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Approach to Horizontal Restraint: Reliance on Exemption from Antimonopoly Act in Japan as Contrasted with Antitrust Laws in the United States

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APPROACH TO HORIZONTAL RESTRAINT:
RELIANCE ON EXEMPTION FROM ANTIMONOPOLY ACT IN JAPAN
AS CONTRASTED WITH ANTITRUST LAWS IN THE UNITED STATES

by

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I. INTRODUCTION

It was hard to predict forty years ago that Japan would become the economic superpower that it is today.1 Japan has been able to continue developing its industry and economy since the time immediately after World War II. Though in the 1970's, Japanese industry was forced to face tough issues such as steep appreciation of the yen2 and the two oil crises,3 it successfully responded to them, and accordingly, it has shown a favorable international balance of payments since 1981.4 While the amount of surplus has been shrinking since 1988, Japan is still maintaining a

1 Just after World War II, Japan’s economy had been destroyed. “Production in the mining and manufacturing industries had fallen to one-seventh the 1941 level [at the beginning of the War] and there were severe food shortages and rampant inflation.” NIPPON STEEL HUMAN RESOURCES DEVELOPMENT CO., LTD., NIPPON THE LAND AND ITS PEOPLE (3d ed. 1988). In addition to the fact that Japan inherently is short of raw materials necessary for development of its heavy and chemical industries, it had lost its productive facilities by aerial attacks and its colonies in the War.

2 Id. at 83-85; Though the yen had been fixed at 360 to the dollar since 1949, it began to appreciate near the end of 1971 and went as high as about 260 to the dollar in 1973. This rise in the value of the yen caused Japan’s international balance of payments to go to into the red.

3 The first oil crisis occurred in 1973, and the second one in 1979.

favorable balance.\(^5\) Approximately two-thirds of its surplus is the balance with the United States.\(^6\)

The United States cannot tolerate this imbalance and is expressing its frustrations to Japan. One of its complaints is in regard to Japan’s Antitrust law, the Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (hereinafter Antimonopoly Act).\(^7\)

At the first Structural Impediments Initiative (hereinafter SII) at Tokyo in September 1989, the United States requested strict implementation of the Antimonopoly Act to Japan.\(^8\)

Further, Mr. T. Boone Pickens determined that Japan’s unique form of business practice, *keiretsu*, was a classic unlawful cartel.\(^9\) He announced he was

\(^5\) *Id.*

\(^6\) *JAPAN EXTERNAL TRADE ORGANIZATION* (hereinafter JETRO), *NIPPON 1990 BUSINESS FACTS & FIGURES* 59 (1990); Japan’s current balance with all countries is 79.6 billion dollars, and in 1988 with the United States, is 51.3 billion dollars.

\(^7\) *Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuho ni Kansuru Hōritsu* [Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade], Act No. 54 of 1947 (Japan), as amended, translated in *ANTIMONOPOLY LEGISLATION OF JAPAN* 3 (Masanao Nakagawa ed. 1984) (hereinafter Antimonopoly Act).

\(^8\) *Dokkinhō Ishitsu no Nichibei Dojō [The Antimonopoly Act: Different Foundation between Japan and the United States]*, *NIHON KEIZAI SHINBUN* [JAPAN ECON. NEWSPAPER], Sep. 18, 1989, at 8.

\(^9\) T. Boone Pickens, *The Heck with Japanese Business; Why I’m Not Interested in Trying to Compete in a Cartel System*, *THE WASH. POST*, Apr. 28, 1991, at C1. *Keiretsu* is "the unique form of business organization that links companies together in industrial group." It is "often portrayed as exclusionary devises that make Japanese companies unduly clannish and insular." There are two kinds of *Keiretsu*: "The so-called financial *keiretsu* . . . large groups of often-unrelated companies, including a main bank, other financial institutions, and a giant trading company, are
going to give up fighting with Japan's cartel system when he quitted trying to become a director of Koito Manufacturing, the world's premier auto-lighting manufacturer, although he was the largest shareholder possessing 26 percent of its share.\textsuperscript{10}

Moreover, another commentator indicated that all Japanese firms performed the same conduct as others "to minimize the competitive threat."\textsuperscript{11}

Does the Antimonopoly Act in Japan have no power against a cartel? Do Japanese enterprises all enjoy concerted activities so enterprises in other countries than Japan suffer injuries?

There must be room for improvement in the Antimonopoly Act in Japan. Indeed, Japan responded to criticism from foreign countries with amending the Antimonopoly Act and with considering further revisions. On July 1, 1991, Japan enacted an amendment of the Antimonopoly Act that raised the surcharges from one and a half percent to six percent of the amount of the sales against enterprises which engaged in unreasonable restraint of trade.\textsuperscript{12} Further, Japan is considering raising

\begin{itemize}
  \item linked together by cross-holdings of shares, by sales and purchases within the group, and by formal and informal consultations;"
\end{itemize}

\textsuperscript{10} \textit{Id.}


\textsuperscript{12} Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakusho ni Kansuru Hōritsu no Ichibu o Kaiseisuru Hōritsu [Act concerning Amendment of a Part of the Antimonopoly Act], Act No. 42 of 1991 (Japan). This Act amended Section 7-2 of the Antimonopoly Act as follows:
the criminal penalty from the current five million yen (approximately 38 thousand dollars)\textsuperscript{13} to 100 million yen (approximately 770 thousand dollars).\textsuperscript{14}

While Japan should improve the Antimonopoly Act in order to harmonize with the international economy, Japan may exonerate a part of its competition policies which it believes correct. Mr. Pickens, for instance, contended that Japan’s cartel system had prevented him from making Koito more profitable.\textsuperscript{15} He suggested that “Japan’s industry is not necessarily smarter, more agile and more efficient than ours,”

\textsuperscript{13}The Antimonopoly Act § 89. Section 89 also provides penal servitude for not more than three years.


\textsuperscript{15}See U.S. Says Japan’s Planned Antitrust Fine Too Low, 1992 KYODO NEWS, Mar. 13, 1992, available in WESTLAW, Newswire Library, JAPANECOM File; Responding to this plan, however, Mr. James Rill, Assistant U.S. Attorney General in charge of antitrust matters, said "the amount ‘is far behind the world standard.’"
but that Japan’s international competitive advantage is simply its cartel system.16 His statement does not make sense because a formation of cartels cannot give Japanese industry a competitive advantage in the foreign market even though a cartel will possibly exclude foreign manufacturers from supplying to Japanese enterprises.17 Furthermore, according to his opinion, Japan’s system ultimately limits a consumer’s choice and increases prices. If Mr. Pickens were absolutely correct, then the products which the Japanese manufacturers have a big market such as video disk players,18 compact disk players,19 and facsimile machines20 would be limited and very expensive. To avoid such misunderstandings, Japan must show its antitrust policies in order to make themselves understood by the United States.

16 Pickens, supra note 9.

17 However, keiretsu actually does not mean to prevent access to the Japanese market from foreign companies. If the purpose of keiretsu was to deal only with Japanese suppliers and to exclude foreign companies regardless that foreigners can supply low-price, high-quality parts, then Japanese enterprises would soon lose their competitive advantage. Only when manufacturers receive quality parts, can they produce quality products assembled by such parts. For example, if a certain American auto-parts maker shows superior productivity and efficiency that no other makers achieve, Japanese auto-makers will place an order for their parts, or otherwise lose competition with American auto-makers which use such parts.

Keiretsu is one example which makes the Japanese market seem closed to foreign competitors, but it will not be discussed further because that is not the purpose of this thesis.


19 Id. at 537.

20 Id. at 256.
This thesis will give a balanced examination of Japan's regulation against a cartel which is the horizontal restraint of trade. First, it will explain the regulation against the horizontal restraint of trade in the United States in general. Though the courts used the per se rule and the rule of reason analysis to the horizontal restraint of trade, their application of the two doctrines seems unstable where a challenged conduct has both anticompetitive and procompetitive effects.

This thesis will show, in Chapter III and VI, that the Antimonopoly Act in Japan strictly prohibits a cartel and what is less strict in Japan compared to the Antitrust laws in the United States. In Chapter V, it will especially focus on exemptions from application of the Antimonopoly Act. To recognize how the Antimonopoly Act prohibits a cartel, it is as important to understand exemptions as it is to understand the provisions regulating cartels themselves. Though exemptions, which immunize anticompetitive conducts from antitrust liabilities, are hazardous to fair and free competition and consumer's welfare, Japan uses them more than the United States. This thesis will analyze how the exempting laws from the Antimonopoly Act protect and how they avoid adverse effects on free competition as well as on international trade. By recognizing merits and demerits of exemptions, it will become clear how those exemptions should be enforced.

Finally, this thesis will introduce an examples of immunized cartels in Japan: a cartel in a depressed industry. Since it is not allowed in the United States, this example will help to understand exemptions from antitrust liabilities in Japan.
II. APPROACH TO HORIZONTAL RESTRAINT IN THE UNITED STATES

Section 1 of the Sherman Act\(^\text{21}\) prohibits every agreement among companies to restrain trade, but it is a very simple and vague provision.\(^\text{22}\) Though the courts have developed standards concerning the application of the Sherman Act since the Act was enacted in 1890,\(^\text{23}\) it seems that the definite approach to the agreement among competitors has not been established. This chapter will show main doctrines applicable to the horizontal restraint of trade, and thereafter examine some important cases mainly relating to price fixing and market allocations.


\[\text{22}\] Section 1 of the Sherman Act does not provide a clear definition of illegal conducts. For example: It is unclear whether Section 1, which examines the restrictive conducts in question, considers the purpose of the agreement, conspirator’s market power, or results of the restrictive conducts including the anticompetitive impact to the market, harm to consumer, economic efficiencies of the enterprise, improvement of technology, level of employment, or the development of the national economy; or whether the courts use the uniform standard to determine illegal conducts regardless of the types of the conducts or the kind of the industries, or ignore any societal benefits protected by the restrictive conduct or compare such interests with free competition.

A. Three Doctrines

1. Ancillary Restraints doctrine

Though the Supreme Court had announced that every restraint of trade shall be held illegal without exception, the Court changed its view. The first doctrine, the ancillary restraints doctrine was developed from the Court's change. It is not the conduct itself but the main purpose of the conduct which determines illegality. Where the restraint of the conduct is merely ancillary to the lawful contract and is necessary to protect parties' legitimate benefits of the contract, the contract can be

24 United States v. Trans-Miss. Freight Ass'n, 166 U.S. 290 (1897).

25 United States v. Joint-Traffic Ass'n, 171 U.S. 505, 567-68 (1898); The Court held it is not illegal where the challenged conduct is the ordinary contract of sales, purchase, or lease made in good will with an accompanying agreement not to engage in a similar business. Hopkins v. United States, 171 U.S. 578, 592 (1898); The Court also suggested it is not appropriate to hold an agreement illegal where it has a good effect to commerce and does not directly or immediately restrain commerce.

26 United States v. Addyston Pipe & Steel Co., 85 F. 271, 291-92 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899); Manufacturers and vendors of cast-iron pipe agreed to raise prices by dividing territories and possessing monopoly power in their region. The defendants argued that their agreement was reasonable because its purpose was to protect members from the evils of ruinous competition. Id. at 279.

27 Id. at 283; Judge Taft held the agreement was illegal since it had no main purpose but "the sole object is to restrain trade in order to avoid the competition." Nevertheless, he did not rule all conducts in restraint of trade illegal, but focused on the main purpose of the contract to determine if it is unlawful:

It would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of these fruits by the other party.

Id. at 282 (emphasis added).
immunized from antitrust liability.\textsuperscript{28} To the contrary, if the contract is a naked restraint of trade, or if the restraint exceeds a legitimate necessity of the restraint presented by its main purpose, it is illegal per se.\textsuperscript{29}

2. Rule of reason analysis

Given the rule of reason analysis, only unreasonable restraint of trade should be illegal.\textsuperscript{30} In order to determine whether the restraint is unreasonable, the Court determined that all facts relating to the case should equally be considered,\textsuperscript{31} but this

\textsuperscript{28} Id.

\textsuperscript{29} Id.

In order to analyze whether the agreement involving a restrictive activity is illegal or not, the following procedure will be used under the ancillary restraints doctrine.

Q. 1: What is the main purpose of the agreement?
   If restraining competition, it is illegal.
   If protecting the legitimate benefits of the agreement, go to Q. 2.

Q. 2: Is the restrictive activity necessary to protect the benefit?
   If yes, it is lawful.
   If no, it is illegal.

\textsuperscript{30} Standard Oil Co. of New Jersey v. United States., 221 U.S. 1, 60 (1911).

\textsuperscript{31} Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Justice Brandeis announced the standard for the rule of reason. Under this standard, the lawful restraint merely regulates and may promote competition. Id. The courts must consider factors including "the facts peculiar to the [defendant's] business," "its condition before and after the restraint was imposed," "the nature of the restraint, and its effect, actual or probable," and the purpose of the restraint. Id.

See also Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977); Later, the Supreme Court stated that all of the circumstances should be weighed to determine if there is unreasonable restraint on competition under the rule of reason analysis.
criteria causes a heavy burden for the courts and for the plaintiffs. This doctrine may achieve the flexible application of the Sherman Act and a careful investigation in

---

32 See Thomas A. Piraino Jr., Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis, 64 S. CAL. L. REV. 685, 690 (1991); The courts should engage in a complicated investigation on the market impact to make a judgement. Judges are not economists. Even though judges can hear testimony from experts, it is still a tough job for them to judge the issue of law from an economic standpoint.

The number of cases filed in the federal courts has been increasing. See Warren E. Burger, Symposium: Reducing the Costs of Civil Litigation, Introduction, 37 RUTGERS L. REV. 217, 217 (1985). Though the number of antitrust cases has decreased a little from its peak in the late 1970's, there are still a lot of cases filed every year. Steven C. Scalop & Lawrence J. White, Economic Analysis of Private Antitrust Litigation, 74 GEO. L.J. 1001, 1002 (1986).

The antitrust cases are one of the "most complex, expensive and time consuming" litigations. Piraino Jr., supra, at 701. The average length of antitrust litigation is more than two years; the number of depositions by plaintiffs and by defendants and that of judge orders are about three each in one case; the number of docket entries is seventy; and the thickness of docket file is more than eight inches. See Scalop & White, supra, at 1009. It is natural that the courts try to introduce a simple method to analyze antitrust litigation. For efficiency, the courts often use summary judgments to dismiss plaintiffs' claims because they failed to prove conspiracy among defendants. Id. at 1016. See e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The longer the litigation, the cost increases. The legal fee of antitrust litigation in current cases is estimated in the range of 250 million dollars per year. Id. Plaintiffs' cost is about one third of this total, or 80-100 million dollars per year. Id. at 1016 n.59. Prolonged litigation is a heavy burden for the parties as well as for the courts.

One commentator indicates the number of cases will increase because the parties are unsure of the outcome. Maxwell M. Blechen, The "New Antitrust" as Seen by a Plaintiff's Lawyer, 54 ANTITRUST L.J. 43, 45 (1985). But another suggests the significant costs and an uncertain outcome under the rule of reason analysis will discourage plaintiffs to bring antitrust law suits. Piraino Jr., supra, at 702-3. Indeed, the number of private antitrust cases has declined by approximately 30 percent from 1978 to 1984 as the courts often introduce the rule of reason analysis. Scalop & White, supra, at 1002. The rule of reason analysis would be an ideal way if the private plaintiffs stop cheap law suits for the purpose of interfering with competitors or for the monetary reward of settlements. However, if a heavy burden and uncertainty prevent the necessary antitrust litigation which would promote free and fair competition, it is not beneficial for society. Frequent application of the rule of reason may create unnecessary elaborate economic analysis.
complicated cases, but it remains uncertain in its enforcement and sacrifices litigation efficiency.

3. Per se rule

The last doctrine is the per se rule which does not need elaborate inquiry of economic factors to prove an unlawful conspiracy. In *Northern Pacific Railway v. United States,* Justice Black listed types of conduct which had been held illegal per se.

33 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); Where oil companies had made a program to purchase "distress" gasoline from independent refiners for the purpose of maintaining market prices of their products, the Court held "[u]nder the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." The Court did not consider the reasonableness of prices. It is enough proof of unlawful conspiracy that "a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result." *Id.* at 224. Further, it declared a price fixing agreement is illegal regardless of the market power of the conspirators stating that "[e]ven though the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces." *Id.* In sum, the Court rejected considering the reasonableness of the agreement or economic justification of price fixing. *Id.* at 221, 224 n.59.

See also *United States v. Trenton Potteries,* 273 U.S. 392, 397-98 (1927); Though the Supreme Court did not use the term "per se," the Court held that a price fixing agreement is illegal without considering whether it was reasonably exercised or not, or whether the price fixed is reasonable or not. However, it did not mention whether or not the market power of the defendant should be considered.

34 *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 5(1958); The Court held conducts which have "pernicious effect on competition" and lack "any redeeming virtue" should be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."
se such as price fixing,\textsuperscript{35} division of markets,\textsuperscript{36} group boycotts,\textsuperscript{37} and tying agreements,\textsuperscript{38} and implied it would be reasonable to automatically apply the per se rule to such conducts.\textsuperscript{39} Comparing to the complex rule of reason analysis, the clear per se rule can save the significant costs of the antitrust litigations.\textsuperscript{40} In spite of the litigation efficiency, the per se rule has a detractor that it cannot flexibly analyze a

\textsuperscript{35} \textit{E.g.}, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

\textsuperscript{36} \textit{E.g.}, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), \textit{aff d}, 175 U.S. 211 (1899).

\textsuperscript{37} \textit{E.g.}, Fashion Originators' Guild of Am. v. Federal Trade Comm., 312 U.S. 457 (1941).

\textsuperscript{38} \textit{E.g.}, International Salt Co. v. United States, 322 U.S. 392 (1947).

\textsuperscript{39} R. Bruce Phillips, \textit{An Appropriate Postscript to Topco: We Were Just Kidding!}, 42 \textsc{Okla. L. Rev.} 429, 435 (1989); Justice Black deemed \textit{Addyston Pipe} as a per se illegal case and not an ancillary restraints case, perhaps because, in \textit{Addyston Pipe}, only after the investigation the main purpose of the agreement, were the defendants found illegal.

\textsuperscript{40} 356 U.S. at 5; Justice Black explained the per se rule is reasonable and effective because it can avoid an "incredibly complicated and prolonged economic investigation." \textit{See also} Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., 472 U.S. 284, 289 (1985); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 333-34, 343-44 (1982).

Moreover, the per se rule can make up for Judge's inability to examine difficult economic problems. \textit{See} United States v. Topco Assoc., Inc., 405 U.S. 596, 609-10 (1972).

Furthermore, without per se rule, businessman would be forced to predict with little help "in any particular case what courts will find to be legal and illegal under the Sherman Act." \textit{See id.} at 609 n.10.
complicated practice which seems to fall into its category but involves procompetitive virtue.\textsuperscript{41}

B. Confusion of Approach to Horizontal Restraint

1. Rigid per se rule and horizontal market division

The Supreme Court in \textit{United States v. Sealy, Inc.},\textsuperscript{42} held that the case combined price fixing and division of markets\textsuperscript{43} is illegal per se,\textsuperscript{44} however, it did not make it clear whether horizontal market division unaccompanied with price fixing

\textsuperscript{41} See \textit{Topco}, at 611; The Supreme Court admitted the inflexibility of the per se rule and appointed the Congress to relieve restrictive business activities when necessary.

\textsuperscript{42} \textit{United States v. Sealy Inc.}, 388 U.S. 350 (1967).

\textsuperscript{43} While most manufacturers of mattress and boxsprings began as single-plant firms confined by high transportation cost to limited territorial markets, several small manufacturers including Sealy had formed a joint venture to compete effectively with larger firms. \textit{See United States v. Sealy Inc.}, 1964 Trade Cas. ¶¶ 71,258, 80,074-75 (N.D. Ill. 1964), \textit{rev’d}, 388 U.S. 350 (1967). The Joint venture licensed manufacturers of mattresses and bedding products to produce and sell their products under the Sealy name and trademarks. 388 U.S. at 351. The member manufacturers allocated mutually exclusive territories among themselves and set minimum retail prices for their dealers. \textit{Id}.

\textsuperscript{44} 388 U.S. at 357-58; The Supreme Court reversed the lower court’s decision. \textit{Cf.} 1964 Trade Cas. at ¶¶ 80,083, 80,106-7; The District Court, though it found the maintaining resale prices violated Section 1 of the Sherman Act, allowed exclusive market allocation under the ancillary restraints doctrine since the defendant’s activities had been developed "for entirely legitimate purpose" and had been directed "not toward market division among licensees but toward obtaining additional licenses and more intensive sales coverage." The legitimate purpose was royalty income for "the Sealy name, trademarks and patents," and "the benefits to licensees of joint purchasing, research, engineering and merchandising." \textit{Id}. at ¶ 80,063.
would be applied the per se rule even though division of markets were deemed to be per se illegal in *Northern Pacific*. Justice Fortas indicated that "[t]he territorial restraints were a part of the unlawful price-fixing and policing," and therefore held unlawful "without necessity for an inquiry in each case as to their business or economic justification, their impact in the market place, or their reasonableness." The notable point is that the Court did not consider using the ancillary restraints doctrine despite the fact that the defendant used this doctrine and that the

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47 388 U.S. at 353-54. *See* *Timken Roller Bearing v. United States*, 341 U.S. 593, 598 (1959); Justice Black held the license agreement which divided the world market accompanied with price fixing was illegal per se because such division of markets was "an aggregation of trade restraints." "Trade restraints" meant price fixing.

48 388 U.S. at 357-58. Note that it was also very important whether the division of markets was horizontal or vertical. The defendant argued the division of markets was not horizontal but vertical because Sealy principally engaged in the conduct. *Id.* at 353. Vertical territorial restraint was subject to the rule of reason analysis. *See* *White Motor Co., v. United States*, 372 U.S. 253 (1963). Horizontal territorial restraint, on the other hand, was applied to the per se rule. *See* *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). Therefore, the Supreme Court tried to distinguish *Sealy* from vertical restraint cases.

However, the Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), ruled vertical territorial restraint also per se illegal on June 12, at the same time as *Sealy*.

Both horizontal and vertical territorial restraint were deemed as per se illegal for ten years, until the Supreme Court overruled *Arnold, Schwinn* and examined vertical territorial restraint under the rule of reason in *Continental T.V. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

49 388 U.S. at 356; Sealy defended by the ancillary restraints doctrine providing that "the territorial restraints were incidents of lawful program of trade licensing."
lower court adopted this defense.\textsuperscript{50} While the Court recognized "that territorial exclusivity served many other purposes,"\textsuperscript{51} it refused the defendant's argument because of the connection of territorial restraint with the price fixing.\textsuperscript{52}

The Court clearly distinguished \textit{Sealy} from the small business cartel case without a price fixing agreement\textsuperscript{53} which was very similar to \textit{United States v. Topco Associates, Inc.}\textsuperscript{54} Given the dictum in \textit{Topco}, the Court at least would have to avoid applying the per se rule.\textsuperscript{55} However, the Court in \textit{Topco} explicitly denied this and

\textsuperscript{50}1964 Trade Cas. at ¶ 80,083. As to the Sealy's defense, \textit{see id.} at ¶¶ 80,071, 80,703.

\textsuperscript{51}388 U.S. at 356.

\textsuperscript{52}\textit{Id.} at 356-357.

\textsuperscript{53}388 U.S. at 357;

It is urged upon us that we should condone this territorial limitation among manufacturers of Sealy products because of the absence of any showing that it is unreasonable. It is argued, for example, that \textit{a number of small grocers might allocate territory among themselves on an exclusive basis} as incident to the use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition, and \textit{should not be condemned as per se unlawful}. But condemnation of appellee's territorial arrangements certainly does not require us to go so far as to condemn that quite different situation, whatever might be the result if it were presented to us for decision (emphasis added).

