CARTEL
AND
BID RIGGING

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1. Introduction

A cartel is a form of union of legally and economically independent companies to limit their competition, based on mutual accord in the form of agreements and within the range of said accord, while maintaining their respective independence. The Antimonopoly Act has many provisions for the control of cartels and actions related to them. The prohibition of unreasonable restraint of trade, as contained in the latter part of Section 3, international agreements or contracts, as contained in Section 6, and prohibited acts of trade associations, as contained in Section 8 of the Antimonopoly Act are regulations relating mainly to cartels. Although there are governmental measures, such as cease and desist orders, pertaining to the above mentioned prohibited unlawful acts, and the same kind of measures pertaining to other unlawful acts, there are still more special regulatory measures pertaining to surcharges and the reporting system of parallel price increases in addition to these pertaining to cartels. Criminal punishments against the contravention of the Antimonopoly Act have been imposed on illegal acts of cartels and bid riggings in Japan. (Refer to Appendix 1)

(1) Harms of Cartels

Cartels have the aspects of protecting corporate profits and stabilizing the management of enterprises, and they are said to allow enterprises to avoid wasteful use of resources, such as repetitive spending of production or advertising expenses. However, larger wasteful use of resources or harms to parties other than the enterprises concerned arises from cartels.

Harms of cartels manifest themselves in the form of interference with wholesome functions of market mechanisms. First, social welfare loss arises as a result of price increases and curtailment of production volume (generation of dead-weight loss). In addition, efficiency in distribution of resources is hampered because of the retention of non-efficient marginal enterprises, or dynamic economic development is prevented due to the loss of inducement to higher efficiency or due to prevention of innovation. Second, cartels represent the most easygoing method to maximize profit through avoidance of competition among enterprises, and because cartels are directly aimed at completely eliminating competition among cartel participants, they resultantly restrict competition in the entire market. Third, cartels are considered to run counter to justice in distribution in that they impose high prices, secure excessive profits, and compel, on the strength of many parties, the acceptance of arrangements that cannot be forced by a single party.
(2) The Attitude Toward Cartels

Under the competition policy and competition law in the major industrialized countries, a position of overall prohibition is held with regard to cartels. There are two stances: that of general prohibition regulation and that of abuse regulation, with regard to regulations concerning hard-core cartels such as price cartel which will be detailed in the following item (4) “The From of Cartels”. The abuse regulation takes the basic stance to allow cartel contracts as being effective, and prohibits only those which are harmful. The general prohibition regulation takes the position that all the cartels should be regulated in regardless of the efficiency. Before the Second World War, both Japan and Germany took the later stance toward cartels, however, the United States, post-war Japan, Germany and the EU etc., now take the former stance.

The adoption of this regulatory posture is getting common pertaining to typical hard-core cartels. The reason for it is that they have large economic and social harms, hamper realization of such economical and social merits as to efficiency improvement due to expansion of production volume or attainment of economy of scale. Regarding this kind of hard-core cartels, OECD calls for advanced countries to adopt common handling based on this hard stance.

Such a regulatory attitude has the following effects. First, simplified regulations result in the reduction of legal enforcement expenses with social merits. Second, cost increase on the part of cartel participants due to the actions of illegal cartels lessen economic inducement to execution of cartels and have the preventive effect on illegal actions, bringing about the reduction of law enforcement cost.

On the other hand, there are cases in which joint research and development cartels or standard unification cartels referred to as cooperative actions or joint ventures between enterprises or internal discipline cartels by professional organization such as attorneys or certified public accountants, have economical and social merits, so different handling of these cartels is desirable by determining them not illegal in principle.

(3) Problems related to Cartel Regulation -- Problems related to Oligopolistic Markets and Economic Friction/Structural Changes

Present regulations regarding cartels are designed to confront the problems facing the effectiveness of surety measures for the opening of the market which will in turn enhance transitions in the structure of the Japanese economy or the easing of trade friction, and the effectiveness of regulations regarding market oligopoly, problem areas regarding regulations concerning market oligopoly arise from the existence of a cooperative attitude which is a prerequisite for oligopolistic mutual dependence. However, it is thought that an attitude of tolerance toward cartels, reflected in both pre-war and post-war laws and government attitudes in Japan, failure to recognize the negative social and economic implications of cartels, and the fragility of regulations regarding cartels contributed to Japan's predisposition to dependence on them.

The first problem is that even without the actual presence of cartels, the cooperative attitude taken among entities brings about the same kind of results. It is impossible under current
law to regulate these activities, which presents a problem of legislation. It is a problem whether or not to regulate these acts.

The second problem regards the fact that it is easy to form cartels through mutual agreement and as agreements can be made through even the slightest of contacts, even when agreement exists it is difficult to discover or prove. As the requirements regarding proof have been relaxed, it is becoming easier to deal with this problem.

The third problem concerns the fact that cartels are highly effective and continue in an oligopolistic market. In order to cope with this problem, regulatory measures, such as cease and desist orders etc., are being strengthened.

The effective obstruction of changes in economic structure and of new entrances into the Japanese market through the actions of cartels or through systems of exemptions is pointed out as illustrations of problems relating to the blocking of overseas enterprises or new enterprises from entering the market even after the removal of public or institutional trade barriers. This problem has been dealt with through stricter enforcement of cartel regulation and curtailment of the exemptions system. Curtailment of exemptions is effected through governmental deregulation programs, mainly designed to abolish exemptions based on individual laws other than the Antimonopoly Law.

Finally, there is the problem relating to the Antimonopoly Act in industrial sectors and markets in which competition was not possible or at least difficult under former government regulations, but a state of competitiveness is in the process of creation due to deregulation and regulatory reforms. The following two problems are considered to exist. Firstly, there are the problems of the applicability of Antimonopoly Act towards the actions of former monopolistic corporations for whom a monopoly was assured by regulations, and of the manner in which how policy should be involved in the creation and maintenance of competition in these kinds of markets. The second problem arises when entrepreneurs and trade associations attempt to undertake joint operations in socially regulated areas in which the relaxation of regulations has been undertaken, or in unregulated fields. Entrepreneurs and trade associations undertaking joint operations with the purpose of preserving the environment, the health of people, and safety, may take steps to prevent the further entry on to the market of such special types of goods specified in standards. How Antimonopoly Act should be applied to such actions is also a problem. In addition, in relation to the second problem, the state of cartel regulation is also being questioned. The second problem questions the circumstances surrounding regulations on cartels. The Fair Trade Commission has released its “Guidelines concerning joint activities for recycling under the Antimonopoly Act” (June, 2001).
(4) The Form of Cartels

There are various forms of cartels, including those which restrict price, volume, customers, patents, products and allocation. It is possible to apply all the provisions of the latter part of Section 3, Section 8 and Section 6 to these cartels. Up until now, there have been many examples of cartels restricting prices and volumes (refer to Table 4). In many cases customers restriction are taken in order to effectively restrict prices and volumes. However, due to the attention afforded trading within industrial groupings as a major contribution factor to closed markets at the Japan-US Structural Impediments Initiative (SII) and, since the end of the 1970s, a strengthening of regulations regarding distribution systems (distribution keiretsu systems), a policy of strengthening regulations regarding cartels to restrict customers was adopted in order to alleviate these problems. In these days, a significantly increased number of cases has been indicated in restricting bid riggings as well as price cartels (refer to Tables 4 and 5).

In recent years, OECD and major governments have introduced two categories of cartels; hard-core type and non-hard-core type, and their guidelines often explain in accordance with these categories. It means that the sole purpose of hard-core cartels is to restrict competition, or objective effects of restricted competitions are clear, and there are no effects of promoting competition or justification to supplement those factors mentioned above. For example, price setting among competitors, bid riggings, restriction or allocation of production volume, and market division by allocating customers, suppliers or areas fall into this category. Hard-core cartels cannot be explained rationally unless the parties concerned, trying to maximize profits, jointly form and execute market control based on agreement and mutual accord. Those cartels, which are determined illegal per se under the Antitrust Law in the U.S., belong to this category and the Competition Law in the EC enforces strict regulations on it.

Non-hard-core cartels describe agreement and mutual consent among enterprises, which is necessary for and reasonably related to the integration of business activities which target or affect the expansion of production volume due to the improvement of efficiency. In this case, it is not possible to judge them illegal only because an agreement or mutual consent includes restriction on competitive actions among enterprises. In these days, they are referred to as cooperative actions, joint projects or joint ventures among enterprises, for which some government agencies in charge have designed guidelines regarding the interpretation of law application. Cases in which internal disciplines of a professional organization are justified in accordance with the nature of services offered by the said profession are not immediately considered illegal just because of the restriction imposed on competitive acts of enterprises by internal disciplines. Also cases involved with advertisements or regulations for business/working hour with indirect effects on price or volume, are handled the same as those mentioned above. Some of them can be classified into non-hard-core cartels for which guidelines have been designed.

The classification of hard-core cartels and non-hard-core cartels is set in terms of evidence of effects on competition or socially desirable effects of actions. Depending on which category the actions concerned belong to, may influence the law application and examination standards. It can be said that the classification of the two patterns applied in the U.S.; the principle of undoubted violation and the principle of per se illegal and rule of reason, correspond to these
categories mentioned above.

Legal problems regarding the proof of communication of intent or agreement, which will be detailed later (II. 2), are the most important in Japan for the application of law in respect to hard-core cartels. On other hand, the major issue for non-hard-core cartels is how to prove substantial restraint of competition (II.3).

In recent years, while much attention has been paid on how to recognize and proceed non-hard-core cartels, most of regulations under the Antimonopoly Act are focused on hard-core cartels, and the strict and positive legal enforcement on them are socially demanded. Until now, most of regulations in the Japanese Law have dealt with hard-core cartels.

II. The Prohibition of Unreasonable Restraint of Trade (Latter Part of Section 3)

Unreasonable restraint of trade is prohibited under the latter part of Section 3 of the Antimonopoly Act and the definition of such is found in Section 2 Subsection 6. The main requirements determined in the definition are entrepreneurs, concerted actions (communication of intent, mutual restraint of business activities, joint execution), and substantial restraint of competition in any particular field of trade (amounting to market control) contrary to the public interest.

1. Entrepreneurs

The term ‘entrepreneurs’ as the person engaging in unreasonable restraint of trade is defined in Section 2 Subsection 1 of the Antimonopoly Act. In the same section, an ‘entrepreneur’ is defined as a person who carries on any form of business of a commercial, industrial, financial, or any other nature. Business is said to be the action of receiving benefit in return for benefit continuously and repeatedly, regardless of profitability. The question of whether or not free-lance persons (for instance, men of profession, such as attorneys and certified public accountants, as well as writers and professional sports players), public entities and public associations (in cases in which the central government or public bodies, such as local governing entities, conduct economic activities) to be considered as entrepreneurs has been brought about. At present, the eligibility of entrepreneurs is now affirmed. There are cases in which the eligibility for the central government or local governing entities was questioned, such as illegal sales of new-year cards with lottery prize, (ruled by the Supreme Court on 18 Dec. 1998 pertaining to the damage suit against the central government by private new-year card enterprises,) and illegal sales of a slaughterhouse run by the Tokyo Metropolitan Government (ruled by the Supreme Court on 14 Dec. 1989 pertaining to a local government). The former case was presented to the sales of post cards which are not being monopolized, under the legal system in which the national government monopolizes the delivery of letters and the production and sales of stamps. Though it was considered that the production cost of new-year cards with special printing and lottery prizes exceed those of normal cards, the government sold them at the same price. Private entrepreneurs who are in competitive with the government for the sales of new-year cards, brought the case before the court, claiming it illegal sales. In the latter case, private butcheries presented a case against the Tokyo government, who had allegedly set the regulated slaughtering charge of public
butcheries comparatively low, which is, according to the plaintiff, less than the actual cost required for processing, to result in unreasonable sales. The courts in charge of both cases recognized that the national and local governmental entities are entrepreneurs in terms of the Antimonopoly Act, and still judged their acts not to fall into unreasonable sales.

