical areas, stage of transaction (manufacturing, wholesaling, retailing, etc.) and so on. In MDS Nordion case, the “relevant market” is “the field of trade regarding Molybdenum-99 in Japan.”

   With regard to product market, no other goods could substitute Molybdenum-99, manufacturers of the diagnostic product had to buy that, and the scope of the market is naturally “Molybdenum-99”.

   With regard to geographic market, division of markets within Japan did not exist. Now the issue is whether we should confine the market to domestic one, or we should extend it to international one. The answer is the former, since foreign market is jurisdictionally out of reach in terms of Japanese law enforcement, and the interest that the Japanese laws protect is confined in principle within the territory of Japan.

   (3) Dominance in the relevant market

   As you can see in the AMA clause, it is not specified that the firm(s) engaged in the private monopolization need to have “dominant position”, or to have certain level of market shares. However, for a firm (firms) to “exclude or control” business activities of other firms, dominant position is certainly a presumption.

   In this case, MDS Nordion had had 100% share in Japan, and its dominance in the Molybdenum-99 market is obvious.
(4) “Substantial restraint of competition”

We have already seen the interpretation of “substantial restraint of competition”. In this case, MDS Nordion kept its 100% share in Japan by concluding exclusive contracts, and it naturally had an ability of controlling the whole market by manipulating price and other market conditions. Therefore, the “substantial restraint of competition” can be clearly maintained.

An interesting issue might be “what if its share of MDS Nordion were below 100%?” As we have seen in the Tokyo High Court ruling, we cannot draw a definite line of share thresholds. At least it is clear that the share need not be 100%, and the precedents of private monopolization cases show that shares can be much lower (in one case the firm violating private monopolization clause had 56% share in the relevant market.). We need to make case-by-case analysis for each case.

(5) Difference between normal competition and “exclusion of competitors”

Exclusion here does not necessarily mean that firms are forced to exit from the market. Exclusion here includes activities that make it difficult for other firms to engage or continue to engage in normal business activities. On the other hand, competition in general involves process of exit from the market. If efficient firms offer better goods or services at a cheaper price, some of the other firms might not be able to continue their business in the market.

Then, what is the difference between private monopolization and normal business activities? In MDS Nordion case, it is true that before the contract MDS Nordion had 100% share in the Japanese market, but no anti-competitive conduct had been found. The activities of competitors (including potential competitors that have not entered the Japanese market) had not been impeded, and the 100% share might simply be the result of competition.

=> The contract made competitors substantially impossible to enter the Japanese market. Having 100% share itself is not illegal in the AMA. ABUSING its market position is the problem here.

4. Sanctions and Remedies/ the Judicial Review
(1) Remedies

* Illegal conduct that ceased to exist

The JFTC issues an order even though illegal conduct had ceased to exist. This is because the JFTC wanted to make sure that competitors are free to market their products in the Japanese market, and that buyers are free to choose its suppliers. This
kind of order after the illegal conduct had ceased to exist is very common in the Japanese AMA enforcement.

*Section 7(2) of the AMA*

The Fair Trade Commission may, when it finds it particularly necessary, even when an act in violation of the provisions of Section 3 [prohibition of private monopolization or undue restraint of trade], or the preceding section has already ceased to exist, order the firms concerned… to take measures to publicize that the said act has been discontinued and order any other measures necessary to ensure elimination of the said act: provided, that the foregoing shall not apply to cases where one year has elapsed since the date of discontinuation of the said act without recommendation being given to the firm concerned or without the hearing procedures being initiated with respect to the said act.

* Structural remedies in private monopolization cases

In general, prevailing interpretation is that, regarding private monopolization cases, the JFTC can order “structural remedies,” such as divestiture, as well as “conduct remedies”. Usually, remedy should be targeted to illegal conduct that led to substantial restraint of competition, but structural remedies might be necessary, in rare cases, if simple elimination of illegal conduct is not enough for the prevention of future violation of the AMA. There are some arguments as to whether the JFTC can order structural remedies in private monopolization cases.

In MDS Nordion case, the JFTC considered that such structural remedy was not necessary.

(2) Sanctions

In Japan, only cartels or bid-rigging that affects price are subject to administrative surcharges.

(3) Relation with the court

The case was finalized by the acceptance of the recommendation and the following administrative order mentioned above, and it was not appealed to the court.

(4) Criminal accusation

In the AMA, private monopolization will be subject to criminal accusation if the conduct concerned can be considered to amount to public offence and need to be dealt with by criminal procedure due to its seriousness of the violation. The JFTC,
however, has not made criminal accusation regarding private monopolization cases. (In the cases of cartels and bid-riggings there are many criminal accusation cases.)