\textsuperscript{54}\textit{United States v. Topco Assoc., Inc.}, 405 U.S. 596 (1972).

\textsuperscript{55}Phillips, \textit{supra} note 39, at 436.
ruled that horizontal territorial restraint without a price fixing agreement is illegal per se.\textsuperscript{56}

In \textit{Topco}, small supermarket chains established a buying cooperative, Topco Associates, Inc. (hereinafter Topco), to purchase high quality merchandise and sell it under private labels.\textsuperscript{58} The purpose of Topco was not to restrain trade\textsuperscript{59} but to effectively compete with large supermarket chains.\textsuperscript{60} Its market power was not

\textsuperscript{56} There were many cases with respect to horizontal market division, but they were usually accompanied with a price fixing agreement. \textit{See}, e.g., \textit{United States v. Sealy, Inc.}, 388 U.S. 350 (1967); \textit{Timken Roller Bearing Co., v. United States}, 341 U.S. 593 (1951); \textit{United States v. Addyston Pipe & Steel Co.}, 85 F. 271 (6th Cir. 1898), \textit{aff'd}, 175 U.S. 211 (1899).

\textsuperscript{57} 405 U.S. at 609 at n.9.

\textsuperscript{58} 405 U.S. at 598; Such small and medium sized regional supermarket chains were independently owned and operated. Though Topco had no manufacturing processing or warehousing facilities, it distributed goods purchased from the packers and manufacturers directly to the members, in most cases, under brand names operated by Topco. \textit{Id.}

\textsuperscript{59} \textit{See} 319 F. Supp. at 1037; This licensing system did not include price fixing. It was only an exclusive market division among independent small supermarket chains, but did not include any agreement to control or affect prices, and Topco members could sell and actually sold topco-brand products at whatever price they wished.

\textsuperscript{60} 405 U.S. at 598.

\textit{See} \textit{United States v. Topco Assoc., Inc.}, 319 F. Supp 1031, 1034 (N.D. Ill. 1970), \textit{rev’d}, 405 U.S. 596 (1972); At that time, a small number of large national supermarket chains dominated the retail grocery business, and market power had been concentrated in a few of the most powerful chains while smaller chains had disappeared at an accelerating rate.

\textit{See also} 405 U.S. at 599 n.3; The members of Topco were in a difficult situation competing with larger chains such as A&P, because of the larger chains' own private-label programs. It is obvious that, by using private-label products, a chain can save its cost significantly in purchasing, transportation, warehousing, promotion, and advertising. Because of these advantages, a chain can offer its private-label products at lower prices than other brand-name products. An important advantage of the program is that a chain can sell national-brand products at the same price as
large, and its effect was procompetitive. The Government, nevertheless, challenged Topco because Topco issued licenses to approve members selling Topco-brand products exclusively in their designated territory. Topco members insisted that, to maintain the private label program, territorial exclusivity is

competitors while it simultaneously sells its private-brand products as alternatives at lower prices, or if the profit margin is sufficiently high on the private-brand products, the store can afford to sell national-brand products at reduced prices. Other advantages are: that a chain can obtain a more favorable bargaining position to national-brand manufacturers by diversifying suppliers, then decreasing dependence upon a limited large national-brand manufacturers; that a chain can use a "price-mix" whereby prices on special items can be reduced in order to attract customers while profits are maintained on the other items; or that a chain simply can offer high quality products at lower prices.

61 405 U.S. at 600; The market share of member supermarket chains in their regional area was from 1.5 percent to 16 percent, the average was approximately six percent.

62 405 U.S. at 600; Topco members frequently possessed as strong a competitive power in their areas as other large chains because of success of Topco-brand products. Further, the Topco-brand products had improved the competitive potential of Topco members with respect to other large and powerful chains. Id. As a result, their total sales were more than 2.3 million dollars by 1967 exceeded only by three national grocery chains; A&P, Safeway, and Kroger. Id.

63 405 U.S. at 601.

64 405 U.S. at 602; In order to obtain the license, prior approval from the board of directors and an affirmative vote of the Topco members were necessary. Frequently new small chains came in and old grown chains left, therefore Topco was constantly seeking new members. 319 F. Supp. at 1038.

65 405 U.S. at 601-2; There were three categories of territorial licenses: "exclusive," "non-exclusive," and "coextensive," though "non-exclusive" proved to be de facto exclusive. Although no member could sell Topco-brand products outside the designated territory, Topco members could and did expand their business into other members' territory without using Topco brand products. Id. at 602.
indispensable\textsuperscript{66} to eliminate the "free ride" effect.\textsuperscript{67} While the Government conceded\textsuperscript{68} Topco's procompetitive effect,\textsuperscript{69} it contended that exclusive territorial arrangements by Topco clearly had the effect to restrain competition among Topco members who otherwise might have competed with each other.\textsuperscript{70}

\textsuperscript{66} 319 F. Supp. 1036; It is necessary for the successful private label program to offer many hundred of items, and to sell a substantial volume to be able to afford the heavy costs of development of Topco-brand products including continuous advertising and promotion. Unless the Topco members could use the Topco private labels exclusively in their market area, many of the members would not have joined Topco. \textit{Id.}

\textsuperscript{67} 319 F. Supp. at 1040; The Topco members were afraid of a "free ride" on the advertising or promotion of their direct competitors, and testified that "they would not spend the money, time and energy necessary to establish consumer acceptance of Topco brands in their areas of operation if any of their substantial competitors could likewise sell the same brand names."

\textsuperscript{68} 319 F. Supp. at 1040; The Government also contended that if Topco had been a single, large national chain, its business activities would never have violated the Sherman Act.

\textsuperscript{69} 319 F. Supp. at 1040; The Government conceded Topco's procompetitive effect, their private label program, would encourage its members to compete more effectively both with large national chains and with other small or medium chains.

\textsuperscript{70} 319 F. Supp. at 1040; The Government contended that the territorial exclusivity was illegal "even if the ultimate result of these practices may be an over-all increase in supermarket competition."

Note that it did not matter at that time whether the territorial restraint was horizontal or vertical. The per se rule had applied to both restraints from \textit{United States v. Arnold, Schwinn & Co.}, 388 U.S. 365 (1967) to \textit{Continental T.V., Inc. v. GTE Sylvania Inc.}, 433 U.S. 36 (1977).
The District Court, applying the ancillary restraints doctrine,71 denied the Government's per se contention for Topco's procompetitive purpose and impact in the market72 in spite its effect of decreasing competition among Topco members.73

On direct appeal, the Supreme Court reversed this decision.74 Justice Marshall, citing Northern Pacific,75 defined Topco's horizontal division of markets as one of a classic per se illegal conducts.76

71 319 F. Supp. at 1038; The Topco's licensing program was recognized as being "ancillary and subordinate to the fulfillment of the legitimate, procompetitive purpose of the Topco cooperative, reasonable and in the public interest."

72 319 F. Supp. at 1038; The District Court said that the Topco cooperative serves a legitimate pro-competitive purpose by:
   (1) providing its members with commonly procured products to offer the consumer another choice of high quality, low price, private-label merchandise;
   (2) enhancing the ability of its members to compete more effectively in their respective markets against the stronger national and large regional chains;
   (3) enabling its members to exist as independently owned and operated businesses; and
   (4) benefitting the small manufacturers and processors which are the principal source of private label products.

73 319 F. Supp. at 1043; The District Court criticized the relief which the Government sought because it "would not increase competition in Topco private label brand but would substantially diminish competition in the supermarket field." This reasoning is similar to that in Sylvania, 433 U.S. 36,55 (1977), five years after Topco, which the Supreme Court admitted the effect of promoting interbrand competition rather than reducing intrabrand competition.

74 405 U.S. at 612.


76 405 U.S. at 607-608.
He criticized the rule of reason because of judicial inability to examine difficult economic problems\(^77\) and uncertainty of applying the Sherman Act.\(^78\) While these views above are indeed demerits to the rule of reason, it is doubtful these reasons justify the courts abandoning it.\(^79\) Further, was it certain that the territorial exclusivity by Topco really had a "pernicious effect on competition" and lacked "any redeeming virtue,"\(^80\) and was "naked restraints of trade" only for the purpose of eliminating competition?\(^81\) Moreover, though the majority suggested that the per se rule is applicable only after the courts had considerable experience with the business

\(^77\) 405 U.S. at 609. The Supreme Court declared it was incapable of comparing "destruction of competition in one sector of the economy" with "promotion of competition in another sector." Id. at 609-10.

\(^78\) 405 U.S. 609 n.10.

\(^79\) 405 U.S. at 622, 624; While Chief Justice Burger recognized the merits of the per se rule, he suggested that an examination of difficult economic problems is one role of the courts, and that "we should not abdicate that role by formulation of per se rules with no justification other than the enhancement of predictability and the reduction of judicial investigation."

\(^80\) Northern Pacific, 356 U.S. at 5.


See also Topco, 405 U.S. at 622; Chief Justice Burger, in his dissenting opinion, stated the majority did not tell us what "pernicious effect on competition" the practices here outlawed are perceived to have; nor did it attempt to show that those practices "lack . . . any redeeming virtue."
in question\textsuperscript{82} and that the Court had enough,\textsuperscript{83} it had never held a non-price fixing market division case.\textsuperscript{84}

The Supreme Court seemed to want to escape from complicated economic investigation under the rule of reason. But the ancillary restraints doctrine also could have released the Court. Although both Topco\textsuperscript{85} and the District Court\textsuperscript{86} introduced the ancillary restraints doctrine, the Supreme Court just compared the rule of reason with the per se rule.\textsuperscript{87} If the Court was not favorable to the ancillary doctrine,\textsuperscript{88} it

\textsuperscript{82} 405 U.S. at 607-8.

\textsuperscript{83} 405 U.S. at 608.

\textsuperscript{84} 405 U.S. at 615; Chief Justice Burger dissented because horizontal division of markets had not previously been held to constitute per se violation of Section 1 of the Sherman Act.


But there was no case in which horizontal market division unaccompanied with price fixing had been held illegal per se.

\textsuperscript{85} 319 F. Supp. at 1039.

\textsuperscript{86} 319 F. Supp. at 1038.

\textsuperscript{87} 405 U.S. at 606-12. The Court consequently chose the per se rule due to the enhancement of the ability to predict and the reduction of complicated investigation.\textsuperscript{Id. at 609-12.}

\textsuperscript{88} There is an opinion that the Supreme Court may have intentionally not addressed the ancillary restraints doctrine since "Topco’s durationless assignment of closed territories among potential competitors so large and numerous that they could not have merged was so intentionally restrictive as to preclude the ancillary claim and
should have expressed the ancillary doctrine was not suitable\textsuperscript{89} instead of ignoring it. Furthermore, if the Court had analyzed the territorial exclusivity agreement under the ancillary restraints doctrine, the Court could have held it was illegal because there was an insufficient evidence that the market allocation had been really necessary to maintain Topco.\textsuperscript{90} The Court, however, finally chose the "easy" per se rule.

\textsuperscript{89} The ancillary restraints doctrine's problem is that it is not well recognized as the approach to the antitrust litigations. Though the ancillary restraints doctrine was clearly articulated in Addyston Pipe, 85 F. at 282, the court held the defendants' conduct was illegal. The court actually analyzed the main purpose of the restrictive conducts, thus the ancillary restraint doctrine was not a dictum. However, the Supreme Court classified Addyston Pipe as a per se illegal case. See Topco, 405 U.S. at 608.

Moreover, in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), the ancillary restraint concept was absorbed by the rule of reason analysis which is a broader concept examining every element equally. "Judges and antitrust scholars have not openly articulated the distinctions between the ancillary restraints doctrine and the rule of reason." Louis, supra note 88, at 882. See also Phillips, supra note 39, at 433.

\textsuperscript{90} Topco showed reasons the territorial exclusivity among Topco members necessary, and the District Court approved it. See 319 F. Supp. at 1035-36, 1040, 1043.

However a question still remains whether Topco would not be able to successfully continue without the exclusive market allocation. The evidence is not clear whether the Topco members would suffer seriously from sales of Topco-brand products by other stores near the members, nor that there would be a way to prevent the "free ride" by new members.

The Supreme Court actually doubted whether territorial restraint was really necessary, 'Without territorial restrictions, Topco members may indeed "[cut] each other's throats." But we have never found this possibility sufficient to warrant condoning horizontal restraints of trade.' 405 U.S. at 611 (citation omitted).
Instead, the Court appointed Congress as the authority to relieve such restrictive business activities such as Topco’s, if necessary. The Court limited its own authority and decided, unless exemption laws from Antitrust laws provided otherwise, to judge horizontal market divisions under the per se rule. This concept, depending upon the exemption laws from the antitrust liabilities seems, similar to that of Japan, though in the United States there are not as many exemptions.

The Court admitted the inflexibility of the per se rule. The per se rule, however, can enhance predictability of its enforcement for the public and can promote litigation efficiency compared to the rule of reason. The Court compared the inflexible but clear per se rule with the flexible but uncertain rule of reason, and just ignored the ancillary restraints doctrine. To conclude, in *Topeo*, the Supreme Court gave up the flexible approach to certain horizontal restraint, and it ruled to apply the rigid per se rule regardless of the procompetitive purpose of the restraint, the necessity of the restraint, the procompetitive impact to the market, or the small market power of the conspirators.

2. Per se rule eroded by rule of reason

The Supreme Court supported the rigid per se rule in *Topeo*. However, it has been moving from the per se rule to the rule of reason analysis in order for

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91 405 U.S. at 611; Justice Blackmun, in his concurring opinion, also stated only the Congress can provide relief by legislation.

flexible application of the Sherman Act.

The first step began in a vertical territorial restraint case. Though the vertical territorial restraint had been held illegal per se,\(^ {93}\) the Supreme Court in *Continental T.V. v. GTE Sylvania*,\(^ {94}\) overruled it. The Court\(^ {95}\) examined vertical territorial restraint unaccompanied with price fixing\(^ {96}\) under the rule of reason analysis, since it found neither "pernicious effect on competition" or lack of "redeeming virtue,"\(^ {97}\) but


\(^{95}\) Justice Marshall, who wrote the majority's opinion in *Topco*, and Justice Brennann dissented to overruling *Schwinn*. 433 U.S. at 71. Justice White concurred. *Id.* at 59-71.

\(^{96}\) 433 U.S. at 37-39; The purpose of the franchise system in question was procompetitive, the market share of the defendant was small, and the system had a procompetitive impact in the market.

*GTE Sylvania, Inc.* (hereinafter *Sylvania*), a manufacturer of television sets, made an agreement requiring retailers to operate only in a designated area. *Sylvania's* market share was a relatively insignificant (1-2 percent) of national television sales compared to other larger companies (RCA had a dominant power as much as 60 to 70 percent of national television sales). *Id.* at 37-38.

*Sylvania* then changed its strategy to have competitive advantage: it ceased distribution through wholesalers and began to sell its television sets directly to a small group of franchised retailers. For the efficiency of this franchise system, *Sylvania* limited the number of franchises and required franchisees to sell franchised goods only in the franchised locations. This franchise did not have strict territorial exclusivity nor exclusive dealing. *Id.* at 38-39.

This new marketing strategy was very successful. *Sylvania's* market share of national television sales increased to approximately five percent, and it ranked as the nation's eighth largest manufacture of color television sets. *Id.*

\(^{97}\) 433 U.S. at 58-59; The Court could not find "that vertical restrictions have or are likely to have a 'pernicious effect on competition' or that they 'lack . . . any redeeming virtue.'" Both factors are as conditions to apply the per se rule. *See Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).
a procompetitive effect. The Court removed vertical restraint from the per se illegal category defined in *Northern Pacific,* and preferred the flexible application of the Antitrust laws. This showed its positive attitude to the judgement based on economic investigation.

Further, although the Supreme Court indicated that horizontal restraint still should be analyzed under the per se rule in *Sylvania,* it considered some elements before applying it where the restraint had been engaged in special business. In *National Society of Professional Engineers v. United States,* the Court suggested that the service by a learned professionals might survive under the rule of

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98 433 U.S. at 54; "Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products" while they "reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers." As an example, the Court showed the effect of preventing "free ride": "Because of market imperfections such as the so-called 'free rider' effect, these services (service and repair) might not be provided by retailers in a purely competitive situation despite the fact that each retailer's benefit would be greater if all provided the services than if none did." *Id.* at 55 (citing Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 COLUM. L. REV. 282, 285).

99 356 U.S. at 5.

100 433 U.S. at 58-59; "[D]eparture from the rule of reason standard must be based upon demonstratable economic effect rather than - as in *Schwinn* - upon formalistic line drawing."

101 433 U.S. at 58 n.28.


103 Defendant, the National Society of Professional Engineers (hereinafter Society), was the organization dealing with "the non-technical aspects of engineering practice, including the promotion of the professional, social, and economic interests of its members." 435 U.S. at 682. The Society made the canon of ethics which prohibited
reason because of the possibility of promoting competition in professional service. Actually, the Court considered whether the ethical canon prohibiting bidding was reasonable or not in spite of the price restraint among competitors.

competitive bidding among its member professional engineers. *Id.*

435 U.S. at 686; "[C]ertain practices by members of a leaned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context." The Court recognized the character of business between professional services and the others, and stated the former may be treated under the rule of reason.

*See also* Goldfalb v. Virginia State Bar, 421 U.S. 773 (1975); The Supreme Court noted that certain kind of practices by professionals might be immunized from antitrust liabilities under the rule of reason even though they appear to be violating the Antitrust laws. *Id.* at 778-79, n.17.

435 U.S. at 696.

435 U.S. at 696.

The Society argued that the ban of competition was necessary to avoid risk to public safety and health because bidding would cause deceptively low prices and thereby inferior performance by engineers. *Id.* at 693.
but found no justification for it, and therefore held it illegal per se. The Court in fact seems to have applied the ancillary restraints doctrine to this case.

The rule of reason had reached even horizontal price fixing in *Broadcast Music, Inc. v. Columbia Broadcast System*. The defendants, BMI and

\[107\] 435 U.S. at 696; The Court held that the Society’s argument was "a far cry from such a position" which might promote competition, and that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

Had the purpose and effect of the ethical cannon been promoting competition, efficiency, or safety and quality of their products or service, the Court might have investigated it under the rule of reason. The Court showed an example although it was vertical restraint case: "Courts have, for example, upheld marketing restraints related to the safety of a product, provided that they have no anticompetitive effect and that they are reasonably ancillary to the seller’s main purpose of protecting the public from harm or itself from product liability." *Id.* at 696 n.22. *See e.g., Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970), *cert. denied*, 400 U.S. 831 (1970).

\[108\] It is ambiguous what doctrine the Court used. Justice Stevens explained only the per se rule and the rule of reason while the ancillary restraints doctrine seemed to be used. 435 U.S. 692.

He ruled that unreasonableness under the rule of reason "could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices." *Id.* at 690.

Between the per se rule and the rule of reason, the difference is whether an elaborate study is necessary or not. Both have the common purpose "to form a judgement about the competitive significance of the restraint," and "not to decide whether a policy favoring competitions is in the public interest, or in the interest of the members of a industry." *Id.* at 692.

The Court denied to weigh all circumstances equally in the rule of reason. *Id. But see* Chicago Bd. of Trade v. United States, 246 U.S. 231, 283 (1918); Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977).

However, the Court examined whether the ethical cannon had a procompetitive purpose and effect. 435 U.S. 692. The Court held the canon was illegal not just because it fell into a category of horizontal restraint, but because the Court could not find a procompetitive character.

ASCAP,110 issued the "blanket license" which had the effect of horizontal price fixing among copyright owners.111 The purpose of the blanket license was the convenience of policing copyrighted products,112 and the blanket license was a necessary method to achieve that purpose.113 The blanket license had a procompetitive effect.114 But BMI and ASCAP had a monopoly power in the

110 Broadcast Music, Inc. (hereinafter BMI) and the American Society of Composers, Authors and Publishers (hereinafter ASCAP), were organizations representing individual copyrighted owners and issued licenses and policed those who wanted to perform or use copyrighted works. 441 U.S. at 4-5.

111 441 U.S. at 5; The blanket license gave the licensees the right to perform any and all of the music composition of members as often as the licensees wished during stated terms. Fees for the blanket license was either a flat fee or a percentage of revenues of licensees without regard to the amount or type of music used.

There might have been competition between the each individual composer. The blanket license set common prices of their products regardless of their popularity.

112 441 U.S. at 20-21; The blanket license offers unlimited access to the musical repertory for public performance, and gives reliable protection against infringement. The Court admitted its unique character gave immediate use of copyrighted compositions without the delay of prior individual negotiations and a great flexibility in the choice of musical compositions. Id. at 22-23.

Since 1897, owners of copyrighted musical compositions have been given the exclusive right for public performance of their works by the copyright laws. Id. at 4. However, it was impossible as a practical matter for the many individual copyrighted owners to negotiate with license users, to collect royalties, and to prevent unauthorized uses. Id. at 4-5. That is because performance of copyrighted music for profit were very frequent, fleeting and widespread. Id. BMI and ASCAP were established in order to resolve those problems above. Id.

113 441 U.S. at 20; Without the blanket licenses, thousands of individual negotiations between copyrighted owners and users would be necessary, and it would be difficult and expensive for the copyright owners to police their copyrighted works.

114 441 U.S. at 21-22; The blanket license substantially lowers costs and results in efficient policing of copyrighted works. ASCAP and BMI "made a market in which individual composers are inherently unable to compete fully effectively." Id. at 22-23.
The Supreme Court implied how to decide the applicable doctrine to the horizontal restraint: if the courts have "considerable experience" with the restraint and the business at issue, then the per se rule will apply; if not, the courts will examine the purpose and the effect of the restraint in order to select the proper method - the per se rule or the rule of reason. At first, the Court admitted not having "considerable experience" with the music industry involving copyright laws to apply the per se rule immediately. Then, the Court found the procompetitive

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115 441 U.S. at 5; Almost every domestic copyrighted composition was in the repertory either of ASCAP or of BMI.

116 441 U.S. at 9-10. Justice White delivered the majority's opinion that it was necessary to determine whether the blanket license would fall into the category of "per se price fixing" which is "'plainly anticompetitive' and very likely without 'redeeming virtue.'" Id. at 9.

Further, citing Topco, 405 U.S. at 607-8, in which the Supreme Court declared "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations. . . ." he admitted the Court did not have enough experience to hold the blanket license as a per se restraint of trade because it had "never examined a practice like this one before." Id. at 9-10. It seems interesting that the Court doubted the automatic application of the per se rule considering Topco.

Also the Court stated the rule that: "The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, or else we should apply the rule of reason from the start. That is why the per se rule is not employed until after considerable experience with the type of challenged restraint." Id. at 19 n.33 (citation omitted).

117 441 U.S. at 19-20. The Court pointed out the necessity of focusing on whether the purpose and the effect of the practice "are to threaten the proper operation of our predominantly free-market economy" before it characterizes the conduct in question under the per se rule. Id. at 19. That is to say, the per se rule will be applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." Id. at 19-20.

118 441 U.S. at 8-10.

Justice White criticized the Court of Appeals and the plaintiff because they recognized the blanket license as price fixing only "in literal sense," when the practice which literally fixes prices is not necessarily a per se violation of the Sherman Act.
purposes\textsuperscript{119} and effect\textsuperscript{120} of the blanket license, and concluded that an examination under the rule of reason analysis was necessary instead of the per se rule.\textsuperscript{121} The Court finally declared every horizontal restraint is not necessarily per se illegal.\textsuperscript{122}

\textit{Id.} at 8-9.

Then, he admitted the Court did not have considerable experience to hold the blanket license as a per se restraint of trade since it had "never examined a practice like this one before." \textit{Id.} at 9-10.