According to the definition of unreasonable restraint of trade, entities carrying out such acts must consist of two or more entrepreneurs. Initially, according to judicial precedents, these entrepreneurs were determined to be those entrepreneurs participating in the same field of business. However, in recent years, a policy which, although limited, is not bound by this interpretation has been announced by the FTC. ("Guidelines Concerning Distribution Systems and Business Practices" (1991; Secretariat of the Fair Trade Commission), (hereinafter referred to as "Distribution Transaction Practice Guidelines"), Part I. Antimonopoly Act Guidelines Concerning Continuity and Exclusiveness of Business Practices Among Firms; 2. Boycotts). There was a case whose court ruling was that enterprises in different stages of transactions can exceptionally become parties to unreasonable restraint of trade.

2. Concerted Actions (Communication of Intent, Mutual Restraint, Joint Execution).

In order for cartels to be formed, there firstly needs to be mutual consent or agreements between entrepreneurs in some form, such as a contract etc. Mutual consent between entrepreneurs with regard to the formation of a cartel agreement is known as communication of intent. There is no set form for communication of intent. This is regardless of the presence or absence of documents and measures for the maintaining of the effectiveness of agreement or discrepancies in names.

(1) Communication of Intent
(a) What degree of communication of intent satisfies prerequisites for unreasonable restraint of trade under the Antimonopoly Act

It is said that the communication of intent prohibited as unreasonable restraint of trade within the Antimonopoly Act, includes moderate communication of intents such as tacit agreement as well as explicit agreement of mutual restraint among the parties concerned. Tacit agreement is determined to be such when there is considered to be sufficient consolidated evidence of actual fulfillment and maintenance of such understanding. Where evidence of actual conformity of actions is determined by reason of inference, this may also be determined to be tacit agreement.

Where there is no agreement among the parties involved, there may still be price fixing and all-round price increases amounting to price leadership, however, this is not considered to be an unreasonable restraint of trade. In addition, there may be a joint awareness between entrepreneurs which results in market control, however, this is still not considered to be unreasonable restraint of trade.

In the case of Yuasa Lumber (hearing decision on 31 Aug. 1949), the FTC recognized the communication of intent where all participants in a gathering, realizing that another party would enter a bid at a specific price, decided to take concerted actions. In this case, there was no explicit
agreement regarding the tender price while the participants made conversations regarding some issues including tender price in the meeting. The FTC recognized the communication of intent where there was a price to be referred, for example, regulated price in the past, and someone predicted other’s action and took the same action based on the concerted intent. The FTC explained that the fact outwardly showing the conformity of results does not satisfy but rather it requires a proof that there exists a specific communication of intent among the acting parties.

In the case of the decision revocation claim on newspaper distribution channels (ruled by the Tokyo High Court on March 9, 1953), the newsagents conducted exclusive segmentation of sales areas based on the business practice and contracts which had been closed between them and the newspaper company. The contract did not state the sales area to be exclusive or the newsagents did not discuss the matter in negotiation. The Tokyo High Court recognized the communication of intents among the newspaper agents based on the fact that, being fully aware of the business structure, they followed these practices by accorded actions, and also it was easy to find out that they had the mutual understanding to be allocated with different sales areas in the contracts between the newspaper company and newsagents, to predict all newsagents to conduct sales activities in their own areas and, in return, to secure their status respectively. The court did not find the formation of concerted actions among newsagent based on specific gatherings to discuss the exclusive segmentation of sales areas, but rather recognized the formation of mutual understanding regarding the area segmentation between newsagents based on the agreement with the newspaper company.

In the case of Toshiba Chemical (decided by the Tokyo High Court on Sep.25, 1995), there was a price increase of specific products for which three major production and distribution companies occupied 70% of the market share and other five companies did the rest in the industry. Facing the price increase of raw materials and the decline of product price which led to the demand of price increase, they held several meetings to exchange information in respect to the price increase. In one occasion of those meetings, when the three major companies declared the price increase and requested the rest five companies to follow, there was no clearly stated objection against the request. Later the eight companies directed the price increase in house respectively and informed consumers. In this case, it was questioned whether or not the participants, who did not show approval to the price increase proposed by some of the participants, offered mutual consent. The court showed legal precedents pertaining to the concept of communication of intent as follows; it does not require to state an agreement of mutual restraint, rather it is satisfied by mutual recognition and tacit agreement on the action of price increase by other entrepreneurs, though it is not enough only to recognize and accept the other parties involved. The court further explained the rules by reason of inference regarding communication of intent that, if specific entrepreneurs exchange information with other entrepreneurs regarding the action of price increase and take the same or similar actions, and if there is a relationship among the parties concerned to expect cooperative actions to be taken, it is unavoidable to be deducted that there exists the said communication of intents unless recognized otherwise, i.e. that there are special situations proving the presence of sole decision by the said party regardless of the actions taken by other entrepreneurs, to meet the price competition in the trade market. This means that the actions of information exchange regarding price followed by parallel actions are determined that a tacit consent have been formed with the exemption of other special conditions (proof of parallel actions
based on the individual decision making).

(b) **Legal Problems Regarding the Proof of Communication of Intent**

Where there is no document directly proving an agreement, whether or not there are a proof of “tacit agreement” arises a problem.

It is easy to prove with direct evidence like a statement promising a cartel agreement. However, in general, parties involved try not to leave any evidence in terms of hart-core cartels which are the object of strict regulations. Rather it is natural to avoid the formatting of consents, which are subject to the unreasonable restraint of trade, being disclosed outside. Moreover, the penalty on unreasonable restraint of trade is much heavier than other violations. Only cartels which have more influence on price or volume are subject to the surcharge system, therefore, it has been applied to all the cases of violations on unreasonable restraints of trade. All criminal punishments, which have been positively put in motion since the beginning of 1990, target contraventions against the prohibition of unreasonable restraint of trade. In order to avoid punitive measures, companies try not to leave any proofs which may contribute to charges of violation. In this reality, it is a problem how to prove communication of intent due to the dependence of indirect proof. In order to prove communication of intent, the following three facts are employed and officially recognized.

The first is prior contact or negotiations between the parties involved. To a certain degree, specific concrete proof is necessary, and it is most preferable to establish the fact by direct proof. However, if it can be seen that there were some kind of artificial factors behind the said action, even if there is no direct proof, it may be still theoretically possible to infer the prior contact based on the results of the concerted action or other indirect proofs.

The second is the existence of the content of prior contact or negotiations, or in other words, proof of the existence of an exchange of opinions regarding the matter of cartel agreement. In this case, it is sufficient to show that an exchange of opinions took place. For example, if specific standards can be shown regarding the rate or breadth of price increases, this, however, is even more favorable.

The third is the uniformity of the effect of the action involved and the market environment regarding the uniformed actions. They are often used as indirect proofs of contact or negotiations to deduce that their purpose is to form cartels among the parties involved. It is also possible to use them as circumstantial evidence of tacit understanding based on the resulting uniformity of actions, even without the fact of prior contact or negotiation.

The FTC decisions and court decisions further explain as follows.

In the case of the newspaper distribution channel (hearing decision on April 7 1951, and judged by the Tokyo High Court on March 9, 1953 regarding the decision revocation claim of newspaper distribution channels), while the establishment of mutual understanding among newsagents regarding allocation of sales areas and its exclusiveness was recognized, the existence of prior contact or negotiations was not recognized. In this case, whether or not tacit understanding exists was deduced based on objective circumstantial proofs such as the structure of the industry or business practices, without emphasis on the human factors on communication of intents. Since
there has been no similar case following this case, it is a rare case in respect to the recognition method. After the case, the latter part of Sections 3 has proven whether or not the prior contact or negotiation occurred among the parties involved.

In the case of Toshiba Chemical regarding the decision revocation claim (remand) (decided by the Tokyo High Court on Sep. 25, 1995), as aforementioned, a third party could not identify whether or not some of the parties involved reached an explicit agreement followed by the prior contacts and negotiations. Reviewing the awareness and intents of the entrepreneurs in consideration of various circumstances before and after the price increase, the court ruled the presence or absence of the common understanding or acceptance among the parties concerned should be judged. The FTC deduced the consent of the parties involved from their actions before and after the price increase, repeated meetings (more than ten times) and their attendance, no objection of them against the price increase, etc. and the court affirmed the finding too.

Recent years, in addition to cases in which the existence of meetings or negotiations have been proved by specific proofs, the FTC has also recognized an agreement based on market condition or structure, business practices even if the meeting in which the agreement was made cannot be specified with difficult to prove the contents of negotiations and decision with direct evidence. Those cases of the Hiroshima City Oil Dealer Trade Association and Ando Landscape Engineering fall into this example.

In the case of the Hiroshima City Oil Dealer Trade Association (hearing decision on June 24, 1997), there was a problem to prove communication of intent regarding the decision of price in the trade association which was composed of sales dealers in the Hiroshima area. They decided to increase the retail price of general benzene to be sold in their oil stations. There were no sufficient direct evidence regarding the time and meeting pertaining to the decision of retail price increase, and the organization of the said trade association. By reason of inference from the facts; the price increase in conformity with unnatural actions, such as increase of primary price, the comparison of the retail price increase with other areas, no possibility of price leadership by the market structure, and the actions based on the assumption that the decision for price increase exists, for example, that, knowing the policy of the trade association, the members raised the price, and that the reporting was made in meetings regarding the easy price raising, the FTC suspected the price increase as the result of human-induced common recognition rather than individual actions, and decided the effect that there was the decision of price increase in the meeting of the said trade association, based on the facts regarding the prior contacts and negotiation and their contents. The FTC proved the communication of intent based on the following facts concerned with the prior contact and negotiation; recognition of members, activities of the trade association in the past, objective situations, background of the meetings, confirmation after price increase, and recognition of illegality among the parties concerned regarding the contents of meetings. The case of Ando Landscape Engineering (hearing decision on Sep. 12, 2001) regards bid rigging, in which when and where the bid rigging was agreed was not specified. As a result of the detail analysis pertaining to the historical background in the hearing, the FTC determined that the specification of the date and place in respect to the communication of intent is not required because it is possible to prove its presence based on the common understandings of the entrepreneurs concerned, such as entrepreneurs’ recognition, ranking of bidders, and order entry of individual products.
In the case of zip code readers (hearing decision on June 26, 2003), the FTC determined that it is possible to infer communication of intent from the integration of facts such as market actions of the entrepreneurs before and after the communication of intent, which contributes to deduce its presence, on the assumption of the market environment which facilitates it, even though there is no proof of prior contact and negotiation or meetings. This was a bid rigging of zip code readers for the former Post and Telecommunications Ministry. There were only two entrepreneurs to produce and sell machines of different specifications, one for clockwise, and the other for counterclockwise. The ministry announced to accept a different type of machine every time in the designated tender and conveyed information to the two companies. Therefore, the one producing the machine which was subject to the bidding, applied the tender and the other did not. Under these circumstances, the two companies shared the bidding of the said machine. The FTC recognized that it is easy to facilitate the communication of intent because of the market environments as such; the market structure of the said machine, characteristics of the product, and past market actions of the parties involved, and because of duopoly, trade barrier, availability of tender only to those who received information from the ministry, and the adoption of cooperative actions in the past. The FTC listed other indirect evidences as to meetings offering a statement of objection against competitive biddings in the ministry and demands for continuity of information offering, the uniformity of actions that only information receivers entered the bidding and divided the share in halves, which should have been impossible for competitive tender, and the recovery of competitive action and results after the investigation which brought about the suspension of information offering. The FTC established the presence of communication of intent through indirect evidence of market environments which may facilitate communication of intent, actions which promote or maintain it, and unnatural actions which would not occur without it, while they did not necessarily recognize the positive arrangement of meetings or negotiations in which they divided the share in halves.