\textsuperscript{119} 441 U.S. at 20; The blanket license "is not a 'naked restrain[t] of trade with no purpose except stifling of competition' but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use" (citation omitted).

\textsuperscript{120} 411 U.S. at 23; The blanket license made it possible for individual composers to compete fully effectively by eliminating thousands of individual negotiations and by simplifying fees for the use and protection of copyrights.

\textsuperscript{121} 441 U.S. at 24-25; "[T]he blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions."

\textsuperscript{122} 441 U.S. at 23; "Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints."

\textit{See also id.} at 14; The Courts distinguished business with unique character from ordinary ones:

The Sherman Act has always been discriminately applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quality of separate performances each year, the impracticability of negotiating individual license for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music (quoting Memorandum for United States as Amicus Curiae on Pet for Cert in K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (1967), cert. denied, 389 U.S. 1045 (1968), OT 1967, No.147, at 10)(footnote omitted)(emphasis added).
In *NCAA v. Board of Regents of University of Oklahoma*,123 the Supreme Court expanded the application of the rule of reason.124 The NCAA set a plan regulating televised college football games.125 The Court held that the horizontal price and output restraint by the NCAA violated Section 1 of the Sherman Act126 not under the per se rule but under the rule of reason127 despite acknowledging the plan’s anticompetitive effects.128 The reason for applying the rule of reason was not the Court’s insufficient judicial experience with this type of restraint,129 or the plan’s


124 Interestingly, the Supreme Court doubted there was a clear border between the per se rule and the rule of reason analysis stating "[i]ndeed, there is often no light line separating per se from Rule of Reason analysis." 468 U.S. at 104 n.26.

125 468 U.S. at 89-94; The NCAA constituted virtually all major universities and colleges in the United States, and it made a plan to limit the number of football games that any one member college could televise and the total number of games that could be broadcast. Under this plan, no member college could appear on television more than six times and more than four times nationally in two years even if the college’s football team had a high reputation and was popular. *Id.* No college could set the television rights except in accordance with the plan. *Id.* The plan allowed only two networks to negotiate directly with member colleges concerning television rights of football games. *Id.* at 94.

Further, the evidence showed that the prices were arranged as a recommended fee by the NCAA. *Id.* at 93.

126 468 U.S. at 120.

127 468 U.S. at 100.

128 468 U.S. at 104.

129 468 U.S. at 100. *Cf.* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 9-10; United States v. Topco Assoc., Inc., 405 U.S. 596, 607-608; The Supreme Court announced it would not apply the per se rule until after it had considerable judicial experience with a particular restriction.
purpose\textsuperscript{130} and effect. It was rather that "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."\textsuperscript{131} The Supreme Court needed to determine to apply either the per se rule or rule of reason based on the character of the industry\textsuperscript{132} and not based on that of the restraint itself.\textsuperscript{133} Consequently, as commentators indicated,\textsuperscript{134} the analysis in \textit{NCAA} impresses the rigid per se rule although the Court explicitly declared applying

\textsuperscript{130} The purpose of the plan was to reduce "the adverse effects of live television upon football game attendance," and "upon the athletic and related educational programs." 468 U.S. at 91 n.6. With respect to the later purpose, the NCAA asserted that the plan "tended to preserve a competitive balance among football programs of the various schools," in other words, to avoid an adverse recruitment of its members. \textit{Id}.

\textsuperscript{131} 468 U.S. at 101. In the case of league sports, some kinds of agreements among league members are necessary in order to market the league, that is, to maintain competitive games attractive to sports fans and athletes. \textit{Id}. For instance, rules such as "the size of the field, the member of players on a team, and the extent to which physical violence" are necessary for the league sports. \textit{Id}.

Further, college football, an amateur sport, has to preserve unique character and quality. For example athletes must not be paid and must be required to attend class, unlike professional sports. \textit{Id}. at 101-102. The NCAA had served to preserve its character. \textit{Id}.

\textsuperscript{132} The Supreme Court took account of the unique character of the business at issue. \textit{See}, \textit{e.g.}, Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979); National Soc’y of Professional Eng’r. v. United States, 435 U.S. 679.

\textsuperscript{133} Instead, the Court examined whether the restraint can be justified under the rule of reason analysis. The Court focused on the inquiry "whether or not the challenged restraint enhances competition." 468 U.S. at 104.

the rule of reason. In sum, the Court ruled in NCAA, that the rule of reason analysis is applicable to the horizontal restraint of trade even if it looks like a classic per se conduct where an industry at issue requires some horizontal restraints so as to maintain the products being offered in the market.

The Supreme Court has loosened up the Antitrust laws in horizontal restraints other than price fixing and market division. With respect to group boycotts, in Northwest Wholesale Stationers Inc., v. Pacific Stationary & Printing Co., the

135 At the first step of the rule of reason analysis, the Court found the television plan had significant anticompetitive effects. 468 U.S. at 104. Thereby the Court placed upon the NCAA "a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." Id. at 113.

Given such a heavy burden, the NCAA gave four arguments but could not prove that the television plan, horizontal restraint of price and output, was necessary in order for that the college football game "to be available at all." See id. at 109-120.

Consequently, the Court just emphasized the anticompetitive character of NCAA’s plan under the rule of reason analysis. There was no explanation why the Court did not analyze the main purpose of the plan before the rule of reason.


The defendant, Northwest Wholesale Stationers, inc. (hereinafter Northwest), was a purchasing cooperative of a approximately one hundred office supply retailers. id. at 286. The plaintiff, Pacific Stationary & Printing Co. (Pacific), which operated as both a retailer and a wholesaler, was expelled from Northwest and therefore brought suit alleging group boycotts in violation of Section 1 of the Sherman Act. Id. at 287-88.

The reason for expulsion was in dispute. Pacific argued that "the expulsion resulted from Pacific’s decision to maintain a wholesale operation." Id. at 288. Northwest, on the other hand, contended that "the expulsion resulted from Pacific’s failure to notify the cooperative members of the change in stock ownership." Id.
Court showed a new rule: it should be proved to apply the per se rule that the defendant "possesses market power or exclusive access to an element essential to effective competition," otherwise the rule of reason will be applied. The Court admitted that some regulation is necessary for wholesale purchase cooperatives to function effectively, and found the challenged act of expulsion did not necessarily imply anticompetitive effect.

In FTC v. Indiana Federation of Dentists, the Supreme Court followed the

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138 472 U.S. at 296.

139 The issue was whether this expulsion by Northwest would fall into the category conclusively presumed to be anticompetitive. 472 U.S. at 290.

Justice Brennan doubted the automatic application of the per se rule to group boycotts. He reviewed group boycott cases in which the Court held per se illegal, and found the boycotting parties frequently had possessed market power, and thereby determined "not all concerted refusal to deal are predominantly anticompetitive." Id. at 294-98.

140 This reasoning seems similar to the doctrine in NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984). The Court also admitted the procompetitive effect of Northwest stating "such cooperative arrangements would seem to be 'designed to increase economic efficiency and render markets more, rather than less, competitive.'" 472 U.S. at 296 (citing Broadcasting Music, Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1, 20 (1979)).

141 472 U.S. at 296.

Cf. NCAA, 468 U.S. at 101-102, 106; While the Supreme Court admitted some horizontal restraints are necessary for college sports, it found the challenged horizontal price and output restraint had an obvious anticompetitive effect.


Indiana Federation of Dentists (Federation) was an association of dentists. Though number of membership was small, less than 100, its members were concentrated in two areas. Dental insurance evaluated diagnosis and treatment recommendation in order to limit payment of benefits to the cost of the "least expensive yet adequate treatment." To carry out the evaluation system, insurers often requested dentists to submit x-rays that had been used. In order to resist this evaluation system, Federation promulgated a "work rule" which forbad its member
doctrine of Northwest Wholesale,143 but held group boycotts illegal under the "easy" rule of reason analysis without elaborate market analysis.144 The decision in Federation of Dentists, marks the border between the per se rule and the rule of reason less clear since it expressed the rule of reason is not necessarily accompanied by complicated and elaborate economic analysis.145 It is very interesting that the Court

dentists to submit x-rays to dental insurers for use in evaluating claims.

The FTC alleged the Federation had a conspiracy among dentists to refuse to submit x-rays to insurers under Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

143 476 U.S. at 458; "[T]he per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competition." The Supreme Court did not find market power and decided to evaluate the group boycotts under the rule of reason. Id. at 458-59.

See Northwest Wholesale, 472 U.S. at 296.

144 476 U.S. at 459-66; If obvious anticompetitive effects are shown, the rule of reason does not require careful examination of all facts. This rule of reason analysis is similar to NCAA in which the Supreme Court held horizontal restraint illegal under the rule of reason emphasizing its anticompetitive character. 468 U.S. at 104-120.

But cf. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977); The Supreme Court ruled that all facts relating to the case should be weighed under the rule of reason analysis.

145 476 U.S. at 459-61; If the procompetitive effect of the conduct, in other words "countervailing procompetitive virtue - such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services" is found, or if substantial anticompetitive effect is found, then the courts will hold the restraint of trade illegal "even in the absence of elaborate market analysis." The Supreme Court in Federation of Dentists called this analysis "the rule of reason."
announced the rule of reason is not difficult\textsuperscript{146} although the Court in \textit{Topco} had refused to apply it owing to its complicated character.\textsuperscript{147}

3. The Surviving \textit{per se} rule

While the Supreme Court tended to move to the rule of reason analysis in 1980’s, the \textit{per se} rule has survived. In \textit{Catalano, Inc. v. Target Sales, Inc.},\textsuperscript{148} the Supreme Court ruled "when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value," it will be held illegal \textit{per se} despite "the fact that a practice may turn out to be harmless in a particular set of circumstances."\textsuperscript{149} That is to say that if the Court had found any

\textsuperscript{146} 476 U.S. at 459; "Application of the Rule of Reason to these facts is not a matter of any great difficulty."

\textsuperscript{147} 405 U.S. at 609.

\textsuperscript{148} Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); the Court held it was a \textit{per se} violation of the Sherman Act for price fixing where wholesalers made an agreement among themselves requiring retailers to pay in cash in advance.

Beer wholesalers in California had competed with each other about the credit terms for retailers, and they had extended credit without interest up to the 30-day and 40-day limits permitted by the state law. \textit{Id.} at 643-45. To restrain competition, wholesalers agreed that they would deal with retailers only if payment were made in advance or upon delivery. \textit{Id.}

\textsuperscript{149} 446 U.S. at 649-50. The Court unanimously decided the agreement to eliminate credit is deemed as classic price fixing because credit terms are characterized as an inseparable part of the prices. \textit{Id.} at 645-49. "[S]ince price-fixing agreements have been adjudged to lack any 'redeeming virtue,' it is conclusively presumed illegal without further examination under the rule of reason." \textit{Id.} at 650.
redeeming virtue of the agreement in question, the agreement might not have been defined as classic price fixing.\textsuperscript{150}

In *Arizona v. Maricopa County Medical Society*, the Supreme Court did not waive the enforcement of the per se rule against price fixing.\textsuperscript{151} The Supreme Court held illegal per se where physicians set the maximum fee schedule in order to provide patients of health care with a unique desirable form of insurance coverage.\textsuperscript{152} With respect to the issue whether the rule of reason analysis is applicable or not, the majority\textsuperscript{153} refused the physician’s arguments\textsuperscript{154} which are, relying upon

\textsuperscript{150} See 446 U.S. at 649; Though the Court denied it was necessity to inquire into the reasonableness of the agreement, it responded to the defendants’ arguments which had been upheld by the Court of Appeal and stated these arguments did not make sense.

The Ninth Circuit had admitted the procompetitive effects of the agreement such as "removing a barrier perceived by some sellers to market entry" and "the increase visibility of price made possible by the agreement to eliminate credit." Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097, 1099 (9th Cir. 1979), *cert. denied*, 446 U.S. 643 (1980).

\textsuperscript{151} *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 347 (1982).

\textsuperscript{152} 457 U.S. 339-41. Two county medical societies in Arizona established foundations for medical care "for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans." *Id.* at 339-41. This foundation set the maximum fees of medical services for the patients insured under the insurance plan authorized by the foundation. *Id.* at 339.

Under the plan: (1) the authorized insurance companies were to pay in full for medical services performed by member physicians; (2) the member physicians might charge less than the scheduled maximum fees; and (3) when an insured patient would go to a non-member physician, the insurance company should cover for patient’s charges up to the amount of scheduled maximum prices, and the patient should pay the balance by himself. *Id.* at 341.

The Maricopa Foundation for Medical Care, one of them, consisted of about 70 percent of the physicians in Maricopa County. *Id.* at 339.

\textsuperscript{153} It was controversial 4-3 judgment.
that the restraint was set by the members of the profession,\textsuperscript{157} that the Court lacked judicial experience in the health care industry,\textsuperscript{158} and that the schedule involved price fixing "in only a literal sense."\textsuperscript{159} Moreover, although the Court conceded there were merits of the

\textsuperscript{154} First of all, the physicians contended that fixing maximum prices was not subject to the per se rule. 457 U.S. at 342. The Court responded that maximum price fixing is placed on the same legal footing as minimum price fixing, and therefore is illegal per se. \textit{Id}. at 348.

\textsuperscript{155} National Soc’y. of Professional Eng’r. v. United States, 435 U.S. 679 (1978).


\textsuperscript{157} \textit{Maricopa}, 457 U.S. at 348. The Court refused this argument since "the price-fixing agreements in this case . . . are not premised on public service or ethical norms." \textit{Id}. at 349.

\textsuperscript{158} 457 U.S. at 349.

To this argument, the Court suggested "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing arguments are concerned, establishes one uniform rule applicable to all industries alike." \textit{Id}. at 349 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940)).

The Court distinguished \textit{Maricopa} from \textit{Broadcast Music}. In \textit{Broadcast Music}, the Court examined the challenged blanket licensing under the rule of reason because the restraint involved the copyright and not because it involved a music industry. 441 U.S. at 9-10.

\textsuperscript{159} \textit{See Broadcast Music}, 441 U.S. at 8-9; The Supreme Court stated that though the blanket license involved price fixing in the literal sense, for the judgement under the per se rule "it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label ‘per se price fixing.’"

However, the Court in \textit{Maricopa} is distinguished from \textit{Broadcast Music} because:

Each of the foundations is composed of individual practitioners who compete with another for patients. Neither the foundations nor the doctors sell insurance, and they derive no profits from the sale of health insurance policies. The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product. Their combination has merely permitted them to sell their services to certain customers at fixed prices...
schedule, it also rejected the procompetitive justification for escaping from the per se rule, and added that the price fixing among physicians was not necessary to achieve procompetitive effects.

Maricopa, 457 U.S. at 356 (footnote omitted).

Justice Powell, in his dissenting opinion, indicated this distinction by the majority was unconvincing because each arrangement in Broadcast Music and in Maricopa "involved competitors and resulted in cooperative pricing," "was prompted by the need for better service to the consumers," and "makes possible a new product by reaping otherwise unattainable efficiencies." Id. at 364-365 (footnotes omitted).

160 457 U.S. at 352; The Court acknowledged that a prior agreement between physicians and insurance companies assures full insurance coverage and brings potential to having lower insurance premium. The merits "can be obtained only if the insurer and the doctors agree in advance on the maximum fee that the doctor will accept as full payment for a particular services." Id.

The Court also conceded there was a competitive advantage for the foundations' member physicians that they could not have otherwise obtained. Id. at 356 n.33. The member physicians could attract patients who evaluate the assurance of "full health coverage" by an insurance and" a choice of doctors." Id.

161 457 U.S. at 351; "The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy," Id. n.23 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940)).

Besides, the majority additionally stated the schedule would not significantly enhance competition. Id. at 351.


It is not clear which doctrine the Court would have applied if it had found the necessity of price fixing in the schedule. The Court announced that procompetitive justification can not be a defense. Id. at 351. Further, the Court said "[e]ven if a fee schedule is therefore desirable, it is not necessary that the doctors do the price fixing." Id. at 352 (footnote omitted)(emphasis added). The Court seems to apply the per se rule.

However, a question remains where the Court found the procompetitive merits were "apparent potentially redeeming value." See Catalano, 446 U.S. at 649.
In the latest Supreme Court decision, *Jay Palmer v. BRG of Georgia, Inc.*\(^{163}\), the Court found the agreement of price fixing and horizontal market division illegal per se\(^{164}\) where the Bar Review Group of Georgia (hereinafter BRG)\(^{165}\) and the Harcourt Brace Jovanovich Legal and Professional Publications (hereinafter HBJ)\(^{166}\) made an agreement that BRG had an exclusive license to use HBJ's materials and continued doing its business only in Georgia and that HBJ did its business only outside Georgia.\(^{167}\) While the Eleventh Circuit denied the price fixing because the agreement did not explicitly addressed the factor of price,\(^{168}\) the Supreme Court

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\(^{164}\) 111 S. Ct. at 403.


\(^{166}\) HBJ has offered bar review courses nationwide under the name "Bar/Bri." 874 F.2d at 1418. HBJ began offering a review course on a limited basis in 1976. 111 S. Ct. at 401.

\(^{167}\) *See* 874 F.2d at 1418-19, 1428-30.

BRG and HBJ had competed with each other from 1977 to 1979. 111 S. Ct. at 401. HBJ lost large profits because of the low price of BRG, and HBJ decided to withdraw its business from Georgia in 1979. 874 F.2d at 1418. In 1980, BRG and HBJ entered an agreement that:

1. HBJ "gave BRG an exclusive license to use HBJ's name 'Bar/Bri' in Georgia;"
2. HBJ "would no longer offer a bar review course in Georgia;"
3. HBJ "would not compete with BRG on Georgia;" and
4. BRG would not compete with HBJ outside Georgia. *Id.*

The price of BRG's course rose from 150 dollar to 400 dollars immediately after the agreement. *Id.* at 1419.

\(^{168}\) 874 F.2d at 1424.
ruled, citing *Socony-Vacuum*, a combination which aimed to affect price is per se price fixing. To the lower court's decision that it was a vertical licensing agreement, the Court suggested, citing *Topco*, territorial restraint between competitors to minimize competition are per se illegal emphasizing that the defendants had done their business simultaneously in Georgia. Note that this agreement had

169 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."

170 111 S. Ct. at 402. *See also* 874 F.2d at 1434; Judge Clark, in his dissenting opinion, stated that it is not necessary for the plaintiff to prove that the defendants literally fix prices, and that the revenue-sharing agreement was not inherently anticompetitive because "the record establishes that the purpose and effect of the agreement was to increase the price of bar review courses."

171 874 F.2d at 1424; The Eleventh Circuit acknowledged that the only market ever claimed by both BRG and HBJ was Georgia, and BRG and HBJ did not divide up the Georgia market in which both were doing business, since (1) BRG had never done its business outside Georgia; (2) BRG had never intended to do business outside Georgia; and (3) HBJ has done the nationwide business but withdrew from Georgia.

172 United States v. Topco Assoc., Inc., 405 U.S. 596, 608 (1972); "One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same time level of the market structure to allocate territories in order to minimize competition. . . . This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition'" (citations omitted).

173 111 S. Ct. at 403; "Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other."

*See also* 874 F.2d at 1432-34. Judge Clark, in dissenting, found that BRG and HBJ were horizontal competitors ruling that "[i]t is firmly established that entities in a seemingly vertical relationship may be capable of horizontal restraints if they are actual or potential competitors." *Id.* at 1432. Further, he denied the necessity of proof that defendants sub-divided the relevant market because "market division is simply a subset of market allocation both of which are per se antitrust violations." *Id.* at 1434-
no lawful purpose nor economic efficiency between the defendants although it was disputed whether this type of restraint had belonged to the per se category.

4. Summary

The Supreme Court has tried to eliminate inflexibility of the rigid per se rule especially since *Sylvania*.174 Although *Topco*175 is still supported in *Palmer*,176 it is clear that Supreme Court has been moving from a prompt decision under the per se rule toward the flexible application of the Sherman Act on a case-by-case basis. In a lower court decision, the District of Colombia Circuit announced that *Topco* and *Sealy*177 "must be regarded as effectively overruled."178 Other lower courts also held that horizontal restraint are to be analyzed under the flexible approaches, namely the rule of reason or the ancillary restraints doctrine.179

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175 United States V. Topco Assoc., Inc., 405 U.S. 596 (1972).


179 *E.g.*, National Bancard Corp. v. Visa U.S.A., 779 F.2d 592 (11th Cir.) *cert. denied*, 479 U.S. 923 (1986); Polk Brothers, Inc. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985); Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984).
The recently favored rule of reason analysis, however, has a critical detriment which is not to be overlooked. Full consideration of relevant matters needs a considerable amount of time and can be a tough burden for the court to analyze. Besides, uncertainty of the flexible approach makes business and industry feel anxious about antitrust litigation when they sue or are sued. Other problems are what the Supreme Court indicated in *Topco.* The courts nevertheless are reluctant to apply the per se rule in order to evaluate impact on competition, and the Court has applied the rule of reason without elaborate fact findings.

It is clear now that price fixing and horizontal market allocation will be held illegal per se where they are inherently restrictive conduct unaccompanied with any redeeming justification. In the cases where concerted conduct involved some procompetitive efficiencies, the courts will consider on a case-by-case basis under which doctrine they will examine the challenged conduct. No matter what doctrine the courts choose, they will examine more or less the facts which they think necessary unless the restraint is an apparently naked one. Unfortunately, it seems that the

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180 405 U.S. at 609-10.


182 *See* Palmer, 874 F.2d at 1432 n.12; "The plaintiff’s price-fixing and market allocation claims are the types that courts and economists have long condemned as per se violations of the Sherman Act."

183 Even when the Court applied the per se rule, it explained why by referring to the facts relating to the restraint. *See, e.g.,* Arizona v. Maricopa County Medical Soc’y., 457 U.S. 332, 348-56 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649-50 (1980).
standard of when and how they decide an applicable doctrine is still vague\(^{184}\) even though the Sherman Act has a criminal charge.\(^{185}\) The courts should develop the criteria for balancing litigation efficiencies and the flexible application of the Antitrust laws.

\(^{184}\) In *Broadcast Music*, the Supreme Court suggested it is necessary to have considerable experience with the type of challenged restraint to determine whether the restraint falls within the category of per se illegal conduct. 441 U.S. at 8-10. While in *Maricopa*, the Court suggested the application of the per se rule to price fixing uniformly in all industry alike, in *NCAA*, the Court admitted that there exist industries in which some horizontal restraint on competition is necessary. *Maricopa*, 457 U.S. at 349; *NCAA*, 468 U.S. at 101.

Further, in *Broadcast Music*, the Court ruled not to apply the per se rule to the restraint which only literally involves price fixing, though it is not clear what is "only a literal sense." *Broadcast Music* 441 U.S. at 8. See *Maricopa*, 457 U.S. at 356.

Moreover, procompetitive justification cannot be taken into after the conduct was determined as per se violation. *E.g.*, *Maricopa*, 457 U.S. at 351. However, in *Catalano*, the Court announced a conduct "with no apparent potentially redeeming value" will be deemed per se conduct. 446 U.S. at 649.

\(^{185}\) See Sherman Act §§ 1, 2.
III. ANTIMONOPOLY ACT IN GENERAL

A. Brief History

"Free enterprise" and "free competition" are relatively new concepts in Japan. It might be useful in understanding the Antimonopoly Act in Japan to know the history and background of the Japanese competitive policy.

1. Before World War II

The Japanese Government had promoted policies of developing industries to reach European countries and the United States before World War II. To achieve this goal, while no policy to control a restrictive business practice nor to promote competition was adopted, cartels were promoted and reinforced by laws for rationalization and systematization of Japanese industries.

For example, the Important Industries Control Act of 1931 was enacted for rectifying the unstable condition of enterprises caused by excessive competition through rationalization, and for eliminating national economic losses caused by such

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186 MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 1 (1990).

187 ANTIMONOPOLY LEGISLATION OF JAPAN, supra note 7, at 301.
competition. The government could control and supervise activities of non-members of the cartels in designated industries under this Act. More than twenty industries were covered by this Act. Additionally, Zaibatsu, a giant conglomerate had developed before World War II. Zaibatsu were groups consisting of various powerful companies from the banking, coal, steel, heavy industry, trading, securities and other sectors, and usually were controlled by a holding company. These Zaibatsu had an extremely strong influence over many areas of Japanese industry. The period until the end of World War II can be called the period of government

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189 IYORI & UESUGI, supra note 188, at 3.

190 E.g., Cotton spinning, silk spinning, paper, carbide, cement, sulfuric acid, flour, pig iron, ferro-alloy, various steel products, refined sugar, beer and coal. IYORI & UESUGI, supra note 188, at 4 (citing MITSUBISHI KEIZAIKENKYŪJO [MITSUBISHI ECONOMIC RESEARCH INSTITUTE], NIHON NO SANGYÔ TO BÔEKI NO HATTEN [DEVELOPMENT OF INDUSTRIES AND TRADE IN JAPAN] 126-27 (1953)).

191 MATSUHITA, supra note 186, at 1.

See also AKIRA SHÔDA, ZEN TAI DOKUSEN KINSHIHÔ I [ANTIMONOPOLY LAW I REVISED ED.] 4 (rev. ed. 1980); As to Mitsui Zaibatsu, for example, the Headquarter of Mitsui Company which was a holding company and the Mitsui family together owned 66.7 percent of interest in 10 so called directly affiliated companies. They also owned 48.7 percent of interest in 12 so called semi-directly affiliated companies. Id. These 22 companies controlled 151 domestic companies and 61 overseas companies in 1946. Id.

192 IYORI & UESUGI, supra note 188, at 5; Especially the four largest Zaibatsu (Mitsui, Mitsubishi, Sumitomo and Yasuda) controlled huge share of Japanese industries. At the end of World War II, they controlled 544 companies, directly or indirectly. Id. Their controlling ratio of the total companies in Japan was 24.5 percent in all fields of industries, 49.7 percent in the financing business, 32.4 percent in heavy industry, 10.7 percent in light industry, and 60.8 percent in the marine transportation industry. Id.
control because "free enterprise" or "free competition" could not be established under the circumstances above.\textsuperscript{193}

2. New Japanese economic policy

The end of World War II had completely changed these situations in Japan. The Allied Occupation Forces, in which the United States was the leading power, took some measures to reform the then wholly controlled economy into a free competitive one.\textsuperscript{194} One measure was the dissolution of Zaibatsu. So as to eliminate Zaibatsu, holding companies which had controlled Zaibatsu were dissolved,\textsuperscript{195} combination with the affiliated companies through stockholding or personal or contractual relationships was prohibited,\textsuperscript{196} and the Zaibatsu families were forced to transfer their securities\textsuperscript{197} and were also restricted from holding executive positions in companies.\textsuperscript{198}

\begin{itemize}
\item \textsuperscript{193} MATSUSHITA, \textit{supra} note 186, at 1.
\item \textsuperscript{194} ANTIMONOPOLY LEGISLATION OF JAPAN, \textit{supra} note 7, at 301.
\item \textsuperscript{195} Mochikabukaisha Seiri Iinkai Rei [Holding Company Liquidation Commission Ordinance], Imperial Ordinance No.233 of 1946 (Japan).
\item \textsuperscript{196} Kaisha no Shōken hoyū Seigen tō ni kansuru Ken [Restriction of Securities Holding, etc. by Companies], Imperial Ordinance No.567 of 1946 (Japan).
\item \textsuperscript{197} Amendment to the Holding Company Liquidation Commission Ordinance, Imperial Ordinance No.592 of 1946 (Japan).
\item \textsuperscript{198} Zaibatsu Dōzoku Shihairyoku Haijohō [Act for Termination of Zaibatsu Family Control], Act No.2 of 1948 (Japan).
\end{itemize}
3. The Antimonopoly Act

Another important measure to reform the Japanese economy was to enact the Antitrust laws in Japan. The Antimonopoly Act was promulgated in 1947, and the Fair Trade Commission (hereinafter JFTC)\(^{199}\) was established by this Act.\(^{200}\) Since the Japanese Government had a vague conception of free competition and little knowledge of regulation of a restrictive business practice, the Allied Occupation Forces had strongly advised them to draft the Antimonopoly Act.\(^{201}\) The Antimonopoly Act, therefore, was patterned after the Antitrust laws in the United States, and added several new improvements which were deemed necessary and helpful in the light of American experiences.\(^{202}\)

4. The 1953 amendment

The Antimonopoly Act has been amended several times to meet Japan’s actual economic conditions. The notable amendment concerning cartels was relaxation of the Antimonopoly Act. The occupation by the Allied Occupation Forces was terminated.

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\(^{199}\) The Fair Trade Commission (JFTC) is an independent administrative agency of the Government, which aims to achieve the purpose of the Antimonopoly Act. Although the JFTC is attached administratively to the Prime Minister, the chairman and commissioners perform their duties independently. **ANTIMONOPOLY LEGISLATION OF JAPAN, supra** note 7, at 328. Yet, the JFTC has been often less active against private monopolies, cartels and unfair practices. SHIGEKAZU IMAMURA, DOKUSEN KINSHIHÔ SHINBAN [ANTIMONOPOLY LAW NEW ED.] 15-26 (2d ed. 1978).

\(^{200}\) Antimonopoly Act § 27.

\(^{201}\) **ANTIMONOPOLY LEGISLATION OF JAPAN, supra** note 7, at 301.

\(^{202}\) **ANTIMONOPOLY LEGISLATION OF JAPAN, supra** note 7, at 301.
in 1952. The Korean War and the Cold War made the United States change its policy from discouraging Japan’s resurgence as a major economic power to rebuilding Japan into a heavily industrial country for the purpose of making Japan as a bulwark against Communism.\(^{203}\) Then, the request for an amendment to relax the Antimonopoly Act became stronger when Japan was struggling with the depression following the end of the Korean War.\(^{204}\) At the same time, Japan was introduced to West German’s Bill Against Restraint of Competition (Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen) which has provisions to exempt a depression cartel, a rationalization cartel and an export cartel from application of the Bill.\(^{205}\) In 1953, the Antimonopoly Act was amended to respond to these requests.\(^{206}\) As a result of this amendment, the per se approach to a restrictive practice including a cartel was

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\(^{204}\) Iyori & Uesugi, supra note 188, at 15.

\(^{205}\) Imamura, supra note 199, at 19.

\(^{206}\) See Antimonopoly Legislation of Japan, supra note 7, at 302; Iyori & Uesugi, supra note 188, at 16; The major points of the 1953 Amendment were as follows:

1. By deleting or modifying provisions which had prohibited activities affecting competition, the only activities which substantially restrain competition were prohibited. In other words, the proof of market power eventually became necessary.

2. "Unfair methods of competition" was changed to "unfair business practices" so as to widen the scope of application.

3. The abuse of one’s dominant bargaining position was additionally prohibited.

4. Exemption of depression cartels and rationalization cartels under certain conditions was approved.

5. Exemption of the resale price maintenance for particular conditions was approved.
eliminated. And only those activities are prohibited when they constitute
"unreasonable restraint of trade" which restrain "substantially competition."207

Moreover, this amendment admits that a depression cartel208 and a rationalization
cartel209 can be exempted by the JFTC's approval from application of the
Antimonopoly Act. This amendment seems to recognize the existence of "good
cartels" and "bad cartels," unlike the Antitrust laws in the United States.

In addition to the 1953 Amendment, separate laws providing for exemptions
from application of the Antimonopoly Act were enacted. They included a law
covering a small business cartel210 and an import-export cartel.211

The original Antimonopoly Act, which was patterned after Antitrust Laws in
the United States, has been changed through several amendments.212 Especially by
the 1953 Amendment, the Japanese approach to the horizontal restraint of trade
differed from the that of the United States. This Amendment, however, does not mean

207 Antimonopoly Act § 1(6).

208 Antimonopoly Act § 24-3.

209 Antimonopoly Act § 24-4.

210 Chūshō Kigyō Dantai no Soshiki ni Kansuru Hōritsu [Small and Medium Sized
Enterprise Organization Act], Act No.185 of 1957 (Japan), as amended, translated in
ANTIMONOPOLY LEGISLATION OF JAPAN, supra note 7, at 235, (hereinafter Small and
Medium Enterprise Organization Act).

211 E.g., Yushutunyū Torihikihō [Export and Import Trading Act], Act No.299 of
1952 (Japan), as amended, translated in ANTIMONOPOLY LEGISLATION OF JAPAN,
supra note 7, at 257.

212 Major amendments were enacted in 1949, 1953, and 1977. ANTIMONOPOLY
LEGISLATION OF JAPAN, supra note 7, at 3.
Japan abandoned a free competition policy or returned to the pre-World War II period. It is evident that Japan has pursued its suitable competition policy utilizing concepts introduced from the United States.

B. Purpose of Antitrust Laws

1. Explicit purpose of the Antimonopoly Act

The Antimonopoly Act was enacted to forward the antimonopoly policies in Japan. As the history shows, the concept of antimonopoly policies was not familiar to Japanese people at the end of World War II. Hence, it was necessary to have a provision clearly expressing its purpose specified in order to realize the ideal of antitrust policies.\(^{213}\) Note that this purpose is an important guiding principle when the Antimonopoly Act is interpreted and enforced.\(^{214}\)

The purpose of the Antimonopoly Act is as follows:

(1) "to promote free and fair competition;"

(2) "to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and people’s real income;" and thereby

(3) "to promote the democratic and wholesome development of the national economy;"

\(^{213}\) SHIGEKAZU IMAMURA, Mokuteki [Purpose], in CHŪKAI KEIZAIHŌ JOUKAN [COMMENTARY ECONOMIC LAWS I] 20 (1975).

\(^{214}\) IYORI & UESUGI, supra note 188, at 42.
(4) "as well as to assure the interests of consumers in general."\(^{215}\)

The first purpose of promoting free and fair competition is a classic but the most important one. Undoubtedly, the second purpose is not to protect unproductive companies from competition. Promoting free and fair competition will result in economic efficiencies described in the second part. Though it seems to be correct on the surface that over competition will make the national economy dangerous, protection of inefficient companies or an unreasonable trade practice will not promote economic efficiency. The third and fourth parts, developing national economy and protecting consumers, are the goal of appropriate national economic policy rather than the unique purpose of the Antimonopoly Act.\(^{216}\) The Antimonopoly Act pursues these national purposes through protecting free and fair competition. Promoting competition should not be inconsistent with the welfare of the national economy and consumers. If a particular conduct seems to promote competition in the market as well as be against development of the national economy or consumers' welfare, such a conduct should be examined carefully to see whether it promotes competition for a long term. The Antimonopoly Act, therefore, prohibits some unfair conducts which seem consistent with free competition at the first. For instance, the Antimonopoly Act prohibits price discrimination\(^{217}\) and unjust prices\(^{218}\) including unjust low price

\(^{215}\) Antimonopoly Act § 1.

\(^{216}\) IYORI & UESUGI, supra note 188, at 24.

\(^{217}\) JFTC Notification No.15 of 1982 Subsec. 3 (Japan). JFTC Notification No.15 of 1982 was enacted to specify unfair trade practices prohibited in Section 2(9) of the Antimonopoly Act.
sales\textsuperscript{219} and unjust high price purchasing.\textsuperscript{220} Further, even some kinds of cartels can be exempted from the application of the Antimonopoly Act under a certain circumstance.\textsuperscript{221} What is important is a clear standard to determine legality of conducts which seem to make conflicts between free competition and other benefits. The Congress in Japan provided a lot of specific provisions in the Antimonopoly Act and other separate laws, including exemption laws, in order to help the public understand the unlawful restraint of trade.

The measures taken to achieve the mentioned purposes above are prohibition of (1) "private monopolization," (2) "unreasonable restraint of trade," (3) "unfair trade practices," and (4) "excessive concentration of economic power."\textsuperscript{222} These measures are explained specifically as elimination of "unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combination, agreements and otherwise."\textsuperscript{223}

Subsection 3 prohibits "unjustly supplying or accepting a commodity or service at prices which discriminate between regions or between the other parties."

\textit{Antimonopoly Legislation of Japan, supra} note 7, at 316.

\textsuperscript{218} Antimonopoly Act § 2(9)(ii).

\textsuperscript{219} JFTC Notification No.15 of 1982 Subsec. 6 (Japan).

\textsuperscript{220} JFTC Notification No.15 of 1982 Subsec. 7 (Japan).

\textsuperscript{221} \textit{See infra} part V.

\textsuperscript{222} Antimonopoly Act § 1.

\textsuperscript{223} Antimonopoly Act § 1.
2. Comparison with the United States

Although the Antitrust laws in the United States have no explicit statement concerning their purpose, the Supreme Court in *Northern Pacific Railway Co. v. United States*\(^{224}\) announced the purpose of the Sherman Act. The Court indicated that the Sherman Act "aimed at preserving free and unfettered competition as the rule of trade" in order for "the best allocation of economic resources,""the lowest prices,""the highest quality,""the greatest material progress" and "the preservation of democratic political and social institutions."\(^{225}\) Further, there exists heated arguments concerning the main goal of the Antitrust laws. Traditionalists support the goal of free competition.\(^{226}\) Chicago School, on the other hand, insists it is economic efficiency.\(^{227}\) The Traditionalists' view states the Antitrust laws also enhance or encourage economic efficiency although their main concept is competition.\(^{228}\) It is believed by Traditionalists that tension between free competition and economic efficiency should not exist.\(^{229}\) Under this view,

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\(^{225}\) 356 U.S. at 4.


\(^{228}\) Fox & Sullivan, *supra* note 226, at 971.

\(^{229}\) *Id.*
promoting free competition will consequently bring economic efficiency.\textsuperscript{230} While the economic view of the Chicago School has influenced the Supreme Court,\textsuperscript{231} free competition still must be an important purpose of the Antitrust laws under the Chicago Doctrine. Free competition cannot be ignored because economic efficiency is promoted by free and fair competition in the free economy. In the free competitive market, enterprises should always make an effort to promote efficiency for their survival. At least, the Antitrust laws do not prohibit every agreement in restraint of trade, but prohibit unreasonable ones which are contrary to the development of the economy and consumers protection\textsuperscript{232} which results from free and fair competition.\textsuperscript{233}

In sum, both the Antimonopoly Act in Japan and the Antitrust laws in the United States have the similar purpose of promoting competition and thereby to achieve welfare of consumers and the development of the national economy.

\textsuperscript{230} Id.


\textsuperscript{232} Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); "Congress designed the Sherman Act as a ‘consumer welfare prescription’" (citation omitted).

\textsuperscript{233} See supra part II.
C. Promoting Competition

The Antimonopoly Act has as its primary purpose "to promote free and fair competition."\(^{234}\) Enterprises develop their technology and make themselves more procompetitive through competition. One contradictory situation is that a single survivor dominates the market as a result of winning free and fair competition because of its superior technology, diligent service, and excellent management. Once the market is monopolized, the dominator may be able to enjoy its monopoly power. The question here is whether prevention of such a situation is necessary.

1. Competition

It is important to recognize what is competition since the purpose of the Antimonopoly Act is "to promote free and fair competition."\(^{235}\) The recognition of competition is necessary to judge whether a competitive relationship among entrepreneurs exists.\(^{236}\) The Antimonopoly Act defines the term "competition" as "a situation in which two or more entrepreneurs do or may" deal with the same customers or same suppliers and in the same or similar services.\(^{237}\) "Two or more

\(^{234}\) Antimonopoly Act § 1.

\(^{235}\) Antimonopoly Act § 1.

\(^{236}\) ANTIMONOPOLY LEGISLATION OF JAPAN 45, supra note 7.

\(^{237}\) Antimonopoly Act § 2(4). Section 2(4) provides in full:

The term "competition" as used in this Act shall mean a situation in which two or more entrepreneurs do or may, within the normal scope of their business activities and without understanding any important change in their business facilities or kinds of business activities, engage in any act prescribed in any one of the following paragraphs: Provided,
entrepreneurs do or may" implies the term competition includes potential competitors in the future as well as an actual competitors.\textsuperscript{238} Also in the United States, the conduct eliminating potential competitor in the future is unlawful.\textsuperscript{239}

2. Monopolies resulting from lawful activities

a. Japan

The Antimonopoly Act pursues promoting competition by prohibiting "private monopolization" and by preventing "excessive concentration of economic power."\textsuperscript{240} A monopoly is obviously contrary to free and fair competition. An enterprise can control the market where there are no other good competitors. It is an important role for the Antimonopoly Act to prevent a monopoly or an excessive concentration of economic power. Though the Antimonopoly Act prohibits private monopolization,\textsuperscript{241} it cannot eliminate an enterprise which has a dominant market power as a result of

That paragraph (ii) below shall not apply to such competition as provided for in Chapter IV [Stockholding, interlocking directorates, mergers and acquisitions of business]:

(i) Supplying the same or similar goods or services to the same consumers;
(ii) Getting supplies of the same or similar goods or services from the same supplier.

\textsuperscript{238}MATSUSHITA, \textit{supra} note 186, at 11.

\textsuperscript{239}See Federal Trade Comm'n v. Gamble Co., 386 U.S. 568 (1967); The Supreme Court in a conglomerate merger case held the conglomerate merger between a seller of liquid bleach and a potential candidate for entering into the market violated Section 7 of the Clayton Act.

\textsuperscript{240}Antimonopoly Act § 1.

\textsuperscript{241}Antimonopoly Act § 3.
natural growth.\textsuperscript{242} Section 2(5) of the Antimonopoly Act defines the term "private monopolization" as a situation in which an entrepreneur excludes or controls the business activities of other enterprises.\textsuperscript{243}

The Antimonopoly Act had not had a provision to regulate such a monopolistic situation until 1977. By Section 8-4 of the Antimonopoly Act added in 1977, the JFTC got measures to restore competition where a monopolistic situation exists regardless of whether the monopoly was caused by unlawful conducts or not.\textsuperscript{244} The measures to restore competition is in order for the enterprise concerned "to transfer a part of his business or to take any other measures necessary to restore competition with respect to such goods or services."\textsuperscript{245} However because of its drastic effect, the JFTC must consider several severe conditions when it issues such an order.\textsuperscript{246}

\textsuperscript{242} An enterprise will be able to get dominant power without using anticompetitive conducts if it has a superior technology or performs diligent services.

\textsuperscript{243} Antimonopoly Act § 2(5). Section 2(5) of provides in full:

The term "private monopolization" as used in this Act shall mean that any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by in any other manner, excludes or controls the business activities of other entrepreneurs, thereby restraining, contrary to the public interest, substantially competition in any particular field of trade.

\textsuperscript{244} Antimonopoly Act § 8-4.

\textsuperscript{245} Antimonopoly Act § 8-4(1).

\textsuperscript{246} The conditions required to the JFTC in order to issue an order to restore competition in a monopolistic situation are provided in the Antimonopoly Act as follows.

The JFTC must give consideration to the smooth conduct of business activities by entrepreneurs and welfare of their employees based on following conditions:

(i) Assets, income and expenditures and other aspects of accounting;

(ii) Officers and employees;
monopolistic situation is defined based on the market share of the enterprise, difficulties for new entry into the market, aggregated amount of prices, excessive profits, and excessive selling costs and general and administrative expenses.\textsuperscript{247}

(iii) Location of factories, workyards and offices and other locational conditions;
(vi) Aspects of business facilities and equipments;
(v) The substance of patent rights, trademark rights and other intangible property rights and the technological features;
(vi) Capacity for and situations of production and sales, etc;
(vii) Capacity for and situations of obtaining funds and materials, etc;
(viii) Situations of supply and distribution of goods or services.

Antimonopoly Act § 8-4(2).

Further, no order can be issued under the following situations:
(1) It may reduce the size of business which will destroy its cost efficiency sharply;
(2) Entrepreneurs may fall in financial difficulties;
(3) Entrepreneurs may become difficult to maintain its international competitions;
(4) Other alternative measures can be taken. Antimonopoly Act § 8-4(1).

Moreover, there are other procedural regulations when the JFTC issues an order by the JFTC decision:
(1) The JFTC, when it believes an existence of a monopolistic situation, must notify the competent Minister having jurisdiction over the relevant industry (§ 45-2(1)), and the Minister can provide his opinion whether the monopolistic situation and alternative measures exist (§ 45-2(2));
(2) The JFTC must hold a public hearing to obtain views of the public when it starts an administrative procedure (§ 72-2);
(3) The JFTC must consult with the competent Minister when it starts an administrative procedure
(4) The JFTC cannot issue an recommendation. To be careful, full procedure should be taken (§ 48);
(5) The decision of issuance must be supported by at least three commissioners or the chairman although usually a majority of affirmative votes of attending commissioners are sufficient (§ 55(3)). The commission consists of the chairman and four commissioners (§ 29(1));
(6) The JFTC decision cannot be enforced unless it becomes final (§ 58(2));
(7) A lawsuit to quash a decision can be filed within three months after the decision becomes effective (§ 77(1)).

\textsuperscript{247} Antimonopoly Act § 2(7).

\textit{See} ANTIMONOPOLY LEGISLATION OF JAPAN, \textit{supra} note 7, at 307-308:
No order against a monopolistic situation has been issued so far, while the JFTC announced the Guideline and also often investigates and observes enterprises in relatively concentrated industries. There will be few cases that the order be issued against enterprises in a monopolistic situation. Because even if the enterprise possesses a high market share, the enterprise will not be subject to Section 8-4 as long as it keeps its products low prices and does not get an excessive profit. In other words, although Section 8-4 of the Antimonopoly Act allows the JFTC, without proof of exclusive conducts by the enterprise, to eliminate the enterprise having a

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The term "monopolistic situation" is defined as a circumstance in which each of the following market structures and undesirable market performance exist in any particular field of business where the total amount of sales of goods or services of the same and similar description supplied in Japan during the latest one-year period is in excess of 50 billion yen (approximately 390 million dollars):

(i) The market share of one entrepreneur is over 50 percent, or a combined market share of two entrepreneurs is over 75 percent;

(ii) There exists a condition in which new entry into the relevant field of business is extremely difficult; and

(iii) The price of particular goods or services has increased remarkably, or decreased marginally over a period of time, despite changes in costs and the fluctuation in the supply and demand, and during such period the said entrepreneurs have gained;

(a) extremely high profit margin, or have spent
(b) excessively high selling costs and general administrative expenses.

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248 JFTC ANNUAL REPORT IN 1991, supra note 14, at app. 12-13; No case concerning Section 8-4 has been reported until 1990.

monopoly power in the market, the JFTC still needs to prove that the enterprise improperly enjoys its dominant position.