The normal procedure of bid rigging starts with communication of intent to form basic agreement followed by the coordination of deciding bidders for each bid item, which is referred to as action of individual coordination. The FTC usually recognizes communication of intent on basic agreement. The FTC often cannot collect direct evidence of basic agreement, because the parties concerned often try to hide the evidence of basic agreement for bid rigging which is classified to hard-core cartel. In this case, they use a method by reason of inference to proof by collecting indirect facts in respect to individual coordination meetings, in order to deduce the presence of basic agreement referred to as communication of intent. The case of Kyowa Exeo was a problem of bid rigging for equipment purchase by the U.S. Forces, Japan (USFJ), where 9 manufactures formed a service club for the sake of bid rigging. The FTC recognized the basic agreement in terms of communication of intent for bidding of equipment based on the following facts as evidences; reason for the establishment and process of the service club and the confirmation of order acceptance with the nine parties involved for individual tenders.
(2) Agreement to which the Latter Part of Section 3 is Applicable -- Non-Applicability of the Latter Part of Section 3 to Vertical Restriction --

Most cases to which the latter part of Section 3 of the Antimonopoly Act concern so-called horizontal agreements among competitors. Cases of so-called vertical agreements between enterprises at different stages of transactions are very few, and in particular cases involving vertical agreements between suppliers and purchasers are virtually none. Most cases of vertical agreements were deemed the contravention against the prohibition of unfair trade practices under Section 19 of the Antimonopoly Act, while some cases were dealt with under the former part of Section 3, Private Monopoly, or Section 8, Regulation of Actions by Trade Association. Reasons for restricting the application of the latter part of Section 3 cannot be understood based solely on the text of Section 2 Subsection 6, but they are due to the precedents regarding the following two requirements:

(2-1) Mutual Restraint

The content of concerted action must include mutual constraint and all related parties must be involved in restraint. Therefore, an agreement detailing restraint by only one of the two entities does not constitute unreasonable restraint of trade, for example, a sole agency agreement with a distributor.

(2-2) Common Restraint

Up until this time, the court has ruled that restraint may be imposed on all parties involved but only when the content is different, as in the bestowal of sole selling rights and exclusive marketing of the products of a specific seller, or where one party applies common restraint to numerous other parties, as in the case of resale price maintenance. In these cases, the party issuing the restraint shall not be classified as being a party responsible for unreasonable restraint of trade. The content of restraint had to be the same between all parties concerned and the parties concerned all had to be within the same field of trade.

In the case of the newspaper distribution channel agreement that was later claimed to revoke the decision (ruled by the Tokyo High Court on March 9, 1953), the FTC decided that the sales agreement between the newspaper company and newsagents to set exclusive sales areas among those agents should be classified as unreasonable restraint of trade, applied the law and issued cease and desist orders. However, the Tokyo High Court overrode the decision of the FTC and ruled that the newspaper company shall not be classified as being a party responsible for unreasonable restraint of trade, because the nature of concerted actions for unreasonable restraint of trade constitute that entrepreneurs should be in competition (1), should reciprocally restrain business activities (2), and also the restraint should be common among entrepreneurs (3).

After this case, the FTC seemed to regard collective price agreement of manufactures, wholesale or retail distributors as an individual case of unreasonable restraint on each trade stage, and the law was accordingly applied. For example, in the case of Snow Brand Milk Products recommendation decision on May 22, 1974), the FTC proceeded the price agreement of collective
negotiation between sellers and buyers as concerted actions of the parties involved, however, while only the former were charged illegal, the latter were exempted from the application of law. Also they decided the case of price agreement closed between a sales dealers association, manufacturer, and wholesale dealers, as concerted actions of entrepreneurs on each trade stage (Ishizuka Glass Case, recommendation decision on May 12, 1974). Vertical agreements have been proceeded by the regulations of Section 19 prohibiting unfair trade practice and, on rare occasions, under the first part of Section 3 prohibiting private monopoly.

In these days, there shows a tendency to change this conventional interpretation.

In the seal bid rigging criminal case ruled on Dec.14, 1993, which a competitor of bidders played a role of subcontractor under a designated competitive bidding, the Tokyo High Court recognized a specific field of trade for the parties concerned including the subcontractor of the bidders, and did not require the parties involved regarding unreasonable restraint of trade to be officially competitors in the same field of trade. The court explained that ‘the entrepreneur’ said here need not be in the same or similar competitive relationship, and that it should be unreasonable to decide that there are no business activities to be restrained because the said entrepreneur is not a designated competitor. Furthermore, the court detailed that it should be no obstruction to judge that the said entrepreneur took concerted actions to mutually restrain ‘business activities’ because the said entrepreneur is restrained to the collusive bidding concerned which was agreed with other three designated bidders, conducted business activities based on the collusion, resulting the restraint of business activities, which should have been free, of the said entrepreneur. The court concluded that the parties involved need not be restrained in the same manner. In respect to the claim of the defendant appealing that the parties involved with unreasonable restraint of trade should be competitors, based on the ruling pertaining to the case of the newspaper distribution channel decision revocation claim, the court ruled that it is questioned that whether or not ‘the entrepreneur’ should be interpreted by limiting to the entrepreneur who is competitive in accordance with the ruling mentioned above, under the law in force, and at least it is not reasonable to interpret that ‘the said entrepreneur’ should be limited in competitive relationships in terms of the meaning claimed by the attorney. However, the court judged that this part is a dictum and it should not be disturbed to deal with those who are substantially in competition, as competitors. This judgment is considered not to rebut the decision on the case of the newspaper distribution channel decision revocation claim. Some of the cases proceeded by the FTC, coming after the judgment of the seal bid rigging criminal case, have been affected by the judgment, for example, the cases of large-scale video machine collusive bidding (ordered surcharge payment on March 28, 1995) and Okinawa Aluminum Sash (ordered surcharge payment on June 6, 2000). While they are the case of surcharge payment order, both decisions stated that the parties violating the latter part of Section 3 and the object of surcharge payment order include entrepreneurs who are not in the same stage of trade.

The FTC publicized the guideline of legal operation to modify the conventional line of thoughts regarding the refusal of concerted trade (“Guideline under the Antimonopoly Act Concerning Distribution and Trade Practices” Part I, Section II, 3, Notice (3), (the FTC Secretariat, July 11, 1991). The guideline accepts the mutual restraint limiting business activities of the parties concerned and directing to the achievement of common purpose.
3. Substantial Restraint of Competition in a Particular Field of Trade

(1) The Problem of Implementing Agreement of Concerted Action

In order to classify an act as an unreasonable restraint of trade, there arises the problems as to whether or not agreement in joint action, which results in a situation of market control, must be present. This is related to the theoretical problem of whether or not joint action and a situation of market control must both exist to be classified as unreasonable restraint of trade, and the practical problem of just when cease and desist orders should be instituted.

There are three lines of thought regarding this; 1. Unreasonable restraint of trade should be classified as such purely on the basis of mutual consent; 2. Substantial restraint of competition, in a situation of market control, must exist as a result of mutual consent in order to be classified as unreasonable restraint of trade; 3. Actual preparatory action etc. carried out by mutual consent must be taken in order to be classified as unreasonable restraint of trade.

Initially, the FTC judged mutual consent in joint action alone as insufficient grounds to be classified as unreasonable restraint of trade. In addition to mutual consent, preparatory action regarding to price rises etc. or some form of resulting effect had to exist (see 1974 FTC Rulings Regarding Unreasonable Restraint of Trade). However, in subsequent court rulings, mutual consent alone was judged to be sufficient ground for actions to be considered as unreasonable restraint of trade. There does not arise any problem to apply the law to hard-core cartels in accordance with this interpretation,

(2) Particular Fields of Trade

It has been said that various particular fields of trade mean the market itself, which is the place where the presence or absence of restraint of competition is to be found. According to recent theoretical adjustments, substantial restraint of competition means formation, maintenance and strengthening of market power, and the market should be designed to be measurable of share or concentration of entrepreneurs as indices to evaluate market power. Of course, market scope is unique and is affected by different methods of restraint of competition which may vary depending on actual cases. In order to set a particular field of trade, it is necessary to take into consideration of factors as to products (the subject of transactions), areas (the area of transactions), time, stages of transactions, and customers and suppliers.

The Fair Trade Commission issued 'Operational Guideline of the Antimonopoly Act Concerning Examination of M&A’ (May. 31, 2004; the Fair Trade Commission) (Guideline for M&A) (business combination). In this document, the FTC furthereed its general views regarding the definition of particular fields and substantial restriction in the case of "mergers and acquisitions" (corporate combinations).
(2-1) Basic Method of Defining Markets

The definition of markets is influenced by substitution of supply and demand which companies face. The basic line of thoughts for defining markets adopts the SNNIP test as standards, which means to define a market of a scope where it is possible to make Small but Significant and Non-transitory Increase in Price by monopoly. In the U.S. and the European nation, enforcement agencies declare the effects in various guidelines. So far the FTC has not declared to adopt this approach, rather applying the following analysis method. If there is a product in question dealt by a company in question and also another company which is assumed to monopolize the said product, the FTC will examine whether or not the said assumptive company is able to temporarily increase 5~10% of its price (small but significant). Normally if consumers find an alternative product to be replaced, this price increase would not occur. In this case, it is not appropriate to define the market of this product. Repeating the same procedures in the product group which includes the said and alternative products will finally reach to the definition of a certain product group adopted by this method, which allows price increase. While this example is explained with the aspect of substitution of demand, in this method, it is necessary to take into consideration of the effect of the substitution of both supply and demand since some case are influenced by the substitution in supply. It is also possible to define a geographical market as well as a products market, both of which can be proceeded the same.

The definition method has a defect called cellophane fallacy which may cause the definition of excessively broader monopoly markets or oligopolistic markets. Price elasticity of demands is rather high, when non-competitive actions of a company bring about a price higher than the competitive price, in a non-competitive market, because the assumptive price increase starting from this non-competitive price will cause bigger demand fluctuation. There is a method to adopt the market which was subject to anti-competitive actions of the company in the past, as a market of the case in question.