This is the limit of the Antimonopoly Act against a monopolistic situation. But this limit does make sense. Assume that an enterprise could produce quality goods at low cost. Its products were welcomed by consumers, and the enterprise earned profits. The enterprise spent their profits for research and development and improved their superior technology. It invested its money in its productive facilities and increased its amount of products in order to respond to growing demand. It expanded its business and finally dominated the market. Even after the enterprise got the dominant power in the market, it continued sincere management. Under this situation, nobody would complain to this enterprise. Were such an enterprise held illegal just because of its monopoly power, all private enterprises would be discouraged to make an effort at their business. Discouraging enterprises to perform diligent business activities will cause discouraging competition in the market. Furthermore, enterprises may possibly choose cooperation with their competitors by concerted activities rather than competition among them where the law does not allow a single winner. The Antimonopoly Act therefore does not prohibit a monopoly resulting from a proper business by the most efficient enterprise.
b. United States

Section 2 of the Sherman Act\textsuperscript{250} does not prohibit the existence of a monopoly itself. Additional elements other than monopoly power are necessary in order for proof of a violation of Section 2.\textsuperscript{251} Such additional elements are not necessarily predatory conducts or direct restraints of competitors.\textsuperscript{252} In \textit{United States v. Aluminum Co. of America}, the Second Circuit held Alcoa was illegal despite absence of predatory conducts or direct restraints of competitors.\textsuperscript{253} Judge Hand concluded that Alcoa engaged in "exclusion" by embracing new business opportunity progressively and showing new comers a new capacity already geared into a great organization with the advantage of experience, trade connections and the elite of personnel.\textsuperscript{254} Even given this doctrine, a monopolistic situation cannot be held


\textsuperscript{251} United States v. Grinnel Corp., 384 U.S. 563, 570-71 (1966); The Supreme Court declared the elements to be charged by Section 2 that "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."


\textsuperscript{253} 148 F.2d 430-31 (2d Cir. 1945). Aluminum Company of America (hereinafter Alcoa) controlled more than 90 percent of the aluminum ingot market and had increased its plant capacity in almost eight times meanwhile no one else produced ingot in the United States. \textit{Id.} at 425, 430. As a result, Alcoa effectively anticipated and forestalled all competition, and succeeded in holding the monopoly in spite of at least one or two attempts to enter the industry. \textit{Id.} at 430.

\textsuperscript{254} 148 F.2d at 431.
unlawful where it is a result of fair and free competition and is maintained by proper management.

In regard to monopolies, the Antimonopoly Act in Japan has a severer approach than the Sherman Act in the United States because it may issue an order to regulate a monopolistic situation caused by lawful conducts.

3. Prevention of a lawful monopoly

It is true that the market in which enterprises are competing is better than a concentrated market power even where the monopolist did not abuse its power. The Second Circuit in *Alcoa* announced "[m]any people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." Monopoly itself is not a vice but a danger. Once one enterprise has a big market power, it may be tough for other enterprises or new entries to compete with its dominant power effectively. It seems it would be better and more realistic to prevent a monopolist from appearing before it gets dominant power. Is it possible to prevent a single big winner of competition and to promote free and fair competition? It is also questionable who is authorized to control competition in the market.

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255 United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945).
In Japan, the Antimonopoly Act authorized the Government and the JFTC to control competition under certain circumstances by means of exemption systems. For example, the Antimonopoly Act and other laws admit exempted cartels among small and medium enterprises in order to compete with large enterprises effectively. In addition, the Antimonopoly Act allows, under certain circumstances, enterprises in depressed industries to establish a lawful depression cartel. Less efficient enterprises should withdraw their business in depression. Depression is a good opportunity to draw a line between productive enterprises and less efficient ones. Excessive competition in a severely depressed industry, however, may harm enterprises which have potential to do good business. Having protection for limited period, such enterprises will be able to start a better business and compete after the depression. Both exemptions from the Antimonopoly Act have the effect of maintaining competition entities, but also include danger. The danger is that exempted cartels may protect incapable enterprises which should have withdrawn their business from the market. These exempted cartels will be discussed in following chapters.

To summarize this section; (1) a monopolistic situation is less favorable than competitive market; (2) the provisions prohibiting cartels in the Antitrust laws and the

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256 E.g., Antimonopoly Act §§ 21 - 24-4.

257 Antimonopoly Act § 24; Small and Medium Enterprise Organization Act; Chushō Kigyō tō Kyōdōkumiaihō [Small and Medium Sized Enterprise, etc. Cooperative Act], Act No. 54 of 1947 (Japan), as amended, translated in ANTIMONOPOLY LEGISLATION OF JAPAN, supra note 7, at 219 (hereinafter Small and Medium Enterprise Cooperative Act).

258 Antimonopoly Act § 24-3.
Antimonopoly Act cannot prevent a monopolistic situation maintained by good management; (3) maintaining competition entities is useful to prevent a monopoly; and (4) exempting cartels from the Antimonopoly Act is one way to keep competition entities although it has the dangerous effect of restraining competition.
VI. PROHIBITION AGAINST CARTELS IN JAPAN

Both Japan and the United States similarly prohibit horizontal restraint of trade. Though any kind of horizontal restraint of trade is generally prohibited in Japan, it may be true that the Antimonopoly Act in Japan prohibits a cartel less severely than the Antitrust laws in the United States. This Chapter will focus on how both countries regulate horizontal restraint of cartels, and what the difference is.

A. Cartel

A cartel is, in short, an arrangement or conduct by enterprises to restrain competition among themselves. The Antimonopoly Act prohibits a cartel as "unreasonable restraint of trade" in the latter part of Section 3. The element of "unreasonable restraint of trade" is determined in Section 2(6) as follows:

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259 Antimonopoly Act § 3. Section 3 provides in full:
No entrepreneur shall effect private monopolization or any unreasonable restraint of trade.

260 Antimonopoly Act § 2(6). Section 2(6) provides in full:
The term "unreasonable restraint of trade" as used in this Act shall mean that any entrepreneur, by contract, agreement or any other concerted actions, irrespective of the names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby restraining, contrary to the public interest, substantially competition in any particular field of trade.

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(1) Existence of a contract, agreement, or any other concerted activities among entrepreneurs;

(2) That entrepreneurs mutually restrict or conduct their business activities;

(3) Business activities in such a manner as to fix prices, to limit production, technology, productive facilities, or customers or suppliers;

(4) Activities being contrary to the public interest;

(5) Activities which restrain substantially competition in any part of field.

Business activities of trade associations have similar effects as cartels, so the Antimonopoly Act has provisions to prohibit restrictive conducts of trade associations.\(^{261}\)

B. Evidence of Agreement

Existence of an agreement or a concerted activity is necessary to prove a cartel illegal.\(^{262}\) It is easy to find a concerted activity where enterprises made a written contract among them. To escape from the Antimonopoly Act, enterprises are not supposed to remain any evidence of an agreement. The issue is what fact is sufficient to constitute an evidence of an agreement.

\(^{261}\) Antimonopoly Act § 8(1)(i)-(iii).

The JFTC ruled in 1949 that "[i]n order to establish concerted activities, the existence of an external uniformity as a result of acts of entrepreneurs is not enough, and it is further required that a liaison of wills of some sort exists among the entrepreneurs concerted . . . ," and that "the existence of a liaison of wills could sufficiently be proved," when entrepreneurs exchanged their information, and when one expected others' conducts and also consciously did same conducts as others.263

Given this principle, the existence of cartel can be proved while there is no direct evidence of an agreement but circumstantial evidence. But merely showing that entrepreneurs conducted similarly is not a sufficient proof of an agreement. Neither does it constitute sufficient evidence that entrepreneurs consciously acted similarly. The term "liaison of wills" needs a fact which shows an exchange of information or communication among entrepreneurs existed.264 Thus, it is necessary for the proof of an agreement that similarity of entrepreneurs' conducts appeared after they exchanged information among them.

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This is a case of price fixing at an open bidding. A government agency decided to purchase plywood for the Occupation Forces in Japan. The method of bidding was that the agency requested prospective suppliers to show their estimated prices, and then the agency allocated purchase contracts to the bidders who offered the lowest prices, in ascending order to the bidding with the lowest bid. The prospective suppliers held several meetings concerning the prices in advance. In those meetings, one of the companies suggested a certain price as good price, and many of others agreed. No price nevertheless was set in the meetings. As a result, many suppliers offered the same price as or similar ones to the price previously suggested in the meetings.

264 IMAMURA, supra note 199, at 96; MITSUO MATSUSHITA, KEIZAIHŌ GAISETSU [INTRODUCTION TO ECONOMIC LAWS] 115-16 (1986); MATSUSHITA, supra note 186, at 45-46.
The Tokyo High Court in the oil cartel case took the same position and found ten oil companies' conducts illegal where they had talked with among themselves about their bid prices informally several times, and actually entailed a bid at similar prices.\(^\text{265}\) Unless there had been an evidence of meetings among companies, they would have escaped from application of the Antimonopoly Act. Conscious parallelism among competitors itself is not allowed as a sufficient evidence of a cartel in Japan.

In the United States, conscious parallelism does not necessarily support an inference of a conspiracy under the Sherman Act. In *Interstate Circuit, Inc. v. United States*,\(^\text{266}\) the Supreme Court suggested that agreements or communications among companies are not necessary but that the fact each company knowingly engaged in similar conducts is enough to establish a conspiracy.\(^\text{267}\) In *Theatre Enterprises, Inc.*

\(^{265}\) Judgment of Sep. 26, 1980 (*In re Idemitsu Kōsan Co.*), Tokyo Kōsai [Tokyo High Court], 33 Kōkeishū 359 (Japan). See also Honshū Seishi K.K., 28 Shinketsushū 32 (1951)(Japan); Asahi Glass K.K., 22 Shinketsushū 92 (1975)(Japan); Kodama Sushi, 15 Shinketsushū 9 (1968)(Japan).

\(^{266}\) *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); The Court held that the circumstantial evidence is sufficient to sustain a finding of conspiracy among eight motion picture film distributors where: (1) the exhibitors of first-run films in Texas had sent letters requiring each film distributor to restrict terms of contracts, including price fixing, with other exhibitors of subsequent runs in Texas; (2) each distributor had known other distributors also had been required same conditions because the request letters had listed all eight distributors' name as addressees; and (3) eight distributors had accepted an offer from the first-run exhibitors and had limited the terms when they would licensed subsequent runs of their films.

v. Paramount Film Distributing Corp.,268 the Supreme Court concluded
"[c]ircumstantial evidence of consciously parallel behavior may have made heavy
inroads into the traditional judicial attitude toward conspiracy; but 'conscious
parallelism' has not yet read conspiracy out of the Sherman Act entirely."269 The
difference between Interstate Circuit and Theatre Enterprises is, in Interstate Circuit
each conspirator knew of the existence of same invitations to competitors. For the
inference of a tacit agreement, some further evidence like the circumstance of
Interstate Circuit is necessary in addition to conscious parallel behaviors. According
to subsequent decisions following above the two Supreme Court Cases, mere
conscious parallelism will not be sufficient evidence to sustain the inference of
conspiracy.270

In sum, though there is a difference between Japan and the United States
concerning the degree of necessary evidence to establish a cartel, the difference is not
so great. To prove a cartel in both countries, evidence that an agreement existed is

268 Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537
(1954); The Court denied conscious parallelism itself establishes evidence of
conspiracy where picture motion producers and distributors had each refused to grant a
suburban exhibition first run rights.

269 346 U.S. at 541. See also Delaware Valley Marine Supply Co. v. American

270 E.g., Quality Auto Body v. Allstate Inc. Co., 660 F.2d 1195 (7th Cir. 1981),
cert. denied, 455 U.S. 1020 (1982); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir.
1977), cert. denied, 434 U.S. 1086 (1978); Delaware Valley Marine Supply Co. v.
American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), cert. denied, 369 U.S. 839
(1962); Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397 (4th Cir. 1958), aff'd
not necessary but mere conscious parallel behavior is insufficient. The difference is that, in Japan, it is always necessary to show the communications among companies existed before their uniform conducts.

C. Horizontal Agreement Only

There are arguments as to whether a vertical agreement should be included in the category of "unreasonable restraint of trade" in Section 3 of the Antimonopoly Act. In the United States, the definition of "restraint of trade" in the Sherman Act covers both vertical and horizontal restraints. The Antimonopoly Act, however, defines "unreasonable restraint of trade" as an activity which is *mutually* restricted or conducted by any entrepreneur. Horizontal restraint is undoubtedly covered by this provision because an agreement among competing enterprises requires each enterprise not to compete among themselves.

Vertical restraint, in contrast, is an agreement among various levels of enterprises which are not necessarily competing. There is no competitive relationship in an agreement between a distributor and a buyer. For example, an exclusive dealing agreement is a contract which a manufacturer forces dealers to deal in only the manufacture's products. Under this agreement, only dealers had a duty on dealing, but the manufacturer had no obligation.

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271 *See supra* part II.B. Section 1 of the Sherman Act prohibits the existence of a contract, combination or conspiracy regardless whether vertical or horizontal.

272 Antimonopoly Act § 2(6). *See supra* note 260 and accompanying text.
The JFTC had recognized that vertical restraints could be regulated by Section 2(6) until 1953. The Tokyo High Court on the contrary denied the JFTC’s view. The court ruled that "to mutually restrict or conduct their business activities" means concerted activities under the horizontal agreement only since it is necessary for an enforcement of Section 2(6) that competing enterprises mutually restrict upon among themselves.

The JFTC, responding to this decision, has proceeded against vertical restraint under other provisions, mainly as "unfair trade practice." Exclusive dealing, exclusive distributorship, resale price maintenance, and vertical customer and territorial restraint fall into the category of Section 2(9)(iv) which prohibits "dealing with another party on such terms as will restrict unjustly the business activities of the said party" as

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273 See Hokkaidō Butter Co., 2 Shinketsushū 103 (1950)(Japan); A butter manufacturer set the wholesale and resale prices and asked wholesalers to accept such prices. The JFTC decided theses vertical agreements were unlawful as cartels. See also Shōchiku Co., 1 Shinketsushū 114 (1950)(Japan).

274 Judgment of Mar. 9, 1953 (In re Asahi Newspaper), Tokyo Kōsai [Tokyo High Court], 6 Kōminshū 435 (Japan); Five major newspaper publishers agreed with newspaper sellers that each of the sellers would have their exclusive sales territory. The JFTC condemned that agreements of territorial allocation as unlawful under Section 2(6) of the Antimonopoly Act. The Tokyo High Court denied the JFTC’s argument because these agreements imposed an obligation to do their business within their territories only upon newspaper sellers and thereby mutuality was lacking. See also Judgment of Dec. 7, 1953 (so-called Tōhō and Shin Tōhō case), Tokyo Kōsai [Tokyo High Court], 5 Kōminshū 118 (Japan); A film distributor could exclusively distribute all movies which a film maker made under the contract. Although the JFTC brought a suit under Section 2(6), the Tokyo High Court held it was not a cartel since the film maker was bound to supply all their movies for the distributor but the distributor had no obligation.

275 Antimonopoly Act § 2(9); "The term ‘unfair trade practices’ as used in this Act shall mean any act . . . which tends to impede the fair competition . . . ."
an "unfair trade practices."\textsuperscript{276} Tying arrangements are prohibited by Section 2(9)(iii) as unreasonable coercion.\textsuperscript{277} Further, resale price maintenance has been held unlawful as private monopolization where the price leader with a big market share controlled the market price by means of resale price maintenance.\textsuperscript{278} In any case, vertical restraint of trade cannot be immunized from antitrust liability in Japan.

Though the Tokyo High Court clearly established the rule not to treat vertical restraint as a cartel, some Japanese academics have criticized this judgement.\textsuperscript{279}

D. Types of Activities

The Antimonopoly Act shows examples of the form of concerted activity as: (1) price fixing; (2) limiting production, technology, products or facilities; or (3) customers or suppliers limitation.\textsuperscript{280}

Price fixing is illegal in Japan. No justification of reasonableness can be allowed to escape from the Antimonopoly Act. Even where the fixed price was a reasonable one, such a price fixing agreement is unlawful. The JFTC decided that


\textsuperscript{277} Antimonopoly Act § 2(9)(iii). \textit{See also} JFTC Notification No.15 Subsec. 10.

\textsuperscript{278} Judgment of Dec. 25, 1957, Tokyo Kōsai [Tokyo High Court], 8 Kōminshū 2300 (Japan).

\textsuperscript{279} \textit{See, e.g.}, Ieyoshi Fukunaga, \textit{Tate no Ketsugō ni yoru Torihikiseigen [Restraint of Trade by Vertical Agreement]}, 5 Kōbe Hōgaku Zasshi 82 (1955); \textit{Shōda, supra} note 191, at 227; \textit{Matsushita, supra} note 186, at 100-101.

\textsuperscript{280} Antimonopoly Act § 2(6). \textit{See supra} text accompanying note 260.
fixing a maximum price was also illegal because the power of private companies to control prices was a disadvantage for consumers.\footnote{281} This decision may be affected by the judgement of \textit{Kiefer-Stewart Co. v. Joseph E. Seagram \& Sons}\footnote{282} one year before. Though the Antimonopoly Act explicitly prohibits an agreement "to fix, maintain or increase prices,"\footnote{283} it does not mention decreasing prices. According to the JFTC's decision which prohibited maximum price fixing, every agreement to control price should be contrary to the Antimonopoly Act.\footnote{284} In the United States, the Supreme Court stated that lowering the price is also per se illegal.\footnote{285} Exchange of price information is recognized as lawful in case of past and current pricing, but exchange of future price information can be an evidence of a cartel.\footnote{286} In the United States, the Supreme Court held that the exchange of price data is illegal per se as price

\footnote{281}{Noda Soy Sauce Co., 4 Shinketsushū 1 (1952)(Japan); The Price Administration Agency asked soy sauce companies to set their prices not more than 75 yen (approximately 60 cent) per 1800 milliliter by Administrative guidance under the severe inflation after World War II. Soy Sauce companies argued that fixing maximum prices contributed towards consumers' benefit under the circumstance of inflation. \textit{See also} Motokazu Kikuchi, \textit{Saikoukakaku no Kyōtei [Maximum Price Fixing Agreement]}, 110 \textit{Bessatsu Jurisuto Dokkinhō Shinketsu Hanrei 100 Sen Dai 4 Han [Selected 100 Decisions by the JFTC and Judgments of Antimonopoly Act (4th Ed.)]} 44 (1991).


\footnote{283}{Antimonopoly Act § 2(6). \textit{See supra} text accompanying note 260.

\footnote{284}{Noda Soy Sauce Co., 4 Shinketsushū 1 (1952)(Japan).


\footnote{286}{IYORI \& UESUGI, \textit{supra} note 188, at 53.
fixing under certain circumstances because of its effect of stabilizing prices.\(^{287}\)

However, price exchange itself is not illegal per se.\(^{288}\)

Limiting production unaccompanied with price fixing is illegal under the Antimonopoly Act.\(^{289}\) Under a recession, enterprises tend to control the amount of products in the market. In addition, Japanese industry often has been annoyed by the excess capacity. The Japanese Government, especially the MITI, has frequently advised enterprises and trade associations.\(^{290}\) Yet, a cartel limiting output is illegal unless such a cartel is approved by the JFTC to be exempted from the Antimonopoly Act. Limiting facilities has a similar effect as limiting output and is unlawful. Current amount of products is not reduced where enterprises limit excess capacities or


\(^{289}\) E.g., To-Ray Co., 19 Shinketsushū 112 (1972)(Japan); Teijin Co., 19 Shinketsushū 116 (1972)(Japan); Mitsubishi Rayon Co., 19 Shinketsushū 121 (1972)(Japan); In the three cases above, synthetic fiber manufacturers set a certain reduction ratio of their products. See also Nihon Concrete Indus. K.K., 17 Shinketsushū 86 (1970); Six companies agreed to set the market share of each company.

\(^{290}\) Judgment of Sep. 26, 1980, Tokyo Kōsai [Tokyo High Court], 33 Kōkeishū 359 (Japan); The Japanese Petroleum Association, based on the MITI’s petroleum policy, issued a program limiting the maximum annual output of petroleum products. Tokyo High Court found this program was illegal regardless the MITI’s Administrative guidance. See Tateo Wada, Genyu Shoriryō no Seigen to Sekiyushōhin no Torihikibunya [Restricting Amount of Refining Oil and Relevant Market of Petroleum Products], 110 BESSATSU JURISUTO DOKKINHŌ SHINKETSU HANREI 100 SEN DAĪ & HAN [SELECTED 100 DECISIONS BY THE JFTC AND JUDGMENTS OF ANTIMONOPOLY ACT (4TH ED.)] 20 (1991).
investment for future facilities. There is so far no case in which limiting future productive facilities was held illegal.\textsuperscript{291}

Limiting products means to limit types or kinds of products.\textsuperscript{292} Such a conduct may limit a choice of consumers, slow the development of new technology, and prevent new products from entering the market. Some forms of these cartels can be allowed upon the approval by the JFTC as rationalization cartels where they are deemed to be necessary for the good effect on technology, quality of goods, cutting costs or others.\textsuperscript{293}

Limiting customers or suppliers includes market divisions and group boycotts. Market division without price fixing is unlawful. In Japan, an agreement of market division is usually concluded by a trade association in order to make it effective. The JFTC hence enforces not Section 2(6) but Section 8(1)(i) which regulates a trade association.\textsuperscript{294} For example, the JFTC held conducts of members of a trade association illegal where they made an agreement not to deprive other members of

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\textsuperscript{292} Iyori & Uesugi, supra note 188, at 53.
\textsuperscript{293} Antimonopoly Act § 24-4. See infra part V.C.1.
\textsuperscript{294} Antimonopoly Act § 8(1)(i); "No trade association shall engage in any acts which comes under any one of the following paragraphs: (i) Substantially restraining competition in any particular field of trade. . . ."
their customers.295 In the United States, market division unaccompanied with price fixing is still illegal per se regardless of its reasonableness.296

Group boycotts are, as well as Section 2(6), prohibited as "unfair trade practice" by Section 2(9) and its designative provision.297 As a result, the JFTC usually enforces Section 2(9) on a group boycotts without price discrimination instead of Section 2(6).298 In the United States, the Supreme Court ruled group boycotts are illegal per se where defendants have a market power, otherwise the rule of reason analysis is applied.299

295 National Harbor Shipping Promotion Assoc., 12 Shinketsushū 18 (1963)(Japan); The trade association ordered its members to respect the past relationships and not to attract other members' customers. See also Tokorozawa Milk Sales Coop., 16 Shinketsushū 109 (1969)(Japan); The trade association required members not to catch other members' customers using lower prices.


297 JFTC Notification No.15 Subsec. 1, 2.


E. Contrary to the Public Interest

A business activity must restrain competition "contrary to the public interest" to prove an unlawful "unreasonable restraint of trade."\(^{300}\) The definition of the term "contrary to the public interest" is a very important issue in understanding the concept of cartel regulation under the Antimonopoly Act. The difference of its interpretation affects the enforcement of the Antimonopoly Act against a cartel. If "the public interest" includes any benefit to the economy, the defense of a cartel based on its economic efficiency can easily be allowed even if such a cartel substantially restrains competition.\(^{301}\)

1. Three views

There are various interpretations of "contrary to the public interest" among Japanese academics. This section will describe three major opinions of what "the public interest" is.

First, the public interest means free competition itself or only maintaining or promoting economic order based on free competition.\(^{302}\) Second, in the broader view, the public interest should include not only free competition but also the development of national economy, consumers' welfare and cooperation with foreign

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\(^{300}\) Antimonopoly Act § 2(6). See supra note 260 and accompanying text.

\(^{301}\) MATSUSHITA, supra note 186, at 17.

\(^{302}\) IMAMURA, supra note 199, at 83; SANEKATA, supra note 291, at 182, ANTIMONOPOLY LEGISLATION OF JAPAN, supra note 7, at 307.
countries. Third, the public interest requires a balancing test between benefits of free competition and those of permitting the restrictive activities in question.

The JFTC took the first narrow view and stated that:

The act of joint price fixing by entrepreneurs on the occasion of the open bidding competition is a violation of the spirit of the provision of Section 1 of the Antimonopoly Act, of which the printing purpose is to ensure free competition . . . . Such activity as price fixing should be recognized as being contrary to the public interest. Whether the agreed price is appropriate or not, or whether the national economy has sufficient any loss or not, all these considerations should not furnish any basis for deciding to public interest or not.

Further, the Tokyo High Court found the conduct newspaper sellers illegal where they divided their sales territories among them, though they argued their market division would not put consumers at a disadvantage because the qualities of newspaper and the prices set by newspaper publishers are the same. Under this opinion, any business activity which restrains competition is contrary to the public interest. Only the elimination of such restraint of trade can meet the public interest. This view seems to be same as the per se approach in the United States. No depression cartel, applying this doctrine, would be allowed unless there were an exemption system for them.


304 Matsushita, supra note 264, at 64-65.

305 Yuasa Lumber Co., 1 Shinketsushō 62 (1949)(Japan). With respect to the facts of this case, see supra note 263.

306 Judgment of Mar. 9, 1953 (In re Asahi Newspaper), Tokyo Kōsai [Tokyo High Court], 6 Kōminshū 435 (Japan). With respect to the facts of the case, see supra note 274.
The second broader view has been insisted by the business community and the MITI.\textsuperscript{307} This view argues that the public interest is more than merely a free competition and includes interests of the national economy as a whole. Under this doctrine, a cartel is not necessarily unlawful just because it restrains competition substantially. This doctrine always requires the rule of reason analysis on examination of restrictive conducts. Furthermore, it would be difficult to prohibit a cartel by considering any factors which justify the cartel as reasonable in light of a broader interpretation of the public interest.\textsuperscript{308}

The third view requires a balancing test considering the ultimate purpose of the Antimonopoly Act.\textsuperscript{309} The ultimate purpose of the Antimonopoly Act is "to promote the democratic and wholesome development of the national economy as well as assure the interests of consumers in general."\textsuperscript{310} "To promote free and fair competition" is also a primary purpose.\textsuperscript{311} Both purposes should be consistent with each other. This position, however, admits an exception which may restrain competition but comply with the ultimate purpose of the Antimonopoly Act. The Supreme Court in the oil price fixing case announced under this doctrine that although the public interest under the Antimonopoly Act should in principle mean free competition, an agreement among

\textsuperscript{307} IYORI AND UESUGI, supra note 188, at 50.

\textsuperscript{308} MATSUSHITA, supra note 186, at 18; MATSUSHITA, supra note 264, at 63-4.

\textsuperscript{309} MATSUSHITA, supra note 186, at 19-20; MATSUSHITA, supra note 264, at 64-5.

\textsuperscript{310} Antimonopoly Act § 1.

\textsuperscript{311} Antimonopoly Act § 1.
competitors can be justified under exceptional circumstances when the courts find the agreement is not substantially inconsistent with the ultimate purpose as a result of comparing benefits of free competition with those of permitting restrictive conducts. According to the Supreme Court, in short, some exceptional horizontal restraints may not fall into the category of "unreasonable restraint of trade." That is, even where the cartel at issue was not protected by the exemption system, this judgment would make it possible to admit an exempted cartel from the Antimonopoly Act through an interpretation of "contrary to the public interest."

2. Free competition and the ultimate purpose of the Antimonopoly Act

Which view of the three is the most appropriate? The short answer is that the third one should be applied rather than the first one or, of course, second one. The judgment of the Supreme Court does not admit the broader concept of "the public interest" like the second view. A cartel must not be allowed because of its economic efficiency if it is contrary to the consumers' welfare.

The third doctrine nonetheless is closer to the position of the first view which determines the public interest is free competition, since the Supreme Court emphasized

<sup>312</sup> Judgment of Feb. 24, 1984 (so-called Oil Cartel case), Saikōsai [Supreme Court], 38 Keishū 1287 (Japan); The Organization of Petroleum Exporting Countries (OPEC) and the Organization of Arab Petroleum Exporting Countries (OAPEC) had jointly raised their crude oil prices in 1970's. Defendants, oil refining companies in Japan, needed to raise their prices because their purchase prices had increased. The oil companies agreed to set a certain price and date on which they would raise their prices, and raised their prices simultaneously. Defendants argued that "contrary to the public interest" should be interpreted as "contrary to the benefit of the wholesome national economy including manufacturers as well as consumers."
free competition and acknowledged that a restrictive activity could be allowed only in exceptional cases.\textsuperscript{313} The difference between the first doctrine and the third one is only that the third one admits a potential exceptional situation which will restrain competition but will not be inconsistent with the ultimate purpose of the Antimonopoly Act. Moreover, the definition of the exceptional case is not clear because the Supreme Court did not admit the cartel in this case as an exceptional situation.\textsuperscript{314} As it will be described in following chapter, there are many cartels which are exempted from the Antimonopoly Act in Japan.\textsuperscript{315} Such exempted cartels indeed are exceptional cases which are explicitly approved by statutes. Exceptional cases under the third doctrine, hence, should be admitted very narrowly. The business circumstances will be changing in the future. New business activities will appear. Some of them may have the good effect of pursuing the ultimate purpose of the Antimonopoly Act while they also restrain competition. The exemption system cannot expect all such new business activities. The third doctrine can cover such a new unforeseeable field until a new exemption provision has been legitimated.

In sum, exceptional cases under the third doctrine can be allowed only where the current exemption system does not expect them. For instance, there is less possibility that a small business cartel, which primary purpose is to effectively compete with large enterprises, is deemed as an exceptional case under the third

\textsuperscript{313} MATSUSHITA, supra note 186, at 19.

\textsuperscript{314} Judgment of Feb. 24, 1984 (so-called Oil Cartel case), Saikōsai [Supreme Court], 38 Keishū 1287 (Japan).

\textsuperscript{315} See infra part V.
doctrine where it is not approved as an exempted one by the exemption system. It is otherwise unclear why a small business cartel can be exempted from the Antimonopoly Act by statutes.\textsuperscript{316} An agreement among enterprises in a depressed industry should not be allowed either unless the cartel is approved by the JFTC as the legitimate depression cartel.\textsuperscript{317} Exemption system has a role to make a category of exceptional case clear.

The first doctrine seems similar to the holding in \textit{United States v. Topco Associates, Inc.} In \textit{Topco}, the Supreme Court, by applying the per se rule, did not allow any possibility of horizontal market division unless the Congress exempts it from the Antitrust laws by statutes.\textsuperscript{318} The third doctrine seems similar to the competition policy in the United States. While the horizontal restraint of trade is generally illegal per se in the United States, the Supreme Court has admitted some exceptional cases under the rule of reason analysis.\textsuperscript{319} There may be, nevertheless, more debatable situations than in Japan since the United States has less of a exemption system.

\textsuperscript{316} Antimonopoly Act § 24; Small and Medium Enterprise Cooperative Act; Small and Medium Enterprise Organization Act; A small enterprise can establish a legitimate cartel under certain circumstances. For further explanation, see \textit{infra} part V-VII.

\textsuperscript{317} Antimonopoly Act § 24-3. For further explanation, see \textit{infra} part V-VII.

\textsuperscript{318} United States v. Topco Assoc., Inc., 405 U.S. 596, 611 (1972).

F. Substantial Restraint of Trade

A business activity is held unlawful where the activity restraints substantially competition in any particular field of trade. The question is what substantially means.

The Tokyo High Court defined substantial restraint of trade as follows: "[A] situation where competition itself has decreased and some situation is present or is about to appear whereby a certain entrepreneur or a group of entrepreneurs can, according to its own will, manipulate price, quality, quantity or other various conditions, thereby controlling the market." The Supreme Court in 1954 affirmed this judgment of the Tokyo High Court.

Although there is no precise criterion to measure a substantial restraint of competition, it may be defined as a functional test rather than a quantitative one. The Tokyo High Court stated this point as follows: "The question of under what circumstances a market control is established is a relative one and cannot be determined uniformly, but depends on economic conditions of the case. It cannot be determined only by the share of the supplies (or demands) of concerned entrepreneurs

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320 Antimonopoly Act § 2(6). See supra note 260 and accompanying text.

321 As described earlier, the term "competition" in the Antimonopoly Act includes potential competition in the future as well as actual one. See supra part III.C.1.

322 Judgment of Sep. 19, 1951 (so-called Tōhō and Subaru case), Tokyo Kōsai [Tokyo High Court], 2 Gyōshū 562 (Japan).

323 Judgment of May 25, 1954 (so-called Tōhō and Subaru case), Saikōsai [Supreme Court], 8 Minshū 950 (Japan).

324 MATSUSHITA, supra note 186, at 16.
in a market." The court thereby denied a substantial restraint of competition merely because plaintiffs possessed one third of the market share. Functional elements necessarily taken into consideration are, for example, the scale of business, capital procurement ability, marketing ability, the ability of competitors, the possibility of new entry or countervailing power of buyers or suppliers. These functional elements weigh as standards to judge substantial restraints of competition.

The JFTC, however, has usually proceeded against a cartel when almost all companies in the relevant market participated in the agreement: in many cases, their market share reached 80 to 90 percent. When conspirators have a large market share, other functional elements are not necessarily taken into account in order for proof of a substantial restraint of competition. Nevertheless, the JFTC had held the cartel illegal despite conspirators' small market share. The JFTC held the price fixing agreement among tofu manufacturers substantially restrained competition although the total market share of the companies participating in the cartel was about 50 percent. In this case, tofu manufacturers in Takamatsu City agreed to

325 Judgment of Dec. 7, 1953 (so-called Tōhō and Shin Tōhō case), Tokyo Kōsai [Tokyo High Court], 5 Kōminshū 118 (Japan).

326 IYORI & UESUGI, supra note 188, at 46.

327 SANEKATA, supra note 291, at 165.

328 Id.

329 Bean curd. One of traditional oriental foods.

raise their prices. Their market share in Takamatsu City was about 50 percent. The cartel constituted of large tofu manufacturers, including the leading company which possessed 30 percent of the city’s market share. The rest of the share was possessed by many small companies mainly family operated. These outsiders chose the way to raise their prices rather than have price competition against large companies since these small companies had no ambition to expand their business due to their small size. As a result, the whole market price in Takamatsu City increased. The JFTC found that the cartel had an actual power to control the market price. This case is one example that a cartel can be held unlawful regardless of its market share.

The requirement of substantial restraint of competition shows that the Antimonopoly Act should eliminate an unfavorable effect on competition and not prohibit a concerted activity itself. It is one of the biggest differences between Japan and the United States that an agreement among competitors is illegal in Japan only when the agreement substantially restrains competition in the market. In the United States, horizontal restraint of trade is illegal without regard to its market power under the Sherman Act.\textsuperscript{332} In Japan, a cartel without market power is recognized as a

\textsuperscript{331} Takamatsu City is the seat of the prefectural office in Kagawa Prefecture, Shikoku Island.

\textsuperscript{332} See United States v. Topco Assoc., Inc., 405 U.S. 596, 600 (1972); The horizontal market division agreement among small supermarket chains was held illegal per se where the average market share of Topco was approximately 6 percent. See also United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

But cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., 472 U.S. 284, 296 (1985); Federal Trade Comm’n v. Indiana Fed’n of Dentists, 476 U.S. 447, 458 (1986); The Supreme Court ruled the per se rule can apply to group
mere agreement which has no effect to the competition. The Sherman Act is apparently much severer than the Antimonopoly Act in respect to the market power the conspirators possess.

boycotts only when the enterprises boycotting have a market power.
V. EXEMPTIONS FROM THE ANTIMONOPOLY ACT

It is obvious that a cartel, a horizontal restraint, has an anticompetitive effect. Once a cartel is established, competition in the market will be restrained. Consumers cannot enjoy low prices nor good services which might be caused by competition. A cartel may maintain inefficient enterprises, keep potential competitors from entering the market, and slow the development of technology down. There is no justification based on the consumers' benefit or economic efficiencies.

Although the anticompetitive activities by enterprises and trade associations are generally prohibited, there are some areas in which agreements among enterprises are exempted from the Antimonopoly Act. These exempted areas include the focus of this thesis, cartels in the depressed industries. Exemptions are provided by both the Antimonopoly Act and other separate laws. To understand cartel regulations in Japan, it is necessary to consider provisions of both the Antimonopoly Act and other separate exemption laws.

333 Price fixing, for example, has an "actual or potential threat to the central nervous system of the economy." United States v. Socony-Vacuum Oil, 310 U.S. 150, 224 n.59 (1940).
A. Rationale for Exemption

Both the Antimonopoly Act in Japan and the Antitrust laws in the United States are designed to promote competition,334 and they strictly prohibit a cartel. Some business activities or industries nevertheless are exempted from the application of the Antimonopoly Act or the Antitrust laws in both countries. Why are such areas allowed in spite of their possibility to restrain competition?

The reason for the admission of exemptions from the Antimonopoly Act are varies depending on each case. But there are two common questions concerning the various exempted businesses: (1) whether these exempted business activities inherently violate the Antimonopoly Act; and (2) what is the role of the exemption laws. The short answer for the first question is yes for some business activities.

The first question has a close relationship with the purpose335 and "the public interest"336 of the Antimonopoly Act. Any cartel has the effect of restricting the first purpose of the Antimonopoly Act, "to promote free and fair competition."337 Some cartels may be consistent with from the second to the fourth purposes, such as economic efficiency, or the development of economy and welfare of consumers.338 Business activities or industries from the Antimonopoly Act should comply with at

334 See supra part II.B.

335 Antimonopoly Act § 1.

336 Antimonopoly Act § 2(6). See supra part III.E.

337 Antimonopoly Act § 1. See supra part III.B.

338 Antimonopoly Act § 1. See supra part III.B.
least one of these purposes above. No restrictive business activities should be allowed even by the Antimonopoly Act itself or other statutes which are inconsistent with any purpose of the Act. Further, even if business activities have some benefits in light of the purpose of the Antimonopoly Act, they can restrain competition "contrary to the public interest." As described earlier, the public interest in principle means free competition, and only an exceptional case can be lawful under the comparison between free competition and the ultimate purpose - the development of national economy and consumers' welfare.339 There may be few such exceptional cases. For example, enterprises in a depressed industry can establish depression cartels under Section 24-3 of the Antimonopoly Act. It is necessary for enterprise to get a prior approval from the JFTC, otherwise the cartel would be illegal.340 The unauthorized enterprises, to be acquitted, must have the tough burden of proving that the loss to the national economy caused by the depression will be bigger than the loss of free competition caused by the cartel. This is an example which inherently violates the Antimonopoly Act without protection of the exemption laws.

To answer the second question, what is the role of exemption laws, the first role of exemptions is to eliminate the application of the Antimonopoly Act to the inherently unlawful business activities.341 The exemption laws make originally unlawful conducts legal for reasons except that they promote competition. In other

339 See supra part VI.E.
340 Antimonopoly Act § 24-3(3).
341 MATSUSHITA, supra note 264, at 225.
words, the exemption laws shift restrictive activities from an unlawful category to a legal one.

The second role of exemption laws is merely to confirm that activities covered by such laws do not violate the Antimonopoly Act. Some activities will be exempted from the application of the Antimonopoly Act without regard to exemption laws. The proper exercise of copyrights, for example, should be exempted from the application of the Antimonopoly Act even if there were no exemption provisions. Property rights are inherent human rights, and the protection of copyrights is necessary for the development of culture. It is important to understand which role each exemption provision has. If the provision permitting the depression cartel were misunderstood as merely confirming the depression cartel does not violate the Antimonopoly Act, it would not be recognized as being inherently contrary to the public interest. If so, an unauthorized cartel in the depressed industry could be held lawful. It should be recognized that a cartel among depressed companies is inherently unlawful under the Antimonopoly Act. Such a cartel can be allowed only when it was approved and observed by the JFTC.

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342 MATSUSHITA, supra note 264, at 224.

343 Section 23 of the Antimonopoly Act exempts intangible property rights from the Act.

344 MATSUSHITA, supra note 264, at 226.

345 Antimonopoly Act § 24-3.

346 Section 24-3 of the Antimonopoly Act authorizes the JFTC to judge whether the depression cartel will be contrary to the public interest, to decide on a reasonable period to form the cartel, and to observe whether the cartel is actually performed.
The third role of exemption laws is to give the public a clear standard for the application of the Antimonopoly Act. For example, Section 24-3 of the Antimonopoly Act makes it clear that any cartel among companies in a depressed industry, without a prior approval by the JFTC, is illegal even if it is economically efficiency.

B. Conduct Where the Government Is Involved

1. State action

There is a unique issue on federalism in the United States, as to whether the Antitrust laws can apply to a conduct which involved the state or local government agencies. The Supreme Court approved exemptions from the Antitrust laws where the private companies engaged in restrictive conducts with the authorization of the state legislation\(^{347}\) or the state court.\(^{348}\) This thesis will not discuss this issue further. Since Japan does not adopt federalism, no issue exists concerning conflicts of laws.

2. Government action

Federal officials have no authority to exempt private companies from the Antitrust laws without statutory authorization made by Congress.\(^{349}\) In Japan, it is reasonably. See Antimonopoly Act §§ 24-3, 66.


debatable whether private companies' activities based on the Administrative guidance, an informal process issued by the government agency, can be exempted by the Antimonopoly Act. This section will discuss this issue briefly despite its complex character.

A government agency, particularly the MITI, requests or advises private companies to achieve its industrial policy by means of the Administrative guidance. The Administrative guidance sometimes involves an arrangement of a cartel. The question is whether the Antimonopoly Act can apply to the company's conducts in accordance with the Administrative guidance involving anticompetitive effects where the government issued it despite absence of the applicable exemption laws. Both the JFTC and the courts delivered their opinions, but some differences exist.

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350 So-called Gyōsei Shidō. As to the Administrative guidance in general, see MITSUO MATSUSHITA & THOMAS J. SHOUGENBAUM, JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW 31-41 (1989).

351 An example of the complexity is that the defendants believe their conducts are lawful when they complied with the Administrative guidance. Unless defendants' intention of committing illegal conducts is absent, they can be held guilty in a criminal case. As shown above, a doctrine of criminal law should be considered in a case which involved the Administrative guidance. See Judgment of Sep. 26, 1980 (so-called Oil Cartel case), Tokyo Kōsai [Tokyo High Court], 33-359 (Japan); Mikito Hayashi, Karuteru ni taisuru Keiji Seisai [Criminal Punishment against Cartel], 110 BESSATSU JURISUTO DOKKINHŌ SHINKETSU HANREI 100 SEN DAII & HAN [SELECTED 100 DECISIONS BY THE JFTC AND JUDGMENTS OF ANTIMONOPOLY ACT (4TH ED.)] 254 (1991).

352 MATSUSHITA, supra note 186, at 46-47.

353 Id. at 47.
The JFTC held a maximum price fixing agreement is unlawful even where the Price Administration Agency set the maximum price of soy sauce and requested soy sauce companies to refrain from raising their prices above the designated price.\textsuperscript{354} The JFTC made it clear that the illegality of restrictive conducts cannot be affected by the existence of the Administrative guidance furnished by a government agency. The JFTC also declared this doctrine in the guideline concerning trade associations in 1979.\textsuperscript{355}

The Tokyo High Court held that a cartel violated the Antimonopoly Act in spite of the Administrative guidance by the MITI, but stated in its obiter dictum that the cartel could be exempted from the Antimonopoly Act if it were commissioned by the government, provided the guidance itself was lawful and the method employed to solicit compliance was reasonable.\textsuperscript{356} The Supreme Court also announced its opinion in its dictum that a cartel based on the Administrative guidance can be executed as long as the Administrative guidance is substantially consistent with the purpose of the Antimonopoly Act, that is "to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in

\textsuperscript{354} Noda Soy Sauce, 4 Shinketsushū 1 (1952)(Japan). \textit{See also} Synthetic Fibers Ass’n, 5 Shinketsushū 17 (1953)(Japan).

\textsuperscript{355} Jigyōsha Dantai no Katsudō ni Kansuru Dokusen Kinshihō jō no Shishin [Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act] (1979).

\textsuperscript{356} Judgment of Sep. 26, 1980 (so-called Oil Cartel case), Tokyo Kōsai [Tokyo High Court], 33 Kokeishū 511 (Japan).
general,\textsuperscript{357} and where the method was necessary and reasonable.\textsuperscript{358} Given this doctrine, a cartel can be exempted from the Antimonopoly Act where it was formed by the appropriate Administrative guidance.

There is a difference concerning the assessment of the Administrative guidance between the JFTC and the courts. The essential issue may not be the Administrative guidance itself but whether a cartel is contrary to the public interest or not. As described earlier, there is a room for a lawful exceptional case where a cartel restrains competition but is not contrary to the public interest.\textsuperscript{359} If a cartel under the Administrative guidance is not contrary to the public interest, it can be exempted. The exception, however, should be very limited. Therefore, the Administrative guidance itself has no authorization to exempt enterprises from the application of the Antimonopoly Act.

C. Exempted Business in Japan

1. Overview

Exemptions have been provided both in the Antimonopoly Act itself and other exemption laws. While there are some explicit statutory exemptions from the Antimonopoly Act § 1.\textsuperscript{357}

\textsuperscript{357} Judgment of Feb. 24, 1984 (so-called Oil Cartel case), Saikōsai [Supreme Court], 38 Keishu 1287 (Japan).

\textsuperscript{359} See supra part V.E.
application of the Antitrust laws in the United States, the Sherman Act, which prohibits the horizontal restraint, does not have any express exemptions in its provisions. On the other hand, the Antimonopoly Act itself has provisions of exemption for cartels. In Japan, the exemption system is extensive. There are sixty separate exemption systems authorized by forty-two separate statutes as of June 1991. The exemptions for cartels constitute most of them: fifty-six kinds of cartels are exempted by thirty-seven separate statutes from the application of the Antimonopoly Act. This section will explain business activities exempted from the Antimonopoly Act in general, compared to those in the United States.

2. Exemption by the Antimonopoly Act

The Antimonopoly Act provides exemptions from its application in Sections 21 through 24-4. These provisions can be classified in two groups: exemptions originally provided and those added as amendment.

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360 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 599 (2d ed. 1984).


363 DOKUSENKINSHIH0 TEKIY0 JOGAI SEIDO NO GENJ0 TO KAIZEN NO H0K0 [THE STATUS QUO AND COURSE OF IMPROVEMENT CONCERNING EXEMPTION SYSTEM FROM ANTIMONOPOLY ACT], general remarks 6 (JFTC ed., 1991)(hereinafter THE QUO AND IMPROVEMENT OF EXEMPTION).

364 Id.
a. exemptions originally provided

First, Sections 21 through 24 were originally provided at the enactment of the Antimonopoly Act in 1947. These provisions were considered by academics as the natural limit which was not necessarily inconsistent with the purpose of the Antimonopoly Act. Since the activities covered by these provisions are not contrary to the public interest, they can be allowed as lawful conducts unless these provisions exist. These provisions make it clear that categories of a business activity and conditions are to be exempted from the Antimonopoly Act.

(1) Natural monopoly (Section 21)

The Antimonopoly Act does not apply to conducts performed in the course of proper business by an enterprise inherently constituting a monopoly by the very nature. The railway, electricity and gas industries are examples of enterprises constituting a monopoly by their very nature. The activities of these enterprises must be in the proper course of business, otherwise the Antimonopoly Act will apply. For instance, a gas company must not force its customers to buy gas equipments from itself or from others which it designated.

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365 IMAMURA, supra note 203, at 194.

366 Id.

367 Antimonopoly Act § 21.

368 Id.

369 IYORI & UESUGI, supra note 188, at 110.
In the United States, the energy industry and the transportation business are each regulated by specific statute. Because the industry's character constitutes a monopoly cannot be a reason to exempt it from the Antitrust laws. Unlike Japan, the United States does not have a concept of "natural monopoly." Congress, however, exempts certain industries from the Antitrust laws by statutory regulations regardless of their nature.\footnote{370}

\section*{(2) Regulated industry (Section 22)}

Where there is a law concerning a special industry, the conducts engaged in accordance with such legislation are subject to exemptions from the Antimonopoly Act.\footnote{371} Such special laws\footnote{372} are specified by the Act Concerning of Exemptions from the Antimonopoly Act.\footnote{373} Additionally, there are 29 other special exemption laws which are not specified by the Act of Exemption from the Antimonopoly Act.