(2-2) Status of Market Definition under the Japanese Law until Now

(a) Standards for Defining Product Markets (Fields of Trade with the Same or Similar Kinds of Products or Services)

Product markets are classified by analyzing product or service types (hereafter referred to as products). It has been considered that the scope of this market may depend on the function of products and the final usage of such or substitution. This is determined by analyzing the uniformity of final product usage (functionally identical), and by calculating the degree to which consumption volume of identical products is influenced by price fluctuations of the product in question (cross elasticity of demand). If products of a similar nature exist and they have reasonable substitution of final usage, even if they are not completely functionally identical, it is possible for them to be classified as being in the same particular field of trade (reasonable interchangeability). In reality, it is possible to refer to the ‘Standard Classification of Industry’ or the ‘Standard Classification of Products’. The Guideline for M&A lists the similarity of product function, utility, usage, and supply facility, as factors to be considered.
(b) Standards for Defining Geographical Markets

The determining of geographical markets is designed to limit the scope of market power by placing geographical limits on product markets. Geographic markets are designed to limit the degree to which a supplier of specific products is able to control the market. The Guideline for M&A describes that product characteristics, production capability, the location and size of the manufacturer and supplier, business areas such as sales channels, the degree of development of distribution channels and associated costs and the customs etc. of consumers should be all taken into consideration.

It is possible to break down geographical markets into national markets and local markets. There have been cases where the determining of geographical markets has been influenced by the particularly small nature of areas, or by the fact that there are areas in which specific customers are predetermined. With the opening of the Japanese market to foreign countries, it is becoming increasingly necessary to consider products in terms of the global market and not merely national or local markets, as imported items are often more competitive than local items.

(c) Other Standards for Classification of Markets

Where a particular group of suppliers and a particular group of customers exist in any said geographical area and where there is effective restraint of competition, it is possible for the market for a particular product to be divided into a number of smaller markets within that area.

Firstly, it is possible for a particular market to be divided into one for all products of a particular industry and one for a portion of the products of a particular industry. Products of the same kind may be divided into a finished product market and a semi-finished product market.

Secondly, it is possible for the market of a particular product to consist of different consumers and different trading partners with a large market for purchasers of large volumes, and a small market for consumers who purchase small volumes.

Thirdly, it is also possible for the market of a particular product to be divided into manufacturer, wholesale, and retail markets according to the different stages of purchasing. This finding is possible on the basis of the competitiveness and marketing activities of a manufacturer, and the degree to which industrial grouping is established.

(d) Market Definition in the Regulation of Cartels

In many cases of regulating cartels, when the cartels are actually the effective hard-core type, there occur no problems if the products and areas that are the target of cartels are defined as markets. The market definition problem in the prohibition of cartels is not substantial when compared with other regulatory patterns (for instance, mergers and private monopoly). However, the following cases bring about problems. First, with regard to bid rigging, there is a dispute as to whether or not each case of bidding can be regarded as a market. Second, some of non-hard core
cartels need to be carefully analyzed because markets, which cause problems in respect to market power in relation with the content of concerted actions by the parties involved, are not consistent.

(3) Substantial Restraint of Competition
(a) The Legal Definition of Competition

The definition of Competition is found in Section 2 Subsection 4 of the Antimonopoly Act. This provision stipulates firstly the scope and requisites of competitive relationships, secondly, the connotations of supplier competition and consumer competition, and thirdly, the connotations of actual and potential competition. This definition can be applied to provisions in which competitive relationships are regulated. However, in determining the presence or absence of substantial restraint of competition, as detailed in the definition of unreasonable restraint of trade, this definition is insufficient.

(b) Substantial Restraint of Competition

Substantial restraint of competition means the state of market control and the creation, maintenance and strengthening of that state. Market power is the ability to control prices or eliminate competitors. Court rulings have also determined that ‘substantial restraint of competition’ has the same meaning as limiting the ‘effectiveness’ of competition and is the state where the possibility of effective competition is almost no longer possible. In this state, competition itself decreases while specific entrepreneurs or trade groups, through purposely, and to a certain degree, freely influencing price, quality, volume and various other conditions, effectively gain control of the market, or are in a position to potentially gain control as a result of substantial restraint of competition.

(c) Factors Influencing Determination of Substantial Restraint of Competition

According to the theory of traditional industrial organization, standards for determining substantial restraint of competition include factors such as market structure and market conduct. Market performance can be used as supplementary factors. Important factors when considering market structure are the market share ratio, barriers to entry and product differentiation. Especially market share and concentration ratios are important. They function as the starting point of analyzing market power, for example, the greater the market share ratio, the greater the risks are that the parties concerned will be found violation of the Antimonopoly Act. There are two ways of calculating concentration ratio, one is the N-company concentration ratio which adds market shares of top N companies, and the other is Herfindahl-Hirschman Index (HHI) which squares shares of all companies in the whole market and sums them up. In recent years, many of enforcement agencies tend to implement HHI as standards for their guidelines. Factors, emphasized in analyzing whether or not the substantial restrain of competition exists, depend on market conducts of the said company whether they are cartels or mergers. For example, the standards which are considered important with regard to cartels are different from those considered important with regard to mergers. It is impossible to impose objective standards across the board. In practice, the FTC has announced general standards in its guidelines which are applicable under a variety of conditions.
If substantial restriction of competition is regarded as generation, maintenance, and reinforcement of a market power, the market power can be measured based on the measurement of marginal expenses and learner indexes without passing through market definition in terms of economic theory. However, this measurement is difficult for various reasons, and the measurement factor, which was advocated in the context of traditional industrial organization theory, is estimated by using substitutional variables as a directly un-measurable market power.

(d) Determining Substantial Restraint of Competition with Regard to Cartels in Japan

Through cartels, the participants operate together as one body with the result that competition between the members of the cartel is eliminated. However, in addition to that, in order for substantial restraint of competition in a particular field of trade to occur, the participants of cartels need to hold a large share of the market or cartel outsiders in that market follow cartels. In order to determine substantial restraint of trade with regard to cartels, it is important whether there is the following of outsiders, and the market share ratio of both cartels and outsiders is important.

The recognition of substantial restraint of competition has been seldom regarded as a major issue in the regulation of cartels because the regulation of cartels under the Antimonopoly Act in Japan is mainly focused on hart-core cartels. In the past cases, in order to determine the substantial restraint of competition in cartels, important factors have been the market share ratio of the parties concerned and outsiders, and the presence or absence of the adherence by outsiders. There are some exceptions in which how to recognize the substantial restraint of competition arose a problem, as follows.

In a local city, there was a case of cartels for the increase of sales price for foods among seven manufacturing/sales traders of a specific product, ‘bean curd’. (Case of Central Foods, recommendation decision on Nov. 29, 1968). The major seven occupied 50% of the market and one of them held 30%. The seven manufacturing/sales traders occupied the positions of major directors including the chairman for the trade association of manufacturing/sales traders of the said product. Most of them in the region became members of the union. Those except the major seven traders were in difficulty of increasing production of the said product due to their management structure in a small scale depending on family labors. When the major seven traders increased the price, other traders living in the local city followed the price increase which was almost equal to the price set by the seven. In this case, the market share of the cartel participants was just low as 50%. It seemed to be difficult to recognize the substantial restraint of competition based on this fact. However, it was considered that the recognition of the substantial restraint of competition became possible due the following facts; the capability of production increase by non-members of the cartel was almost zero, non-members of the cartel followed the price increase, the cartel members occupied high status in the said field of trade, and, in addition, it was difficult to participate from other regions due to the nature of the said product.

Needless to say the adverse effects of competition, in future, the importance of cooperative actions among competitors will be emphasized in order to bring socially preferable
impacts in respect to environmental protection such as recycling, health and safety protection of human and animals, standardization/cooperative research and development, which may cause problems on cooperative actions under the Antimonopoly Act. The category of these cases is referred to as non-hard core cartel. Until now, there has been no problem regarding the application of the law for them. None of them received official decisions and they have been handled unofficially as consulting cases. The recognition of substantial restraint of competition will be a problem in respect to the application of the Antimonopoly Act to these non-hard core cartels. The concept regarding the regulations of non-hard-core cartels is partially given in “Guideline Concerning Cooperative Research and Development under the Antimonopoly Act” (April 20, 1993), “Guideline Concerning Patent and Know-how License Agreement under the Antimonopoly Act” (Secretariat of the FTC in July 1997), and “Guideline Concerning Joint Actions in Respect to Recycling, etc. under the Antimonopoly Act” (June 2001).

4. Public Interest

It is questioned regarding whether or not it is possible to consider other values than competition or competition policy, and purpose of the policy in individual cases which have been decided as violation of the Antimonopoly Act, and also whether or not such consideration is favorable. Values and policies other than competition are referred to as social purpose such as protection of environment, health and safety, labor, etc. Under the Japanese Law in the past, problems have arisen in respect to the relation with industrial policies or administrative guidance of restraining competition which conflict with competition policy or the Antimonopoly Act.

(1) The Meaning and Legality of Public Interest

There are three lines of thought regarding the meanings of public interest. 1. The interest of the whole national economy. In this view, public interest includes not only competition policy but also other values. The considerations of competition must be weighed with other values. This view shows that some cartels to restrict competition should not be illegal because it may serve a useful value. 2. The maintenance of competition. This view may not permit the other considerations to intervene into deciding about competition policy matter. Cartels to make market control always are held as illegal without exception. 3. The maintenance of free and fair competition resulting in the preservation of consumers’ interests and the democratic and healthy growth of the national economy. This view allows considering cartels of restricting competition with other social values, but the case of allowance is limited to the range of contribution to general consumers’ interest. In this concept, though cartels to restrain competition are allowed, the permissible scope is strictly more limited than that of the first view because cartels to restrict competition seldom serve to accomplish the interests of consumers and the democratic and healthy growth of the national economy.

A problem arises regarding the necessity of determining whether or not cartel action is contrary to public interest. There are three lines of thought regarding this. 1. As restraint of competition is, of course, contrary to public interest, it is unnecessary to determine this. 2. In order to determine if an action is illegal, it is necessary to determine whether or not it is contrary to public interest. 3. An action is illegal in principle but there may be exemptions as long as it does
not contravene the ultimate purpose of the Antimonopoly Act, which is found in section 1 of it.

If the lines of thought outlines in 2 and 3 of the above paragraph are adopted, the scope of the actions considered illegal under the Antimonopoly Act is relatively narrower. The Supreme Court suggested that it took her opinion like 3 above in the price fixing case by oil cartels, which was judged not to be exempted. Furthermore, up until this time, there is no record of such actions being judged exempted, and in practice, such actions may be interpreted in much the same way as per se illegal.

(2) The Prohibition of Unreasonable Restraint of Trade and Administrative Guidance – Relationship between the competition policy and its benefit and the policies other than competition and their benefits

Administrative guidance is where government bodies act to directly influence parties to abstain from or to commission a specific action with the aim of achieving public goals. In such cases the voluntary cooperation of the parties concerned is a prerequisite. The following two problems arise with regard to the Antimonopoly Act. With regard to this problem, the Fair Trade Commission has released “Guidelines concerning administrative guidance under the Antimonopoly Act” (Fair Trade Commission, 1994).

The first is the problem which arises when the content of administrative guidance or the method of implementing such administrative guidance is against the Antimonopoly Act. On June 30, 1994, the FTC announced its policy with regard to administrative guidance and the Antimonopoly Act. This policy reflects a tendency to disapprove of administrative guidance which restrains competition. In particular, the policy condemns administrative guidance with no specific legal basis which has a detrimental effect on market conditions, such as prices, and also condemns set forms of guidance which give rise to cartels. The Japanese Government also made its policies regarding price cartels and administrative guidance clear in the 72nd Lower House Budget Committee Report released on March 12, 1974.

At the present time, preliminary adjustments (administrative coordination) are in the process of being undertaken between the Fair Trade Commission and the respective government organizations in charge, in order to avoid administrative guidance being given that may conflict with, or contradict the Antimonopoly Act.

The second problem regards whether or not the actions of entrepreneurs acting in line with administrative guidance are illegal under the Antimonopoly Act. Even if administrative guidance is given, if entrepreneurs themselves act spontaneously and violate the Antimonopoly Act with regard to unreasonable restraint of trade, they shall be guilty of such. When there is concerted action between entrepreneurs, regardless of whether the contents of administrative guidance are strengthened or whether they are carried out without modification by such parties, they shall be guilty of violating the Antimonopoly Act with regard to unreasonable restraint of trade. As a rule, such actions by entrepreneurs are judged to be illegal.

An exception to this is when the actions of entrepreneurs acting in accordance with
administrative guidance are determined as being illegal, problems arise as to whether or not such actions are to be determined as contrary to public interest.

There have been cases where the Supreme Court has made exceptions and judged actions which as a rule are illegal, to be legal in certain emergency situations. An example of this was the situation with oil cartels where the Supreme Court judged that even though administrative guidance regarding prices may not have been directly based on specific laws, as long as they fulfill the following three conditions, such administrative guidance need not be considered illegal. 1. There is sufficient reason for such action given the particular circumstances at the time. 2. The administrative guidance given is socially acceptable. 3. It does not contravene the ultimate purpose of the Antimonopoly Act. Furthermore, the actions of entrepreneurs acting in accordance with such administrative guidance should not be considered as illegal, given that they were following and cooperating with legal administrative guidance.

With regard to bid-rigging, there are occasions when government or associated agencies who are in the position of placing an order, have the tenderer partake in bid-rigging. As a subject of criminal punishment, there is a possibility that individuals on the order side might be punished for their involvement in aiding and abetting the bid-rigging, but the undertaking of such procedures is exceptional. In addition to that, it is considered that there are no provisions under Antimonopoly Act, which aims at regulating such actions of the ordering party. When bid-rigging is undertaken in accordance with the desires and wishes of the ordering party, the situation in which only the bidding party is punished is unbalanced and problematic.

There is a possibility of improving the situations under the law enacted in 2002 pertaining to the elimination and prevention of involvement to bid-rigging, etc. Under the provisions of this law, if a bid-rigging occurred inside the central government or local authorities, and their public servants took actions to get involve with the bid-rigging, the obligation is imposed, based on the demand of the FTC, on the head of the central government or a local authority which conducted the tender, to carry out an internal investigation, take necessary measures to eliminate bid-rigging, and publicize results of the investigation. In addition to these measures, if the government or a local authority suffers from the damaged caused by bid-rigging, the law imposes on the government and local authorities the obligations to claim compensation to the civil officer concerned who got involved with the bid-rigging, based on investigations, and allows to issue disciplinary measures against the said civil officer if necessary.
III. Regulations Regarding Trade Associations (Section 8)

1. An Outline of Trade Association

Trade associations are one of the main subjects addressed by the Antimonopoly Act and the definition regarding such associations is found in Section 2 Subsection 2 of the same Act. Firstly, trade associations, as determined in this Act must have as their principle purpose the furtherance of the common business interests of the constituent entrepreneurs. Purely social organizations and religions organizations are not included in this definition. However, organizations for the purpose of research, discussion, and the compilation or distribution etc. of statistics and other information specifically regarding business activities in order to promote the development and communication of such, are included in this definition. The purpose of such organizations is not to be determined by their articles of association, but rather by their actual activities.

Secondly, the trade association must be a combination or federation of combinations of two or more entrepreneurs. A trade association must consist of entrepreneurs who are fully independent from that particular association, have a title which is different from the entrepreneurs concerned, and to a certain degree, have a constant structure. However, the relationship between the constituent entrepreneurs is irrelevant, as is the particular category of business. In addition, when the trade association has branches or sub-branches with their own regulations and executives which are to a certain extent independent from the main trade association, the branches or sub-branches are considered in themselves as trade association.

2. The Purpose and Basis of Regulations Regarding Trade Associations

The purpose of regulations regarding trade associations is in order to regulate the formation and activities of cartels through the structured activities of trade associations. They also have the supplementary function of ensuring the consistency of regulations regarding unreasonable restraint of trade.

In Japan, regulations regarding trade associations have such important roles. The reason is that, firstly, through the structured activities of trade associations restraint of competition easily occurs, and, secondly, since trade associations have a history as controlling bodies which dates back to before the Second World War, traditionally in fact their ability to control is strong.

Regulations regarding the activities of trade associations are found in Section 8 Subsection 1 of the Antimonopoly Act. Subsections 2 and 3 of the same Section contain details regulating the reporting of the formation and dissolution etc. of trade associations. Regulations regarding trade associations were previously contained in the Trade Association Act before being incorporated into the Antimonopoly Act. Section 8 was incorporated into the present Antimonopoly Act in 1953 at the time of the abolition of the Trade Association Act.
3. Prohibited Actions of a Trade Association -- Wider Restriction-Targeted Actions than in the Case of the Latter Part of Section 3 (horizontal restraint/vertical restraint) --

Actions of a trade association are lawful, in principle, and only actions of 5 patterns listed in Section 8 Subsection 1, are regulated. The regulation in Section 8 Subsection 1, includes the prohibition of cartel actions conducted by entrepreneurs under the instruction/decision by a trade organization to supplement Section 3. The target of this regulation is the case in which a trade association instructs or decides to take the following kinds of actions. Section 8 is applicable to both horizontal and vertical restrictions. Also, Section 8 is applied to cases of competition-restricting actions in which those not in competitive relations are also included as members of the association. There are also cases in which Section 8 can be applied to restrict actions whose competition-restricting effects are weaker than actions regulated under the latter part of Section 3. Thus, there is difference in the scope of application between the latter part of Section 3 and Section 8, with the Section 8 having wider applicability than the latter part of Section 3.

(1) Substantial Restraint of Competition in Particular Fields of Trade (Section 8 Subsection 1 Paragraph 1)

Firstly, the substantial restraint of competition in a particular field of trade (Section 8 Subsection 1 Paragraph 1) is prohibited. Although this regulation is basically the same as those found in the latter part of Section 3, it has the following distinct characteristics. Firstly, there are no provisions regarding the restriction of various kinds of activities. It has been pointed out that, in respect to these regulations in comparison with the proof of concerted actions or agreement under the latter part of Section 3, actions being subject to the regulations are broader, which will result in comparatively easier proof. Secondly, there is no mention of actions “contrary to public interest.” From the above-mentioned points we can conclude that all action of trade associations with regard to market control is considered illegal. In recent days, some of judicial precedents indicated that, under these regulations like the latter half of Section 3, there is an allowance for the exemption of illegality due to social benefits. Although many of the actions regulated are actions regarding prices, in contrast with the latter half of Section 3, other types of action apart from price restriction are treated to be illegal at a much earlier point.

(2) Entering into an International Agreements or an International Contract Specified in Section 6 (Section 8 Subsection 1 Paragraph 2) is the Same as Section 6.

(3) Limiting the Present or Future Number of Entrepreneurs in any Particular Field of Business (Section 8 Subsection 1 Paragraph 3)

A ‘particular field of business’ is said to be a place or field where entrepreneurs are present or will be present. Limiting the number of entrepreneurs is said to be the action of preventing new entrepreneurs from entering into a particular field of business or eliminating those currently present in that particular field of business. Examples of actions regulated under this paragraph include: restricting access to trade associations even when it is difficult to commence business without being a member of that particular trade association; restricting the construction or expansion of the facilities of entrepreneurs who are not members of that particular trade association.
through forbidding customers of constituent entrepreneurs from doing business with such non-constituent entrepreneurs.

(4) Unjustly Restricting the Functions or Activities of Constituent Entrepreneurs
(Section 8 Subsection 1 Paragraph 4)

If the number of constituent entrepreneurs in a trade associations is large, an executive organization is often formed which restricts the actions of constituent entrepreneurs. In this case, the action of trade associations with regard to their constituent entrepreneurs is regulated under this paragraph.

Under this paragraph, the unjust restriction of fair and free competition is considered to be illegal. Not all restraints imposed on constituent entrepreneurs by trade association are a problem, but it is the object of this paragraph to regulate those restraints which do impede fair and free competition. This object of this paragraph is to regulate the actions of trade association with regard to their constituent entrepreneurs.

The problem being dealt with in this paragraph is regarding the restraint of ‘the functions and activities’ of constituent entrepreneurs. In this respect, there are parts of this Paragraph which are duplicated in Paragraph 1 of the same Section. Even though the effect of the actions of trade associations in restricting the activities of constituent entrepreneurs in a particular field of business may not amount to substantial restraint of competition, they are still regulated under paragraph 4. Paragraph 4 deals with less severe impedance of fair and free competition than paragraph 1. Paragraphs 1 and 4 regulated different actions depending on the degree of constraint of competition. Of course, the actions covered by both paragraphs include actions regarding price, volume and customer restrictions.

(5) Causing Entrepreneurs to Employ such Acts as Constitute Unfair Trade Practices
(Section 8 Subsection 1 Paragraph 5)

This paragraph is designed to regulate the actions of trade associations to restrain the activities of entrepreneurs whether or not they are constituent entrepreneurs of trade associations. ‘Causing’ in this paragraph refers to attempting to influence entrepreneurs to employ such acts that constitute unfair trade practices. In this case, it does not matter whether or not forceful elements were included in the attempt to influence entrepreneurs to employ such acts that constitute unfair trade practices, and the response of the entrepreneurs approached (whether or not they actually acted) is also irrelevant. An example of actions regulated by this paragraph includes the actions of trade associations with regard to outsiders in indirectly refusing to do business with outsiders.
4. The Relationship between the Latter part of Section 3 and Section 8 (especially Section 8 Subsection 1 Paragraph 1)

Section 8 deals with actions of systematic restraint by trade associations. Section 3 can also deal with the actions of constituent entrepreneurs within the same trade association not related to the activities of it. In an oligopolistic market, as the number of entrepreneurs is few, when decisions are made for the first time as a trade association through the mutual consent of constituent entrepreneurs, if it is possible to prove that this is in contravention of Section 8, even though this is an act of a trade association, it is possible that Section 3 and Section 8 may both be applied. There is a difference regarding the cease and desist order and the application of non-fault damage compensation litigation between Section 8 Subsection 1 Paragraph 1 and the latter part of Section 3. After the amendment of the Act, the difference regarding the application of non-fault damage compensation litigation between Section 8 Subsection 1 Paragraph 1 and the latter part of Section 3 was removed. Those issues arise due to the fact that the sanction of Section 3 is greater than that of Section 8.

In the mid-1970s, although the application of Section 8 was more common due to fact that it was easier to prove, since the latter half of the 1970s, the application of Section 3 has become more common. However, it is standard practice to apply only one of these Sections with regard to a particular action.

5. Miscellaneous

As the surveillance of cartel activities by trade associations is possible, a system of report has been established by the FTC with regard to the establishment and dissolution of trade associations. In order to define the legal limits of trade association activities, the FTC announced guidelines regarding its application of these sections in ‘Guidelines Concerning the Activities of Trade Association under the Antimonopoly Act’. Further, the Trade Association Research Group released ‘Problems Regarding the Activities of Trade Associations and the Application of the Antimonopoly Act – Moving Toward More Open Business Activities’, in order to give some idea of – the extent of the problem. The FTC published the new guideline for the activities of trade associations on October 30, 1995.