\footnote{370 \textit{See infra} notes 380-85.}
\footnote{371 Antimonopoly Act § 22.}
\footnote{372 \textit{E.g.}, Rikujō Kōtsū Jigyō Chōseiho [Land Transportation Business Adjustment Act], Act No. 193 of 1948 (Japan), Agreements among the land transportation business companies based on the Transportation Business Adjustment Committee; Songai Hoken Ryōritsu Sanshutsu Daitai ni Kansuru Hōritsu [Non-life Insurance Rating Organizations Act], Act No. 193 of 1948 (Japan), Agreements on the premium rates, terms, acceptance rates and commissions by the Non-life Insurance Rating Organization.}
\footnote{373 Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kaku ni Kansuru Hōritsu no Tekiyō Jogai tou ni Kansuru Hōritsu [Act Concerning the Exemptions from the Application of the Antimonopoly Act] § 1, Act No. 138 of 1947 (Japan)(hereinafter Act of Exemptions from the Antimonopoly Act).}
Act. They regulate the transportation business, the warehouse industry, insurance, agriculture and others.

In the United States, there are several regulated industries such as banks, security, energy, insurance, transportation and professional and

374 JFTC ANNUAL REPORT, supra note 14, at Supp. 52-53.

375 E.g., Dōro Unsōhō [Road Transportation Act], Act No. 183 of 1951 (Japan); Jidōsha Taminaruhō [Car Terminal Act], Act No. 136 of 1951 (Japan); Kōkūhō [Aviation Act], Act No. 231 of 1959 (Japan); Kowan Unsō Jigyōhō [Harbor Transportation Business Act], Act No. 161 of 1951 (Japan).

376 E.g., Sōkohō [Warehouse Industry Act], Act No. 121 of 1956 (Japan).

377 E.g., Hokengyōhō [Insurance Business Act], Act No. 41 of 1939 (Japan).

378 E.g., Sanshigyōhō [Silk Yarn Industry Act], Act. No. 57 of 1945 (Japan); Kaiu Nōgyō Shinkō Tokubetsu Sochiho [Fruit Agriculture Production Special Measures Act], Act No. 15 of 1961 (Japan).

379 E.g., Shuzei no Hozen oyobi Shuruigyo Kumiai tou ni Kansuru Hōritsu [Act Concerning Protection of Liquor Tax and Liquor Business Association], Act No. 7 of 1953 (Japan); Oroshiuri Shijōhō [Wholesale Market Act], Act No. 36 of 1971 (Japan).


383 McCarran-Ferguson Act, 15 U.S.C. §§ 1101-15 (1988), If the business is regulated by the state law, the Antitrust laws are not applicable. However, group boycotts, coercion and intimidation are not immunized. Id. at § 1013(b).

amateur sports. The statutes regulating these industries above do not necessarily have express provisions to exempt regulated industries from the Antitrust laws. Yet, the courts admitted that the statutes have an implied intent to immunize regulated industries from antitrust liabilities under certain circumstances.

Both Japan and the United States recognize the necessity of adjusting conflicts of interests between some industries and free competition.

(3) Intangible property rights (Section 23)

Activities exercising any rights "under the Copyright Act, the Patent Act, the Utility Model Act, the Deign Act or the Trademark Act" are exempted from the Antimonopoly Act. Nonetheless, if the activities are deemed

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See also Flood v. Kuhn, 407 U.S. 258 (1972); Federal Baseball Club v. National League, 259 U.S. 200 (1922). Once the Supreme Court held professional baseball was exempted from the Antitrust laws in Federal Baseball Club, the Court later recognized professional baseball as inter-commerce but still is exempted by stare decisis in Flood.

387 Chosakukenho [Copyright Act], Act No. 48 of 1970 (Japan).


389 Jitsuyō Shinanho [Utility Model Act], Act No. 125 of 1959 (Japan).

390 Ishōhō [Design Act], Act No. 126 of 1959 (Japan).

391 Shōhyōhō [Trademark Act], Act No. 127 of 1959 (Japan).

392 Antimonopoly act § 23.
to be improper or abuse of these industrial property rights, the Antimonopoly Act will apply to the misuse of such rights.\textsuperscript{393} The JFTC issued two guidelines concerning unfair business practices involving industrial property rights.\textsuperscript{394}

In the United States, the Constitution has a provision promoting invention and creative work providing, "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Investors the exclusive Right in their respective Writings and Discoveries."\textsuperscript{395} The Patent Act also allows those who discover new and useful things to obtain the right of excluding others from making, using, or selling the invention in the United States.\textsuperscript{396} For example, the Supreme Court allowed the price fixing condition in a licensing agreement where General Electric Co. had licensed another to manufacture and sell lamps under its patents.\textsuperscript{397} Abuse of patent is, however, in violation of the Antitrust laws.\textsuperscript{398}

\textsuperscript{393} IYORI & UESUGI, supra note 188, at 111.


\textsuperscript{395} U.S. CONST. art. 1, § 8, cl. 8.


\textsuperscript{398} E.g., Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100 (1969); Brulotte v. Thys Co., 379 U.S. 29 (1964); International Salt Co. v. United States, 332 U.S. 392 (1947); Mercoin Corp. v. Mid-Continental Inv. Co., 320 U.S. 661 (1944);
(4) Certain acts of cooperations (Section 24)

A cooperative is a mutual aid organization consisting of small enterprises or consumers, and is recognized having a procompetitive effect in Japan. The Antimonopoly Act exempts cooperatives' activities which satisfy requirements of Section 24. A cooperative is formed in accordance with separate laws, and there


399 ANTIMONOPOLY LEGISLATION OF JAPAN, supra note 7, at 324.

400 A cooperative has been founded historically as an association of small companies or consumers in order to strengthen their bargaining power against large enterprises. By binding and organizing small companies and consumers, a cooperative can obtain countervailing power. Section 24 of the Antimonopoly Act not only protects small companies and consumers, but also creates effective competitors against large enterprises which potentially have a monopoly power.

The Small and Medium Enterprise Cooperative Act provides its purpose, that is "jointly to carry out the business under the spirit of mutual aid, to secure an opportunity for these persons' fair and equitable economic activities, and thereby to promote their independent economic activities and to contribute to the heightening of their economic position." Small and Medium Enterprise Cooperative Act § 1.

401 Antimonopoly Act § 24.

The important requirement of Section 24 is "small scale entrepreneurs or consumers." While the Antimonopoly Act does not define what are "small entrepreneurs," the Small and Medium Enterprise Cooperative Act provides it based on the entrepreneur's capital and its number of employees. Small entrepreneurs are defined as those whose capital is not more than 100 million yen (approximately 770 thousand dollars) or whose regular employees do not exceed 300, in general. In the case of the wholesale business, those whose capital is not more than 30 million yen (approximately 230 thousand dollars) or whose employees do not exceed 100, and in the case of the retail or service business, those whose capital is not more than 10 million yen (approximately 77 thousand dollars) or whose employees do not exceed 50. Small and Medium Enterprise Cooperative Act § 7(1).
are several separate laws covering them\textsuperscript{402} such as the Small and Medium Enterprise Cooperative Act which deals with small business cartels.

In the United States, conducts by an agricultural cooperative and a fisheries cooperative can be exempted from the Antitrust laws by express statutes. Section 6 of Clayton Act, one of the Antitrust Laws, exempts an agricultural cooperative.\textsuperscript{403} Other statutes also provide exemptions for an agricultural cooperative\textsuperscript{404} and a fisheries cooperative.\textsuperscript{405} While Japan allows many cooperatives which can be exempted from the application of the Antimonopoly Act, the United States allows only a few.

b. 1953 amendment

The second group, Section 24-2 through 24-4 were added to the Antimonopoly Act in 1953. These amendments were recognized by academics as a demotion of the anti-cartel policy in Japan because these exempted cartels have an effect of restraining

\textsuperscript{402} E.g., Nōgyō Kyōdō Kumiaihō [Agricultural Cooperative Act] § 9, Act No. 132 of 1947 (Japan); Shōhi Seikatsu Kyōdō Kumiaihō [Consumers Cooperative Act], Act No. 200 of 1948 (Japan); Suisangyō Kyōdō Kumiaihō [Fisheries Cooperative Act] § 7, Act No. 242 of 1948 (Japan); Shinrin Kumiaihō [Forest Cooperative Act] § 6, Act No. 36 of 1978 (Japan); Shiyō Kinkōhō [Credit Banking Act] § 7, Act No. 238 of 1951 (Japan); Rōdō Kinkōhō [Labor Union Banking Act] § 9, Act No. 227 of 1953 (Japan).

\textsuperscript{403} Clayton Act § 17.


competition in the market. The reason these exempted cartels were approved is that some benefits, for example the development of national economy or consumers' welfare, were deemed to have priority over free competition under certain circumstances.

(1) Resale Price Maintenance (Section 24-2)

Resale price maintenance in general is prohibited as an unfair trade practice. However, to have enterprises refrain from resorting to unjust price cutting or loss leader sales, individual entrepreneur's conduct for restricting resale prices of copyrighted works and such commodities as designated by the JFTC are exempted from the Antimonopoly Act. The JFTC can designate commodities which have resale prices that can be maintained only where the commodities satisfy the following requirements: (1) "The commodity shall be for the daily use by consumers in general," (2) "Free competition shall exist with respect to the commodity," and (3) Uniform quality of the commodities can be easily identified by consumers. The Antimonopoly Act will apply to resale price maintenance

406 IMAMURA, supra note 203, at 201.
407 Antimonopoly Act § 19; JFTC Notification No. 15 Subsec. 8.
408 ANTIMONOPOLY LEGISLATION OF JAPAN, supra note 7, at 324.
409 Antimonopoly Act § 24-2(2)(i).
410 Antimonopoly Act § 24-2(2)(ii).
411 Antimonopoly Act § 24-2(1).
where it is likely to grossly injure the interest of the general consumers, or where it is against the will of the manufacturers.\textsuperscript{412} The JFTC is decreasing the number of commodities allowed resale price maintenance.\textsuperscript{413}

The United States had two statutes to allow resale price maintenance for a while, which conditions were similar to section 24 of the Antimonopoly Act.\textsuperscript{414} These exemption statutes were replaced in 1975.\textsuperscript{415} The Supreme Court held that resale price maintenance was illegal per se in 1911.\textsuperscript{416} While the Court did not overturn this decision, it held resale price maintenance was lawful\textsuperscript{417} or could be lawful.\textsuperscript{418}

\textsuperscript{412} Antimonopoly Act § 24-2(1).

\textsuperscript{413} JFTC Annual Report, supra note 14, at 129. The designated commodities are as follows: (1) copyrighted works including books, magazines, newspapers, cassette tapes and playing records; (2) drug (26 items); and (3) cosmetics for which the list price is less than one thousand yen (approximately 7 dollars)(24 items).


\textsuperscript{416} Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

\textsuperscript{417} United States v, Colgate & Co., 250 U.S. 300 (1919); The Court ruled that a manufacturer can refuse to deal with others which do not accept keeping a designated resale price.

(2) Depression Cartels (Section 24-3)

If the prices of goods fall below the average cost of production and a great number of producers are likely to be forced to discontinue their business, then enterprises can make an agreement limiting prices or products by prior approval from the JFTC.\(^{419}\) The JFTC has been recently reluctant to approve the depression cartel. A cartel among shipbuilders and manufacturers of a large diesel engine for ships had been approved from 1987 to 1989, but no other depression cartel has been approved since 1984.\(^{420}\)

In the United States, restraint of trade in a recession has not been exempted from the application of the Antitrust laws since the judgment of the Supreme Court in 1935 in which the National Industrial Recovery Act\(^{421}\) was held unconstitutional.\(^{422}\)

(3) Rationalization Cartel (Section 24-4)

If a certain cartel was found particularly necessary for an advancement of technology, an improvement of the quality of goods, a reduction of costs, an increase in efficiency and any other rationalization of enterprises, then it will be exempted from

\(^{419}\) Antimonopoly Act § 24-3.

\(^{420}\) JFTC ANNUAL REPORT, supra note 14, at 54-55.


the Antimonopoly Act.\footnote{423} By the prior authorization from the JFTC, the enterprises can undertake concerted activities regarding restrictions on technology or kinds of products, common use of facilities for transportation or storage of raw materials or finished goods, or utilization or purchase of scraps or waste materials.\footnote{424} No rationalization cartel has been approved by the JFTC since January 1982.\footnote{425}

In the United States, there is no statute to admit the rationalization cartel as there is in Japan. Under the National Cooperative Research Act of 1984, a joint research and development venture is immunized from the per se approach of the Sherman Act.\footnote{426} The purpose of this Act, however, is to develop technology in the United States, and not to promote rationalization by the joint activities.

3. Exemptions by separate laws

In addition to the Antimonopoly Act, there are 29 laws that provide exemptions from the application of the Antimonopoly Act.\footnote{427} These exemption laws were enacted separately from the Antimonopoly Act although the character of the exemption laws might be inconsistent with the purpose of the Antimonopoly Act. Moreover, instead of the JFTC, the competent minister has an authorization to approve a lawful

\footnote{423} Antimonopoly Act § 24-4(1).

\footnote{424} Antimonopoly Act § 24-4(2).

\footnote{425} JFTC ANNUAL REPORT, supra note 14, at 121.


\footnote{427} JFTC ANNUAL REPORT, supra note 14, at 119.
cartel under the separate exemption laws. These exemption laws have a risk of making the Antimonopoly Act ineffective. To eliminate such a risk, exemption laws usually require approved cartels not to impede the interests of consumers or the related enterprises or not to employ unfair trade practices. Furthermore, under certain circumstances, the competent minister must notify, consult with, or obtain the consent of the JFTC. Main laws are following.

(1) Small and Medium Enterprise Organization Act

While a cartel by small entrepreneurs is approved as activities of cooperatives by Section 24 of the Antimonopoly Act and the Small and Medium Enterprise Cooperative Act, the Small and Medium Enterprise Organization Act was enacted to

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428 E.g., Small and Medium Enterprise Organization Act § 5-17. See also Export and Import Trading Act: The Minister of International Trade and Industry is appointed as the competent minister.

429 E.g., Export and Import Trading Act § 5(2)(v); Small and Medium Enterprise organization Act § 19(1)(iv).

430 E.g., Export and Import Trading Act § 33(1)(i); Small and Medium Enterprise organization Act § 89(1)(i).

431 E.g., Export and Import Trading Act §§ 34(3)-(5); Small and Medium Enterprise organization Act § 90(3).

432 E.g., Export and Import Trading Act §§ 34(1),(2); Small and Medium Enterprise organization Act § 90(2).

433 E.g., Small and Medium Enterprise organization Act § 90(1).

434 See supra note 257.
stabilize and to rationalize small business operations.\textsuperscript{435} The Small and Medium Enterprise Organization Act allows a formation of cartels among small enterprises under less severe conditions than those of the cooperative cartels and the depression cartels.\textsuperscript{436} Under the Small and Medium Enterprise Organization Act, the competent minister, not the JFTC, has an authorization to approve a cartel.\textsuperscript{437}

(2) Environmental Sanitation Act\textsuperscript{438}

The Environmental Sanitation Act is, surprisingly, relating to the small business cartels. The original purpose of the Environmental Sanitation Act is to maintain high

\textsuperscript{435} Small and Medium Enterprise Organization Act § 1.

\textsuperscript{436} IYORI & UESUGI, \textit{supra} note 188, at 149. The purpose of both Acts may represent their difference. While the Small and Medium Enterprise Cooperative Act aims to promote a bargaining power of cooperatives by their mutual aid, the Small and Medium Enterprise Organization Act aims to protecting small companies for the development of the national economy. The purpose of the Small and Medium Enterprise Organization Act is "to secure for them (small entrepreneurs) the opportunity of fair and equitable economic activities and stabilize and rationalize their business operation, thereby to contribute to the sound development of the national economy." Small and Medium Enterprise Organization Act § 1. With respect to the purpose of the Small and Medium Enterprise Cooperative Act, \textit{see supra} note 400.

Further, the Small and Medium Organization Act allows a large enterprise may join a cartel under this Act where the small and medium entrepreneurs constitute two thirds in the specific business field. Small and Medium Enterprise Organization Act § 12.

\textsuperscript{437} Small and Medium Enterprise Organization Act § 5-17.

\textsuperscript{438} Kankyō Eisei Kankei Eigyō no Unei no Tekiseika ni Kansuru Hōritsu [Act Concerning Improvement of Operation of Business Relating to Environmental Sanitation], Act No. 164 of 1957 (Japan)(hereinafter Environmental Sanitation Act).
standards of sanitation and to secure improvement of existing sanitation facilities.\textsuperscript{439} Some business such as barber-shops, beauty parlors and laundries are required to have environmental sanitation but many entrepreneurs are so small and less profitable that they may lack finances to invest in sanitation facilities.\textsuperscript{440} The Minister of Health and Public Welfare can approve a cartel which restricts service charges, sales prices or methods of business in order to protect the business from excessive competition.\textsuperscript{441} This type of cartel is exempted by the Antimonopoly Act.\textsuperscript{442}

(3) Fishery Production Adjustment Association Act\textsuperscript{443}

The fishery production business often consists of small companies and individual fishermen.\textsuperscript{444} Fishery Production Adjustment Association Act allows

\textsuperscript{439} Environmental Sanitation Act § 1-3.

\textsuperscript{440} Only barber-shops are now still approved to form a cartel exempted by the Antimonopoly Act. Thirty-six prefectures have a cartel in each. JFTC ANNUAL REPORT, \textit{supra} note 14, at 127.

\textsuperscript{441} Environmental Sanitation Act § 8(1)(iii).

\textsuperscript{442} Environmental Sanitation Act § 9.

\textsuperscript{443} Gyōgyō Seisan Chōsei Kumiaihō [Fishery Production Adjustment Association Act], Act No. 128 of 1961 (Japan).

\textsuperscript{444} Kinya Kimoto et al., \textit{Keizaihō [Economic Law]} 203 (1986); there are approximately twenty thousand houses of fishermen, and only a limited number of large fishery companies exist.
fishermen to engage in production adjustment.\textsuperscript{445} The Minister of Agriculture, Forestry and Fisheries can approve a cartel when excessive competition exists.\textsuperscript{446}

(4) Industry Conversion Smoothing Act\textsuperscript{447}

The Industry Conversion Smoothing Act was enacted to help enterprises in a depressed industry to smoothly withdraw their current business and convert them to a new more hopeful business.\textsuperscript{448} The Industry Conversion Smoothing Act is not defined as an exemption law from the Antimonopoly Act because the Antimonopoly Act is theoretically applicable to business activities in accordance with the Industry Conversion Smoothing Act.\textsuperscript{449} However, a similar effect to exemption laws can be expected from the Industry Conversion Smoothing Act. When the competing minister examines activities filed for an approval under the Act, the JFTC will be notified in advance, and it can deliver its opinion if the activities seem to violate the

\begin{itemize}
\item \textsuperscript{445} Fishery Production Adjustment Association Act § 10.
\item \textsuperscript{446} Fishery Production Adjustment Association Act §§ 2,6. Three cartels now are approved to be exempted from the Antimonopoly Act. Object items of the cartels are sauries, sardines, saurels and mackerels. JFTC ANNUAL REPORT, \textit{supra} note 14, at Supp. 70.
\item \textsuperscript{447} Sangyō Kōzō Tenkan Enkatsuka Rinji Sochihō [Industrial Structure Conversion Smoothing Temporary Measure Act], Act No. 24 of 1987 (Japan)(hereinafter Industry Structure Conversion Smoothing Act).
\item \textsuperscript{448} Industry Conversion Smoothing Act § 1.
\item \textsuperscript{449} The JFTC does not list the Industry Conversion Smoothing Act as an exemption laws from the Antimonopoly Act. \textit{See} JFTC ANNUAL REPORT, \textit{supra} note 14, at Supp. 52-3.
\end{itemize}
Antimonopoly Act. Though a prior notification to the JFTC does not necessarily guarantee to immunize the enterprises from the liability under the Antimonopoly Act, it can be expected that the JFTC, in practical matters, will not challenge business activities under the Industry Conversion Smoothing Act.

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VI. EXAMPLE: DEPRESSION CARTEL

It might be contrary to the antitrust policy that a lawful cartel can be formed in a recession. The depression cartel, however, can be exempted from the Antitrust laws under certain circumstances in Japan. Japan allowed cartelization as an adjustment policy in a depression unlike the United States. This section will describe a lawful depression cartel and its effect.

A. Cartels in Cyclical Depression by the Antimonopoly Act

1. Purpose of the depression cartel

There is a business cycle in which economy weakens and falls into a decline following a period of an active market. A cyclical depression is one phase of a normal business cycle. The market will become active after a period of depression. Less effective enterprises must withdraw their business, because only efficient

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451 Antimonopoly Act § 24-3.

452 MATSUSHITA, supra note 264, at 323.

"Business cycles are 'recurrences of rise and decline in activity, affecting most of the economic processes of communities with well-developed business organization, not divisible into waves of amplitudes nearly equal to their own, and averaging in communities at different stages in economic development from about three to about six or seven years in duration.'" JAMES W. ANGELL, INVESTMENT AND BUSINESS CYCLES 3 (1941)(citing WESLEY C. MITCHELL, BUSINESS CYCLE: THE PROBLEM AND ITS SETTING 468 (1927)).
enterprises can survive in a free and fair competition. Especially during a depression, a less efficient enterprise will easily fail because demand is much smaller than supply in the market. This is a market mechanism under the free and fair competition.

Promoting free and fair competition is, of course, the primary purpose of the Antimonopoly Act. At too severe depression, however, demand in the market may depress, and the whole national economy will suffer severely until the market has adjusted the imbalance of supply and demand and has become active. Many enterprises may go bankrupt even if they have potential to do business efficiently and to be vivid competitors in the market. An adverse effect of depression may be too severe for certain industries as a whole to recover after the depression. High unemployment may occur. Related industries also may be affected by the depressed industry. It is too harsh for the whole economy and society in Japan to endure such a severe depression.

In the case of a cyclical depression, it is necessary for the Government to promptly terminate it. A temporary restriction of supply is one positive way to adjust the imbalance of supply and demand instead of the autonomous adjustment mechanism of the market itself.

The depression cartel system by Section 24-3 of the Antimonopoly Act was enacted in 1953 as an exceptional and temporary emergency relief in order to adjust

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453 Antimonopoly Act § 1.

454 Heightening the level of employment is one of the purposes of the Antimonopoly Act. Antimonopoly Act § 1.
the supply and demand gap caused by excessive production. The Government thereby helps enterprises survive in the depression, prevents the industry from losing, keeps the society from confusion, and maintains competing entities in the market. The depression cartels, thus, can be exempted from the application of the Antitrust Act only when demand is severely depressed.

Besides, note that at the time of the depression cartel system in 1953, Japan was under a severe depression because the special procurement demands had ended due to the cease-fire of the Korean War in 1951 and because Japan had not recovered from the injury of World War II.

2. Subject of the cartel

Only manufacturers which produce commodities are permitted to form the depression cartel since its purpose is to adjust disequilibrium of supply and demand.

Approved concerted activities are "restrictions on output or sales, or on facilities or equipments except for renovation or improvement of facilities" and price fixing. Market allocation is not approved since the purpose of this

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455 IYORI & UESUGI, supra note 188, at 114.