IV. Regulations Regarding International Agreements and International Contracts (Section 6)

Section 6 declares that, ‘no entrepreneur shall enter into an international agreement or an international contract which contains such matters as constitute unreasonable restraint of trade or unfair trade practices’. The content of Section 6 deals with two prohibitions of unreasonable restraint of trade and unfair trade practices. In this chapter, the prohibitions of unfair trade will be detailed.
1. International Agreements and International Contracts

Section 6 prohibits the participation of Japanese entrepreneurs in international cartels or the conclusion of an ‘international agreement or an international contract which contains such matters as constitute unreasonable restraint of trade or unfair trade practices’. International cartels, technological licensing agreements, joint venture agreements and sole-agency agreements are the main object of these regulations.

In these cases, the parties concerned must include a foreign entrepreneur or a foreign trade association. International price fixing and the international division of markets are specific examples of this. The effect of restraint of competition should occur in the field of international trade. The Antimonopoly Act cannot be applied with regard to restraint of competition which does not have any influence on the Japanese domestic market.

2. The Meaning of the Regulations in Section 6 – The Reason for Providing Different Regulations Regarding International Cartels etc. from Section 3

Presently it is considered that the latter half of Section 3 can regulate international cartels which seek to restrain competition within the domestic market. If being so, why are different regulations of Section 6 provided and maintained until now? It has been interpreted as follows. The first reason is that there is a difference in the penalties applied under Section 3 and under Section 6. The penalties associated with Section 3 are more severe than those associated with Section 6. The second reason is that as the effectiveness of regulating international cartels under the Japanese Antimonopoly Act to restrict the activities of entrepreneurs is somewhat weaker than that of domestic cartels, it is thought more appropriate to prohibit the participation of Japanese entrepreneurs with regard to such international cartels.

The provisions in Section 6 for this purpose, have the following characteristics. Firstly, as Section 6 deems participation in cartels itself illegal, cartels themselves are considered illegal even before they are implemented. Secondly, as involvement in cartels itself is prohibited, this, of course, includes Japanese entrepreneurs who seek to become involved in international cartels. If a single Japanese entrepreneur is involved, then this Section cannot be applied because the parties referred to in the latter half of Section 3 must be more than one. The application of the Antimonopoly Act to an area of international trade will bring about an issue of extraterritorial application which can be avoided under Section 6. However, this raises another problem regarding foreign parties involved in such cartels to guarantee their procedural rights.

The FTC has released guidelines regarding contracts where problems may easily arise. This includes ‘Guidelines Concerning Unfair Trade Practices with Regard to Patent and Know-how Licensing Agreements’ (FTC Secretariat, 1989) and ‘Guidelines Concerning Distribution Systems and Business Practices’ (FTC Secretariat 1991), which include ‘Guidelines Concerning to Sole Distributorship’.
3. Report System

Section 6 Subsection 2 containing regulations regarding notification by being submitted to the FTC and examination of such notification by the FTC was repealed in 1997.

V. Cease and Desist Orders, Penalties and Compensation for Damages

1. Cease and Desist Orders

Cease and desist orders regarding violation of Section 3 and Section 6 are found in Section 7, and those regarding violating of Section 8 Subsection 1 are found in Section 82. Cease and desist orders are governmental measures for maintaining competition and eliminating illegal conditions in addition to a system of penalties and the imposition of civil liabilities. Where any act exists in violation of the provisions of these Sections, the FTC may order the parties concerned to take appropriate action to alleviate such action.

(1) The Legal Nature of Cease and Desist Orders

As the FTC, which has the authority to issue such cease and desist order, is a government agency, and those orders are a form of administrative action, offending parties must legally comply with such cease and desist order. However, in contrast with the administrative measures of other government agencies, the FTC must go through quasi judicial procedures and directly issue orders to the offending parties.

(2) The Content of Cease and Desist Orders

In addition to orders regarding the cessation of illegal actions, cease and desist order may include orders regarding the disposal of stock, the prohibition of interlocking directorate, the dissolution of a trade association, the cessation of habitual practices, the removal of restraints with regard to the sale etc. of factories or facilities, the cancellation of matters regarding personnel, preventative measures to ensure that illegal action does not reoccur in the future, and the notification of measures taken to the FTC.

(3) The Limits of Cease and Desist Orders

Cease and desist orders focus around the cessation and prohibition of illegal actions. However, the economic power might or business relationships which make such restrain of competition possible can also be the object of such cease and desist order. Two problems arise with regard to the relationship between cartels and cease and desist order.

(a) Orders to Reduce Prices

In oligopolistic markets, as even after the cessation of cartel action there is the tendency for high prices to continue, problems arose as to whether or not it was possible to order the
reduction of prices. It is thought that it would be difficult to order such reduction of prices under the current system due to the fact that the focus of cease and desist orders is around the cessation of illegal actions, the setting of prices by government agencies would not be consistent with the respect for the function of market mechanism, and that the FTC does not have the ability nor is suitable to perform such roles.

However, in order to effectively prevent the continuance of high prices even after the elimination of cartels, orders regarding reporting of prices fixed after the elimination of cartels, the renegotiation of prices with trading partners, and the fixing of individual prices have been included within the cease and desist order themselves.

(b) Prevention of Reoccurrences

Where the effect of restraint of competition is continuing even after the suspending of causative action, cease and desist order may be ordered regarding this (see Section 7 Subsection 2). In order to stop the reoccurrence of illegal action, the dissolution of structures and behavior which form the basis of illegal action may be ordered. In addition, in order to ensure that illegal action does not reoccur in the future, measures to publicize a certain action to trading partners etc. may be taken.

2. Criminal punishment and the damage compensation system

Actions that violate cartel regulations are subject to criminal punishment. However, the right of prosecution rests solely with the Fair Trade Commission. Also, actions violating the latter half of Section 3, Section 6 and Section 8 may become the target of non-fault damage compensation litigation (Section 25 of Antimonopoly Act). It is also possible to demand damage compensation based on the Civil Code, Article 709, with regard to actions that violate Section 8, Section 6 and Section 3. Regarding criminal punishment and the damage compensation system, the lack of their effectiveness has been pointed out up to the present. (Concerning criminal cases, 7 cases of prosecution occurred until 1990. Of these, the case that was taken up as an important case was prosecution against a petroleum cartel in 1974. Damage compensation cases in which the victim/plaintiff ultimately won up to now are limited to only several cases. Comparing the number of cases in Table 7, 8 and 9 and Table 1 shows how small the number of cases for non-fault damage compensation litigation is in comparison with those for cartel.)

In recent years, the FTC has announced steps or measures to utilize these systems. For instance, criminal prosecution guidelines (June 1990) and private litigation assistance measures were announced. At present, the FTC is studying the possibility of instituting regulations that clearly call for improvement of the damage compensation system and uphold private citizens’ right to begin stoppage litigation (injunction). (Damage compensation cases tend to increase after the start of the 1990s.) Revisions have been made to section 25 of the Antimonopoly Act (the addition of the acts violating sections 6 and 8 as the subject) and a system of injunction suits was introduced (Section 24 of the Anti-monopoly Act), however, injunctions in accordance with Section 24 of the Anti-monopoly Act, are limited to cases of unfair trade practices (Section 19 and Paragraph 5, Subsection 1 of Section 8). With regard to damage compensation cases, the number of
such cases has been on the increase since entering the 1990’s. In particular, the number of cases in which citizens use the system of substitution law suit in an attempt to recover damages as a result of bid-rigging, are increasing.

In the criminal prosecution guidelines, the FTC indicated the principle of enforcing prosecution in the following two cases: (1) vicious and serious cases presumably affecting the people’s life, such as price cartels, and (2) cases in which violation is repeated, and the objective of the Antimonopoly Act cannot be attained through administrative actions by the FTC. After the announcement of the criminal prosecution guidelines, the FTC made prosecution of 7 criminal cases against many companies and individuals. Of these, a ruling declaring the prosecuted to be guilty was handed down in 5 cases (the remaining two are a case in which a dispute is going on). In 1992, the law was amended, and the upper limit of penalty payment by an organization was raised to ¥100 million, in 2002, it was raised to ¥500 million.

VI. Surcharges (Section 7-2, Section 8-3)
1. The Aim of Surcharges

Although surcharges are administrative measures with the aim of collecting unfair gains acquired by cartels, they are not merely that, but rather are also an effective way of preventing and deterring cartels.

This system of surcharges was established in 1977. It was thought that penalties and the compensation system would act as a deterrent and as a system for recovering unjust gains, however, there was a lack of effectiveness with both systems, which in turn paved the way for the establishment of the surcharge system. This system of surcharges was amended in 1990 due to the necessity of amending the Antimonopoly Act to bring it into line with international standards and to increase its effectiveness as a deterrent (refer to Table 6 regarding the number and amount of surcharges).

The object of the regulations found in Section 72 is the prohibition of international agreements and international contracts detailed in Section 6 and unreasonable restraint of trade detailed in the latter part of Section 3, and the object of Section 8-3 is the illegal action of trade associations detailed in Section 8 Subsection 1 Paragraphs 1 and 2.

2. Standards for the Calculation of Surcharges (Section 7-2 Subsection 1)
(1) Standards for Calculation

Surcharges are calculated in the following way. In principle the amount of the surcharge is equivalent to the total sales amount of the goods sold or the value of the services in question supplied during the period in which the cartel was operational multiplied by 0.06.

Due to the prohibition of dual penalties, the aim of these surcharges is not to apply criminal sanction against cartels, but rather to recover the minimum amount of undisputed profit of cartels within a rational area.
29

(2) Classification of Businesses by Size and Type

When calculating surcharges, businesses may be divided into two categories according to size and type. The ratio of multiplication for businesses other than wholesale and retail businesses is 6% for large enterprises (Section 7-2 Subsection 1) and 3% for small-medium sized enterprises (Section 7-2 Subsection 2). The ratio for multiplication for wholesale businesses regardless of whether they are large enterprises or small-medium sized enterprises is 1%, while the ratio for multiplication for retail businesses is 2% for large enterprises (Section 7-2 Subsection 1) and 1% for small-medium sized enterprises (Section 7-2 Subsection 2).

(3) The Calculation of Total Sales Amount and Minimum Surcharges

The total sales amount used in calculating surcharges is based on the total sales amount of the goods sold or the value of the services in question supplied during the period in which the cartel was operational. The basis for calculating the total sales amount is, as a rule, the shipping value. Where the calculated surcharge is less than 500,000 yen, the FTC may not order the payment of such.

3. Cartels Subject to Surcharges (Section 7-2 Subsection 1)

Cartels subject to surcharges are restricted to those types which exert a harmful degree of influence and those types which easily show unjust gains.

The first kind is price cartels which affect the price of goods or services. This kind of price cartel is revealed in such actions as bid rigging, customer restriction, and boycotts. Although boycotts have appeared as a form of unreasonable restraint of trade and surcharges are levied at such, surcharges are only levied in cases where practical restraint of supply volumes has influenced prices and details regarding time periods and the total sales amount of affected products can be specified.

The second kind is those cartels which restrict supply volume and have a direct influence on prices. These have a variety of affects on supply volume through such actions as restricting production and sales and determining shipping rations. However, it makes no difference whether they have directly influenced prices or whether substantial restraint of supply volume has occurred in fact.

4. The Operational Period of Cartels, the Object of Orders and the Obligation to Pay (Section 7-2 Subsection 1)

Surcharges may be levied at entrepreneurs for a period of three years (Section 7-2 Subsection 1) retroactively from the time the entrepreneur ceased to engage in such cartels. However, when the entrepreneur has ceased to engage in such cartel activities for a period of more than three years, surcharges may not be levied (Section 7-2 Subsection 6).

Surcharges may be levied at only entrepreneurs who have engaged in unreasonable
restraint of trade or those entrepreneurs who have violated regulations regarding trade associations.

The FTC is the government agency which has the authority to order the payment of surcharges and must do so when the conditions for such are satisfied. Surcharges are levied generally after procedures regarding cease and desist orders have been completed. Details regarding the payment of surcharges are found in Section 48-2, and Section 54-2. Surcharges shall be paid to the Treasury.

VII. Parallel Price Increases Notification System (Section 18-2)

1. Purpose

This system is designed to prevent the abuse of power by oligopolistic enterprises by publicizing the reasons for such parallel price increases.

Up until the 1970s, there were many cases of parallel price increases under oligopolistic markets. Through such cases, the limitations of the Antimonopoly Act as it stood at that time were recognized. Even with the easing of standards for proving the cartels, the strengthening of cease and desist orders, and the strengthening of regulations by structural regulations, there were still legal loopholes through which cartels managed to operate. In order to stop this, Section 18-2 was included in the 1977 amendments of the Antimonopoly Act.

2. Four Conditions Regarding Parallel Price Increases

In order to be classified as parallel price increase the following four conditions must be satisfied. 1. The total sale of products or services supplies in Japan must exceed 60 billion yen per year. 2. The market must be a higher oligopolistic market. 3. The price being increased must be the standard price in business. 4. The increase in prices must be parallel (Two or more leading enterprises, including the top ranking enterprise, in an oligopolistic market must have raised the prices of their products by the same or a similar amount or rate within a period of three months). Guidelines regarding market structural conditions are contained in a separate chart. Those parties who must report parallel price increases are leading entrepreneurs.

3. Report and Publication

Where report regarding parallel price increases is required of leading entrepreneurs by the FTC, the contents of such a report shall include documentation which rationally explains the reason for the price increases in question.

In addition to the annual report of the FTC to the Diet, as outlined in Section 44 Subsection 1, the FTC may also make public any matters which it deems necessary to ensure the proper enforcement of the Antimonopoly Act, with the exception of trade secrets of entrepreneurs (Section 43 and Section 44 Subsection 2).
VIII. Exemptions of Cartels

1. Exemptions to the General Prohibition of Cartels

There are various types of exemption under the Antimonopoly Act. The first is, exemptions regarding monopoly, such as natural monopoly (Section 21) and acts under intellectual property rights (Section 23). The second is, exemptions regarding cartels and the third is exemptions regarding the Resale Price Maintenance Contracts (Section 24-2). If these are divided according to laws which regulate exemptions, the first are laws regarding exemptions found in 5 provisions in chapter 6 of the Antimonopoly Act, the second are laws regarding exemptions found in various laws. There was the scope for the exemption, based on the "Act Regarding the Exemption of the Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade" (= "Exemption Law"). Because this law was abolished in 1999, however, the room for this exemption was eliminated. Exemption regarding cartels was of four kinds, as explained below, two of them were abolished.

2. Legitimate Actions based on Business Undertaking Laws/Ordinances (former Section 22)

Subsection 1 of former Section 22 provides that, if there is a special law regarding a specific business, the Antimonopoly Act shall not be applied to legitimate actions of a business enterprise or a trade association based on the said law or an order pursuant to the said law. Subsection 2 stipulates that such special laws shall be specified by a separate law. The "Exemption Law" was instituted based on this provision. In line with the shrinkage and abolishment of the exemption system in 1999, the "Exemption Law" was abolished, and this provision was eliminated.

3. Acts of Cooperatives (Section 24)

The acts of cooperative, which are made up of small-medium sized enterprises and consumers, are exempt from the provisions of the Antimonopoly Act. As the Antimonopoly Act aims at eliminating market control, it is only natural that cooperatives of small-medium sized enterprises and consumers are exempt from the Act. However, as it is possible for such cooperatives to use social and economic power with regard to others, supplementary conditions and limitations are also provided.

(1) Conditions of Exemption

Conditions regarding exemption are found in Section 24 Subsection 1 Paragraphs 1 to 4 and cooperatives must be formed in accordance with other special laws. In reality, problems arise as to whether or not the entrepreneurs fulfill the requirement of being small-scale. Problems regarding cooperatives based on the Small-medium Sized Enterprises Cooperatives Act are many and varied.
(2) Limitations of Exemption

Exemptions shall not apply when unfair trade practices are employed or when prices are raised unreasonably through substantial restraint of competition in a particular field of trade. As there are no specific standards to govern acts which exceed these limitations, it is a matter which is open to interpretation.

(a) Limitations of the Activities of Cooperatives when They Act as Entrepreneurs

Even though substantial restraint of competition may occur as a result of the joint-ventures of a cooperative with regard to production etc. for cooperative members, this is not considered to be in violation of the Antimonopoly Act. However, the limitations of Section 24 are designed to regulate the actions of a cooperative with regard to its actions as an entrepreneur.

There are three cases which are judged to be illegal. The first is when the prohibition regarding unfair trade practices is contravened. The second is when the prohibition regarding private monopoly is contravened and through unfair trade practices, substantial restraint of competition occurs or when through volume restrictions, market prices are maintained etc. The third is when problems regarding unreasonable restraint of trade or trade association regulations arise. When a cooperative acting as an entrepreneur forms a cartel with another trade association, however this cannot be applied to the cooperative with regard to contravening regulations regarding unreasonable restraint of trade. When a cartel is formed between a cooperative and another entrepreneur, or between two to more cooperatives, Section 8 can be applied with regard to the actions of two or more entrepreneurs with regard to unreasonable restraint of trade.

(b) The Limit of Activities of a Cooperative Association when the Association Acts as a Trade Association

Exemption to a cooperative association was of two kinds: the case based on this Section and the case pursuant to Section 2 of the former Exemption Law. Although these were overlapped, their scope was different. Because of the amendment in 1999, however, the Exemption Law was abolished, and exemption to a cooperative association became based solely on this Section.

4. Recognized Cartels

There were systems of recognized cartels, which refer to cartels that can be subject to the exemption only if approved by the FTC. Such systems were the depression cartel system (based on Section 24-3) and the rationalization cartel system (Section 24-4). These systems were abolished in 1999.
5. Joint Actions for which Exemption of the Antimonopoly Act Is Recognized under Other Laws

A variety of systems regarding exemption of the Antimonopoly Act were instituted in the 1950s, in order to meet the industrial policy targets of stabilization of corporate management and streamlining of corporate structure to strengthen international competitiveness of enterprises for the purposes of protecting and growing industries and coping with trade and capital liberalization. The laws for the institution of these systems included the Export/Import Transaction Law, the Law Related to the Protection of Small and Medium-Scale Enterprises, and extraordinary laws for various industrial promotions (textile industry, machinery industry, electronic industry, etc.). The number of exempted cartels based on individual laws, which totaled 53 cases in 1952, increased to 595 cases in 1959, and further to a peak of 1,079 cases in 1965. These exempted cartels were instituted in line with the aforementioned industrial policy.

However, these exempted cartels were criticized in years after the latter half of the 1960s for allegedly bringing about the stiffening of the price structure and becoming a factor for high prices in Japan. Particularly after the start of the 1990s, exemption systems were reviewed substantially in connection with the necessity of changing the structure of the Japanese economy and economic friction with foreign countries. The review was especially positioned as a matter of improvement actions in the Japanese Government's deregulation program, and the abolition of cartels and related laws was pushed vigorously. The number of exempted cartels was reduced to 12 cases based on five laws as of the end of March 1997. Individual laws providing for exemption were decreased, and exemption systems were curtailed. Due to the review of the exemption, implemented in 1997, the number of exempted systems based on individual laws was diminished to 17 systems based on 12 laws. Through the amendment in 1999, the following revision was carried out with regard to several individual laws that provided for the exemption. First, the scope of exemption was limited (Marine Transport Law, Inland Sea Shipping Association Law, and the Law Regarding Conversion of Environmental Sanitation-related Operations into Suitable Conditions). Second, regarding cases of approving the exemption, a system for consultation between the Cabinet Minister in charge and the FTC was instituted, and regulations concerning procedures, such as notification to the FTC, were set (Marine Transport Law, Inland Sea Shipping Association Law, and Aviation Law).
Appendix  □  Chart

(1) Purpose §1

(2) Definitions - Entrepreneur §2  □ , Trade association §2  □ , Unreasonable restraint of trade §2  □ .

(3) Unreasonable restraint of trade (§3)

Cease and desist orders (§7) □
Surcharges (§7-2 on entrepreneurs)
Criminal penalties (§§89)
Damages - Absolute liability (§25)
(supplemental provisions of §3)

Prohibition of particular international agreements or contracts (§6)

Cease and desist orders (§7) □
Surcharges (§7-2 on entrepreneurs)
Criminal penalties (§§90)

Prohibited acts of a trade association (§8)

filing requirement □
Cease and desist orders (§8-2) □
Surcharges (§8-3 on constituent entrepreneurs)
Criminal penalties (§§89)

(4) §8 □  (Section 8  □ and Types of Sanctions)

Substantially restraining competition in any particular field of trade (para 1)
   Cease and desist orders (§8-2), Surcharges (§8-3), Criminal penalties (§§89)

Entering into an international agreement or an international contract as provided for in §6 □
   (para 2)
   Cease and desist orders (§8-2), Surcharges (§8-3) □, Criminal penalties (§§90) □

Limiting the present or future number of entrepreneurs in any particular field of business (para 3)
   Cease and desist orders (§8-2), Criminal penalties (§§90)

Unjustly restricting the functions or activities of the constituent entrepreneurs (para 4)
   Cease and desist orders (§8-2), Criminal penalties (§§90)

Causing entrepreneurs to employ such acts as constitute unfair trade practices (para 5)
   Cease and desist orders (§8-2)

(Without reference to tort claim under the Civil Code and so on)

( □  Surcharges and criminal penalties do not apply an international agreement or an international contract which include merely unfair trade practices.)
(5) Enforcement measures and remedies

- Cease and desist orders (§7, §8-2)
- Surcharges (§7-2 on entrepreneurs, §8-3 on constituent entrepreneurs)
- Criminal penalties (§§89, §90, §91-2)
- Damages - Absolute liability (§25)
- Tort claim under the Civil Code (§709)
- Parallel price increases (§18-2)

(6) The sanctions under the Antimonopoly Act

<table>
<thead>
<tr>
<th>Civil Action</th>
<th>Damage **</th>
<th>Section 3</th>
<th>Section 6</th>
<th>Section 8</th>
<th>Section 19</th>
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<td></td>
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<td>1st part</td>
<td>2nd part</td>
<td>(i)</td>
<td>(ii)</td>
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<tr>
<td>Surcharge</td>
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<td>×</td>
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<td>×</td>
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</tbody>
</table>

* Surcharge and/or criminal penalties are imposed only on unreasonable restraint of trade.

** It is possible to use provisions of laws other than Section 25 of AMA or Section 709 of Civil Code for damage suit.
(7) Exemptions

Activities under special business acts and orders ((§ 22) (deleted 1999)
Activities of cooperatives(§ 24)
Depression cartels(§ 24-3)(deleted 1999)
Rationalization cartels(§ 24-4)(deleted 1999)
Cartels under laws other than the Antimonopoly Act

(8) Basic concepts of unreasonable restraint of trade in §2

Entrepreneurs + Concerted Actions + in any Particular Fields of Trade + Public Interest

Substantial Restraint of Competition
Appendix  □  Statistics

Table 1  JFTC Cases concerning Main Provisions of the AMA (1947-1996)

<table>
<thead>
<tr>
<th>Provision</th>
<th>Cases</th>
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<tr>
<td>Section 3 1st part</td>
<td>9</td>
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<tr>
<td>Section 3 2nd part</td>
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<tr>
<td>Section 8 (1)</td>
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<tr>
<td>Section 19</td>
<td>154</td>
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<tr>
<td>Total</td>
<td>903</td>
</tr>
<tr>
<td>Administrative surcharge</td>
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</tr>
<tr>
<td>Criminal case</td>
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<td>Section 25 case</td>
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</table>


Table 2  Types of the violation of section 8 para.1(1947-1996)

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<tr>
<td>(2)</td>
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<tr>
<td>(3)</td>
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<td>74</td>
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<td>(5)</td>
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Table 3  JFTC Cases concerning Main Provisions of the AMA (1989-1998)

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<tr>
<td>Section 3 2nd part</td>
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<td>Cartel</td>
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<tr>
<td>Bid rigging</td>
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<td>Section 6(International agreements and contracts)</td>
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<tr>
<td>Section8(1)(Prohibited Activities of Trade Associations)</td>
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<td>Section 19(Unfair Trade Practices)</td>
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<td>Others</td>
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<tr>
<td>Total</td>
<td>243</td>
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Source: *The Violating Behaviors of the Antimonopoly Act and Civil Remedy System*, 165(Koichi Higashide ed.2000).
### Table 4  JFTC Formal Actions concerning Cartels

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<tr>
<td>Others</td>
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<td>0</td>
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<td>1</td>
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<tr>
<td>Total</td>
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<td>15</td>
<td>19</td>
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Source: Annual Reports on Competition Policy in Japan, JFTC. FY means Fiscal Year. The fiscal year of Japan begins in April.

### Table 5  JFTC Formal Actions concerning Bid-Rigging

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<th>FY</th>
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<th>FY</th>
<th># of cases</th>
<th>FY</th>
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### Table 6 Administrative Surcharges

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<th>Surcharge Order</th>
<th>Amount of Surcharge ($)</th>
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<th>No of cases</th>
<th>Surcharge Order</th>
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<td>3360000</td>
<td>1995</td>
<td>24</td>
<td>741</td>
<td>61390000</td>
</tr>
<tr>
<td>1985</td>
<td>4</td>
<td>38</td>
<td>3880000</td>
<td>1996</td>
<td>14</td>
<td>368</td>
<td>71290000</td>
</tr>
<tr>
<td>1986</td>
<td>4</td>
<td>32</td>
<td>2620000</td>
<td>1997</td>
<td>16</td>
<td>369</td>
<td>26970000</td>
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<tr>
<td>1987</td>
<td>6</td>
<td>54</td>
<td>14000000</td>
<td>1998</td>
<td>16</td>
<td>576</td>
<td>29990000</td>
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<tr>
<td></td>
<td>total</td>
<td>222</td>
<td>4398</td>
<td></td>
<td></td>
<td></td>
<td>546390000</td>
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</tbody>
</table>

Source: JFTC Annual Report. (1$=¥105 Figures calculated by author)
Table 7  Frequency use of Civil Damage Systems(1989 to April 1990)

<table>
<thead>
<tr>
<th>Section 25AMA</th>
<th>Number of cases</th>
<th>Plaintiff Final Consumer</th>
<th>Plaintiff Win</th>
<th>Plaintiff Lose</th>
<th>Settlement</th>
<th>Withdrawal</th>
<th>Cause of suit: Violation of AMA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Section 3 2nd part</td>
<td>Section 19</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>2</td>
<td>4</td>
<td>0</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>9</td>
<td>2</td>
<td>7</td>
<td>0</td>
<td>8</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>15</td>
<td>4</td>
<td>11</td>
<td>12</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Filing periods</th>
<th>55-64</th>
<th>65-74</th>
<th>75-84</th>
<th>85-</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 25AMA</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Section709Civil Code and so on</td>
<td>0</td>
<td>1</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>2</td>
<td>4</td>
<td>8</td>
<td>1</td>
</tr>
</tbody>
</table>


Table 8  Civil Damage Cases based on Civil Code and Other Laws (1975-1999)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>13</td>
<td>18</td>
<td></td>
</tr>
</tbody>
</table>

Source: The Violating Behaviors of the Antimonopoly Act and Civil Remedy System, 134-142(Koichi Higashide ed.2000).

* Figures calculated by author and at filing time on first lower court.
Table 9  Causes of Suits of Violation of the AMA in Civil Damage Cases based on Civil Code and Other Laws (1975-1999)

<table>
<thead>
<tr>
<th>Section 3</th>
<th>3 (including 2 cases of 2nd part)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 8(1)</td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>3</td>
</tr>
<tr>
<td>(iv)</td>
<td>4</td>
</tr>
<tr>
<td>(v)</td>
<td>2</td>
</tr>
<tr>
<td>Section 19</td>
<td>33</td>
</tr>
<tr>
<td>Total</td>
<td>45</td>
</tr>
</tbody>
</table>

Source: *The Violating Behaviors of the Antimonopoly Act and Civil Remedy System, 134-142*(Koichi Higashide ed.2000). (Figures calculated by the author)
* One case may have more than one causes of violation of the AMA.

Table 10  Representation suit by residents (1992-August 1999)

<table>
<thead>
<tr>
<th>Case</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saitama Doyokai public engineering and construction work case</td>
<td>1</td>
</tr>
<tr>
<td>The Agency of Japan Drainage case</td>
<td>9</td>
</tr>
<tr>
<td>Water meters case</td>
<td>6</td>
</tr>
<tr>
<td>Tokyo water meters case</td>
<td>1</td>
</tr>
<tr>
<td>Public engineering and construction work in Gunma prefecture and Numata city case</td>
<td>1</td>
</tr>
<tr>
<td>Public engineering and construction work in Aichi prefecture and paving and road repairing work in Nagoya city case</td>
<td>3</td>
</tr>
<tr>
<td>Public engineering and construction work and paving work in Zama city of Kanagawa prefecture case</td>
<td>1</td>
</tr>
<tr>
<td>Sodium chlorate in Kyoto city case</td>
<td>1</td>
</tr>
</tbody>
</table>

Appendix □ Cases

I. Cases for cartels

1. Toho and Shintoho (administrative) case (Antimonopoly Law Section 3 2nd part and 4(deleted))(Tokyo High Court, 07.12.1953)

2. Newspaper Distribution Agreements case (administrative case)(Tokyo High Court, 09.03.1953)


4. Toshiba Chemical Co., case (administrative case)(Tokyo High Court, 25.09.1995)

5. Elevator maintenance price cartel case (J FTC, 28.07.1994)

6. Asahi Glass Co., et al case (J FTC, 31.03.1983)


8. Noda Soy Sause Co., case (J FTC, 04.04.1952)

9. Oil Cartel case (criminal case) (Supreme Court, 24.02.1984)


11. Okinawa Building Maintenance Association case (J FTC, 14.05.1993)

12. Chiba City Medical Association case (J FTC, 19.06.1980)


14. Amano Pharmaceutical Co. and Novo Industry case (administrative case) (Supreme Court, 28.11.1975)

15. Consumer Oil Cartel case (compensation for damage case) (Civil Code Section 709 case) (Supreme Court, 08.12.1989)

16. Consumer Oil Cartel case (compensation for damage case) (Antimonopoly Law Section 25 case) (Supreme Court, 02.07.1987)
1. Nippon Shokuhin case (unjust low sales prices, compensation for damage case) (Antimonopoly Law Section 19 case) (Supreme Court, 14.12.1989) (municipal government)

2. Sales of A New Year's card with a lottery case (unjust low sales prices, compensation for damage case) (Antimonopoly Law Section 19 case) (Osaka High Court, 14.10.1994) (national government)

Cases for substantial restraint of competition

1. Toho-Subaru case (administrative case) (Antimonopoly Law Section 16 case) (Tokyo High Court, 19.9.1951)

2. Toho and Shintoho case (administrative case) (Antimonopoly Law Section 3, 2nd part and 4 (deleted)) (Tokyo High Court, 07.12.1953)

3. Fuji and Yahata Steel Co., case (administrative case) (Antimonopoly Law Section 15 case) (J FTC, 30.10.1969)

J FTC Guidelines concerning Cartel Activities


2. Guidelines Concerning Joint Activities for Recycling (J FTC, June 13, 2001)

3. Guidelines Concerning Activities of Trade Associations (J FTC, October 30, 1995)

4. Guidelines Concerning Activities of Medical Associations (Staff Office, J FTC, August 7, 1981)

5. Guidelines Concerning Activities of Firms and Trade Associations with regard to Public Bids (J FTC, July 5, 1994)


9. J FTC Policy Statement on Accusation of Criminal Penalties for the Antimonopoly
Law Violation (J FTC, June 20, 1990)

1,5,6,7 and 8 can be available on the J FTC website(see below Guidelines index page URL).

J FT C HP URL(English)

http://www2.jftc.go.jp/e-page/index.htm

Home - http://www2.jftc.go.jp/e-page/index.htm

- Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)
- Designation of Unfair Trade Practices (June 18, 1982 Fair Trade Commission Notification No. 15)
- Act Against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (2003 amendment now under translation)(Act No. 120 of June 1, 1956)
- Act concerning elimination and prevention of involvement in bid rigging etc. (Act No. 101 of 2002)


Related Guidelines for This Part on the J FTC Website)

<Antimonopoly Act>

Guidelines Concerning Administrative Guidance Under the Antimonopoly Act (30 June, 1994)
Guidelines Concerning the Activities of Firms and Trade Associations with regard to Public Bids (July 1994)
Notification System Concerning M&As by Companies outside Japan
Guidelines Concerning Holding Companies which Constitute an Excessive Concentration of Economic Power (8 December, 1997)
Guidelines Concerning Authorization of Stockholding by Financial Companies under the Provisions of Section 11 of the Antimonopoly Act (8 December, 1997)
Guidelines for Patent and Know-how Licensing Agreements under the Antimonopoly Act (30 July, 1999)
Guidelines Concerning Unfair Price Cutting (20 November, 1984)
Guidelines Concerning Unjust Return of Unsold Goods under the Antimonopoly Act (21 April, 1987)
Guidelines for Promotion of Competition Policy in the Telecommunications Business Field (30 November, 2001)
Guidelines Concerning Joint Research and Development (April 20, 1993)

<Premiums and Representations Act>
Guidelines for the Interpretation of the Notification Concerning Designation of Premiums, Etc. (16 February, 1996)
Guidelines for the Interpretation of the Notification on Premium Offers to General Consumers (16 February, 1996)
Guidelines for the Interpretation of the Notification on Premium Offers by Lotteries or Prize Competition (16 February, 1996)
Guidelines for Open Lotteries and Prize Competition (16 February, 1996)