456 See supra part III.A.4. See also IYORI & UESUGI, supra note 188, at 15.

457 Antimonopoly Act § 24-3(1).

458 Antimonopoly Act § 24-3(2).

459 Antimonopoly Act § 24-3(3).
exemption is to adjust the imbalance of supply and demand.\textsuperscript{460} For the same reason, price fixing can be approved under more limited situation than others. Price fixing will be approved where (a) restriction on output of the commodity is extremely difficult for technical reasons, or (b) concerted activities other than price fixing had been engaged in first but, as a result, were found inadequate to overcome the depression.\textsuperscript{461} Even under the cartel, renovation or improvement of facilities cannot be barred since these activities are consistent with rationalization.\textsuperscript{462}

3. Conditions for approval

Severe conditions are required to obtain an approval for the depression cartel by the JFTC. They are provided in Section 24-3 as follows: (a) "there exists an extreme disequilibrium of supply and demand for a particular commodity;"\textsuperscript{463} (b) "the price of the said commodity is below the average cost of protection;"\textsuperscript{464} (c) "a considerable part of the entrepreneurs in the trade concerted may eventually be forced

\textsuperscript{460} Shōgo Itoda, \textit{Section 24-3, in CHŪKAI KEIZAIHŌ JOUKAN [COMMENTARY ECONOMIC LAWS I]} 523 (Shigekazu Imamura et al. eds., 1975).

\textsuperscript{461} Antimonopoly Act § 24-3(3).

\textsuperscript{462} Antimonopoly Act 21 § 24-3(2).

\textsuperscript{463} Antimonopoly Act § 24-3(1).

\textsuperscript{464} Antimonopoly Act § 24-3(1)(i).
to discontinue production;"\textsuperscript{465} and (d) "it is difficult to overcome such circumstances . . . by the rationalization of individual enterprises.\textsuperscript{466}

"[A] considerable part of the entrepreneurs" in (c) does not mean only a concept of quantity like "more than a half."\textsuperscript{467} Its meaning includes a degree in which relatively efficient enterprises cannot continue their production.\textsuperscript{468} "[T]o discontinue production" in (c) means not only that the prices are below the average cost but also that the period of the prices below the average cost will last for a long time with no hope of ending.\textsuperscript{469} The factors to be considered include the number of new entries into the market and those retreating from it, product cost, product capacity, product situation, financing situation, supply and demand, and prospect for the future.\textsuperscript{470} "[D]ifficult to overcome" in (d) implies preventing entrepreneurs from easily forming a cartel.\textsuperscript{471}

Further, the depression cartel shall be approved under these following limitations: (a) cartels "do not exceed the necessary extent to overcome" the

\textsuperscript{465} Antimonopoly Act § 24-3(1)(i).

\textsuperscript{466} Antimonopoly Act § 24-3(1)(ii).

\textsuperscript{467} Itoda, \textit{supra} note 460, at 524.

\textsuperscript{468} \textit{Id}.

\textsuperscript{469} SANEKATA, \textit{supra} note 291, at 367.

\textsuperscript{470} Itoda, \textit{supra} note 460, at 524.

\textsuperscript{471} Itoda, \textit{supra} note 460, at 524; Entrepreneurs, before they apply for the cartel, had to make an effort for rationalizations such as cutting cost, improving the productivity, renovation of productive facilities and technologies.
depression;\textsuperscript{472} (b) "there is no likelihood of unjustly injuring the interests of the consumers in general, and of related entrepreneurs;\textsuperscript{473} (c) cartels "are not unjustly discriminating;\textsuperscript{474} and (d) cartels "do not restrict unjustly participation in or withdrawal from" them.\textsuperscript{475}

The period of the depression cartel is usually limited to a short time in order not to exceed the necessary extent to overcome the depression. Nonetheless, the period is sometimes renewed. The latest depression cartel was approved in April 1987 at first for one year,\textsuperscript{476} but continued for two and a half years.\textsuperscript{477} The condition of (b), "no likelihood of unjustly injuring the interests of the consumers" is an ironic provision because a cartel must have an anticompetitive effect to consumers. This provision tries to avoid an unjust injury against consumers and tries to minimize an anticompetitive effect.\textsuperscript{478} "[N]ot unjustly discriminatory" in (c) means that the depression cartel must not put certain enterprises in an advantageous or disadvantageous position.\textsuperscript{479} No entrepreneur is forced to participate in or to

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\textsuperscript{472} Antimonopoly Act § 24-3(4)(i).
\textsuperscript{473} Antimonopoly Act § 24-3(4)(ii).
\textsuperscript{474} Antimonopoly Act § 24-3(4)(iii).
\textsuperscript{475} Antimonopoly Act § 24-3(4)(iv).
\textsuperscript{476} JFTC ANNUAL REPORT 122 (JFTC ed., 1989).
\textsuperscript{477} Japan Shipyards Set to End Production Cartel, Reuters, Sep. 19, 1989, available in LEXIS, Nexis Library.
\textsuperscript{478} Itoda, \textit{supra} note 460, at 526. However, this criteria is just vague.
\textsuperscript{479} Itoda, \textit{supra} note 460, at 526.
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withdraw from the depression cartel. Nobody can restrict the activities of entrepreneurs who do not join the cartel even when their activities dilute an effect of one.

Even after a depression cartel is approved by the JFTC, the cartel cannot be exempted from the application of the Antimonopoly Act where the cartel participants employ unfair trade practices.\footnote{Antimonopoly Act § 24-3(1).}

When entrepreneurs intend to form a depression cartel, they should obtain a prior approval by the JFTC by filing an application in accordance with the JFTC Regulation No.3 of 1953.\footnote{Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuho ni Kansuru Hōritsu Dai 24 Jō no 3 oyobi Dai 24 Jō no 4 no Kitei ni yoru Ninka Shinsei Todokede oyobi Chōmon ni Kansuru Kisoku [JFTC Regulation Concerning Application for Authorization, Notification, and Hearing in Accordance with Section 24-3 and 24-4 of the Antimonopoly Act], JFTC Regulation No.3 of 1953 (Japan).} The JFTC must consult with the competent minister in charge of the industry concerned prior to an approval or rejection of the application.\footnote{Antimonopoly Act § 24-3(8).} The JFTC must make public the reasons for their approval.\footnote{Antimonopoly Act § 24-3(5).} If an objection to the decision of the JFTC is filed, the JFTC must have an open summary hearing.\footnote{Antimonopoly Act § 24-3(7).} The JFTC can revoke or modify its approval after it has already been issued when the conditions for the approval seem to have been
disappeared or to have changed.485 In the same situation, the entrepreneurs who formed a depression cartel can voluntarily file a notification to discontinue the approved cartel.486 In regard to the latest depression cartel among shipbuilders, the JFTC recommended they resolve the depression cartel six months before its legal expiration because of the recovery of the shipbuilding market after ten years of recession.487 The shipbuilders accepted the recommendation and filed to cease the cartel by themselves.488

B. Industry Conversion Smoothing Act for Structural Depression

1. Structural depression

An industry in depression cannot welcome the next phase of the business cycle, prosperity, where: (1) enterprises in the industry lose a competitive advantage to imported goods or competing alternative products; (2) demand has generally declined; or (3) suppliers have established an excessive productive capacity.489 Such an industry is in a structural depression without regard to a phase of business cycle of the whole economy.490

485 Antimonopoly Act § 66(1).
486 Antimonopoly Act § 24-3(6).
487 Japan Shipyards Set to End Production Cartel, supra note 477.
488 Id.
489 MATSUSHITA, supra note 264, at 323.
490 Id.
Where the market is structurally over competitive, less competitive enterprises
must withdraw their business from the market until the market’s disequilibrium
disappears. Where some enterprises in the industry lost the competition, they also
must retreat their business from the market. In the case where all enterprises in the
industry lose their competitiveness, Japan should abandon the industry. It is not
beneficial for the national economy and consumers to maintain inefficient enterprises.
In light of employment and a stable society, it is best for such enterprises not only to
withdraw their business but also to convert them to a new business with a potential.

There are some industries in a structural depression in Japan while others, such
as the automobile industry, succeed.\textsuperscript{491} Japan has developed its industrial structure
in response to the change of economic circumstances. But all industries cannot keep
competitiveness in the changing situation.

Japan recently shows a large amount of surplus,\textsuperscript{492} and this favorable balance
maintains high yen rate.\textsuperscript{493} Enterprises which depend on exports were forced to
rationalize themselves under the high yen rate situation. If the Japanese economy

\textsuperscript{491} The Ordinance by the MITI indicates depressed industries involving steel,
fabrics, nonferrous metal. Sangyō Kōzō Tenkan Enkatsuka Rinji Sochihō Dai 4 Jō
Dai 2 Kō no Tokutei Setsubi o Sadameru Shōrei [The Ministerial Ordinance which
Defines Specific Machinery under Section 4(2) of the Industrial Conversion Smoothing
Act Ordinance No. 30 of 1987 (Japan) as amended. See also Sangyō Kenkyūsho
[I institute of Indust. Res.], Sangyō Kōzō chōsei oyobi Kokusaika no Shiten ni Taiōshita
Kyōsō Seisaku no Arikata ni Tuite [Ideal of Industrial Structure Adjustment and

\textsuperscript{492} MITI WHITE PAPER, supra note 4, at 185; Japan’s current balance in 1987 at
its peak reached approximately 870 million dollars.

\textsuperscript{493} MITI WHITE PAPER, supra note 4, at 62-63; One dollar is in the range from
120 to 160 yen since 1986.
were growing strongly, enterprises in a structurally depressed industry could easily convert their business to another which would grow more. In a fast growing economy, a structural change is easy because a growing industry induces investment, risk taking and innovation in an unexplored area, and contributes higher employment which enhances labor mobility and skill acquisition.\textsuperscript{494} But the slow growth itself makes a structural adjustment more difficult.\textsuperscript{495} The real economic growth rate has been around only five percent in recent years.\textsuperscript{496} Japan will keep moderate economic growth, but rapid economic growth cannot be expected. Further, Japan cannot protect a structurally depressed industry from competition with foreign companies in the current situation. Japan should respond to foreign countries' criticism that the Japanese market is not open for them.\textsuperscript{497}

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\textsuperscript{494} ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, POSITIVE ADJUSTMENT POLICIES MANAGING STRUCTURAL CHANGE 7-8 (1983)(hereinafter OECD).
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\textsuperscript{495} Id.
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\textsuperscript{496} MITI WHITE PAPER, supra note 4, at 124.
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\textsuperscript{497} The Japan' average tariff on industrial products is one of the lowest among any industrial countries. JAPAN EXTERNAL TRADE ORGANIZATION, supra note 6, at 120. Further, Japan abolished tariffs on 1,004 items of industrial products in 1990. Id. Furthermore, imports of beef and fresh oranges was liberalized in the spring of 1991, followed by orange juice a year later. Id. at 173. Import restrictions on ten items of agricultural products earmarked by GATT was lifted by April 1990. Id. at 172-3. They are fruit purees and pastes, miscellaneous beans, processed cheese, tomato products, non-citrus juice, dairy products, canned pineapples, grape sugar and isomerized sugar, prepared beef products, and prepared products with sugar as a chief component. Id.
\end{flushright}
Under this situation, Japan should convert its industrial structure to what cooperates and harmonizes with the world economy. Japan should expand imports, transfer its industries to foreign countries by means of direct investment abroad, and develop new businesses especially those which target the domestic market. Enterprises in the structurally depressed industry also convert their business in accordance with the conversion of the Japanese economic structure. However, if enterprises are in a situation that they cannot easily withdraw their business from the structurally depressed industry because, for example, they have already possessed huge product facilities, then they may continue having severe competition without succeeding, and injuries may be aggravated.

Positive adjustment policies are therefore required to assist enterprises in withdrawing their current business and entering a new one. The Industry Conversion Smoothing Act was consequently enacted in 1987.

498 The value of Japan’s imports has been growing rapidly; the value of Japan’s imports in 1990 increased 80 percent from 1985. MITI WHITE PAPER, supra note 4, at 150.

499 Japanese manufactures’ overseas investment also has been growing very much. Annual investment (flow based) within the manufacturing industry in 1990 fiscal year increased about 10 times relative to the 1980 fiscal year. MITI WHITE PAPER, supra note 4, at 150.

2. Purpose

The purpose of the Industry Conversion Smoothing Act is to help enterprises convert their current business to promising ones. The Industry Conversion Smoothing Act aims also to stabilize and develop the economy in a particular regional area. If a certain industry falls into a depression, the area which depends upon such an industry will suffer severely with regard to the regional economy and employment. The Industry Conversion Smoothing Act, in brief, seeks to support smooth conversion of business by private enterprises and to lessen an adverse effect of the conversion in a regional area while the Japanese industrial structure, heavily dependent upon exports, is moving to harmonize with the world economy.

3. Assistance for the entrepreneur

Entrepreneurs must face drastic economic change such as high yen rate which is out of their control. Such an economic change deprives entrepreneurs of price competitiveness, and thereby increases imports, declines exports and demand in the domestic market, and an excessive productive capacity will result.

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501 Industry Conversion Smoothing Act § 1.

502 Id.

503 Some regional areas heavily depend upon a particular industry. If the main industry in the area withdraws its business, the regional economy and employment will badly suffer. In approved areas, under the Industry Conversion Smoothing Act, a joint venture among private companies and regional municipalities can get financial support. See Industry Conversion Smoothing Act §§ 13-15.
Under these circumstances, productive machinery may be defined as a "specific machinery" where it has an excessive capacity. The entrepreneur who possesses the specific machinery can submit a business plan to the competitive minister for approval. The contents of the business plan concerns the abandonment or assignment of the specific machinery and the conversion of business. There should be specific details involving the time period and finance. An approved entrepreneur can get benefits in regard to tax and finance.

The notable matter is that more than one entrepreneurs in the same industry can jointly make a business plan and submit it to the competent minister for approval. The contents of the joint plan concerns joint manufacturing, joint sales, merger, and assignment of their business. Approved entrepreneurs can withdraw or convert their business with the cooperation among them. The joint business plan system encourages entrepreneurs to convert their business through cooperation with competitors and to achieve a smooth conversion otherwise unattainable. These activities are horizontal output restraints although entrepreneurs limit only the excessive capacity. The competent minister may notify the JFTC prior to the issuance

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504 Industry Conversion Smoothing Act § 4(2).
505 Industry Conversion Smoothing Act § 5(1).
506 Industry Conversion Smoothing Act § 5(3).
507 Id.
of an approval for the joint business plan.\textsuperscript{509} The JFTC, if necessary, will deliver its opinion concerning the joint business plan to the competent minister.\textsuperscript{510} If the economic circumstance changes after the approval of the joint business plan, the plan may not be proper. If the JFTC finds that the approved concerted activities of the joint business plan violate the Antimonopoly Act, the JFTC will notify the competent minister.\textsuperscript{511} The competent minister, responding to the notification, will order to cancel or modify the plan.\textsuperscript{512}

The Industry Conversion Smoothing Act does not have any provision exempting the business plan from the application of the Antimonopoly Act. However, the JFTC and the competent minister have a meeting to observe that the joint business plan does not to violate the Antimonopoly Act. This meeting may give the entrepreneurs the presumption that the joint plan does not violate the Antimonopoly Act.\textsuperscript{513} When the change of economic circumstances affects the necessity of the joint business plan, the competent minister will be notified by the JFTC and will

\begin{footnotes}
\item[509] Industry Conversion Smoothing Act §§ 9(1), (2).
\item[510] Industry Conversion Smoothing Act § 9(3).
\item[511] Industry Conversion Smoothing Act § 9(4).
\item[512] Industry Conversion Smoothing Act §§ 8(2), 9(6). The competent minister, in this case, can deliver its opinion to the JFTC. \textit{Id.} § 9(5).
\item[513] Note that the meeting does not necessarily guarantee the joint business plan is exempted from the Antimonopoly Act.
\end{footnotes}
cancel or modify the plan before the JFTC challenges the joint activities with antitrust liability.514

The Industry Conversion Smoothing Act has an effect of exemption from the Antimonopoly Act. The goal of the Industry Conversion Smoothing Act is to change the current Japanese industrial structure to harmonize or cooperate with the world economy with the least injury to industries, and to aid the economy and employment in the region dependent upon the structurally depressed industry.515 Congress, when it enacted the Industry Conversion Smoothing Act, considered both exemptions as a positive adjustment policy and an assessment of Japan from the other countries.

C. The Depression Cartel in Other Jurisdiction than Japan

1. Europe

There are only two countries, Germany and Spain, other than Japan, in which a competition law expressly provides exemptions for a depression cartel under certain conditions.516 In Germany and Spain, the legislation on restrictive business practices has provisions to authorize a depression cartel "in order to facilitate structural adjustment in industries faced with a lasting or irreversible decline in demand."517 Because of extremely strict conditions for the approval of a depression cartel, an

514 Industry Conversion Smoothing Act §§ 8(4), 9(4)-(6).

515 Industry Conversion Smoothing Act § 1.


517 *Id.* at 30.
authorization of a depression cartel has been the rare exception, and recently none have been approved.518

2. United States

In the United States, the National Industrial Recovery Act of 1933 (hereinafter NIRA), was enacted to approve a depression cartel of a cyclical nature in order to respond to the Great Depression.519 Congress at that time respected speedy economic recovery more than social goals such as consumer protection and environmental regulation.520 Under the NIRA, codes to limit the amount of products, to fix prices, and to prohibit sales below cost were issued.521 Thereby not only the prices of products increased unjustly, but also artificially high prices attracted new companies and the productive capacity expanded.522

The Supreme Court in ALA Schechter Poultry Corp. v. United States, held the NIRA was unconstitutional since Congress cannot constitutionally delegate its legislative power for the rehabilitation and expansion the trade or industries without sufficient statutory standard or limits.523

518 Id.


521 *Competition Policy in Recession*, supra note 516, at 30.

522 Id.

The Supreme Court decisions at that time also relaxed the application of the Antitrust laws. In *Appalachian Coals, Inc. v. United States*, the Supreme Court examined the horizontal price fixing under the rule of reason analysis. In its analysis, the Court considered the fact that the coal mining industry was in distress. It mentioned that "[t]he interests of producers and consumers are interlocked," and that "[w]hen industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."

In *National Association of Window Glass Manufacturers v. United States*, the Supreme Court allowed an agreement for wage scales where handblown window glass manufacturers agreed that they all could operate only for one half of the year. The Court indicated that the handblown window glass producers and the handmakers needed to meet a short supply of labor. The Court admitted the necessity of the adjustment for the shrinking and depressed industry.

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524 *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

525 Defendants, who produced about 73 percent of the bituminous coal in Appalachian territories, established an exclusive selling agency. Defendants owned all capital of the agency and agreed to fix their prices. 288 U.S. at 356.

526 288 U.S. at 372.

527 288 U.S. at 372.


529 263 U.S. at 412-13; The factories using machines could produce window glass at half the cost of the hand made. Under the these circumstances, the severe working conditions reduced the number of workers for handblown window glass factories so that all factories could not maintain sufficient labor to operate all year.
In both cases, the Supreme Court considered that the industries were severely depressed when it examined the horizontal restraint of trade. Yet, the horizontal restraint of trade was deemed per se illegal in later decisions.\footnote{E.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).} Since \textit{ALA Schechter Poultry}, a depression cartel, generally speaking, has not been immunized from the antitrust liability.\footnote{Competition Policy in Recession, supra note 516, at 29.}

D. Anxiety for Trade Conflicts

As described earlier, Japan, unlike other countries, utilizes a cartel for the depressed industries as an adjustment tool. The question here is whether the depression cartel in Japan prevents free and fair international trade. The short answer is no.

1. Restriction of imports

The OECD, yet, was afraid that the government would use a cartel for the protection of domestic industries from foreign companies.\footnote{OECD, supra note 494, at 12; "Indeed, if governments tolerate cartels, they are frequently induced to protect these national producers from international competition."} It can be anticipated that foreign countries will fear that the Japanese government, in order to support the depressed industries, might restrict access to the Japanese market in which foreign companies have more competitive advantage.
However, neither the provision of the depression cartel in the Antimonopoly Act or in the Industry Conversion Smoothing Act restrict imports from abroad. The purpose of Section 24-3 of the Antimonopoly Act is to adjust the imbalance of the supply and demand gap caused by excessive production. This provision allows approved entrepreneurs to limit the amount of products or sales, but it does not prohibit non-members of cartels, including foreign companies, to do business as they wish.

One possible argument for protectionism is that since inefficient companies remain in the market owing to the depression cartel, imports from abroad cannot increase or the importers will hesitate to engage in aggressive business because of over competition.533 Nevertheless, if efficient foreign companies enter into the depressed market in Japan, the effect of the depression cartel will be diluted and inefficient Japanese companies should withdraw their business from the industry.534 Were the company so efficient that it could get sufficient profits even in the depressed industry, a cartel would not be effective. A member enterprise of a cartel is not necessarily guaranteed survival by the depression cartel. Efficient enterprises with the competitive


534 If an efficient company has its competitive advantage, for example in its prices and qualities, it will perform its business ignoring the existence of the depression cartel. Its attractive products will be welcomed by consumers much more than products of the cartel member. A productive outsider must win the competition with the cartelist and therefore need not mind the authorized cartel.
advantage can win the competition even in the market where the depression cartel is authorized. The depression cartel cannot bar competitive imported goods.

When foreign enterprises can get profits but Japanese ones cannot, the industry may not be in the cyclical depression but in the structural depression.\textsuperscript{535} In this case, it is no use for permitting the depression cartel under Section 24-3 of the Antimonopoly Act. Enterprises which lost the international competitive advantage should withdraw their business and convert to a new one with potential. The Industry Conversion Smoothing Act assists such enterprises in withdrawing their business and does not protect them from competition.\textsuperscript{536} Hence, the Industry Conversion Smoothing Act is not contrary to free international trade, either.

2. Unjust exports

If enterprises export their products while they are protected by an authorized cartel in the domestic market, such enterprises seem to be supported by export subsidies. The OECD suggested that export subsidies have a "serious danger of aggravating the problems of excess capacity in other countries."\textsuperscript{537}

\textsuperscript{535} Such a cyclical depression where only Japanese enterprises cannot continue their business because of their inefficiency compared with foreign companies will exist. Anyway, as long as any profitable entrepreneur exists, the government do not have to keep inefficient ones until the depression ends.

\textsuperscript{536} See supra part VI.B.

\textsuperscript{537} OECD, \textit{supra} note 516, at 20; "Whist one country can always solve its own problems of excess capacity by subsidizing exports, all nations taken together cannot. Export subsidies can thus amount to structural beggar-thy-neighbour policies which lead to international repercussions in the form of countervailing interventions. The final effect would be an overall deterioration of the world trade system."
However, to repeat, Section 24-3 of the Antimonopoly Act just seeks to ameliorate the imbalance of the supply and demand gap in the market. This provision does not allow enterprises which can afford dumping exports to gain excess profits.\textsuperscript{538} The depression cartel system is only a positive adjustment policy for a cyclical depression. The JFTC always observes the depression cartel and can cease or change its approval of it if necessary.\textsuperscript{539}

Besides, it is not easy for Japanese entrepreneurs to get excessive profits through the depression cartel. A reduction of supply by Japanese enterprises does not raise their prices much if the quality of imported products meets the demand and imports are not restricted by the tariff or non-tariff barriers.\textsuperscript{540}

Further, unless the JFTC allows Japanese entrepreneurs discriminately to restrict only their domestic sales, the enterprises cannot promote their exports using the profits from their domestic sales. Only when enterprises agreed among themselves to limit their outputs or sales only for the domestic market, does the depression cartel mean subsidize exports.\textsuperscript{541}

\textsuperscript{538} According to the survey by the MITI and the Ministry of Agriculture, Forestry and Fisheries, 11 of 41 Japanese manufactured products are cheaper in the United States than Japan. These products, nevertheless, are not made by enterprises which are approved to form a lawful depression cartel. JAPAN EXTERNAL TRADE ORGANIZATION, \textit{supra} note 6, at 70-71.

\textsuperscript{539} Antimonopoly Act § 66(1).

\textsuperscript{540} Uesugi, \textit{supra} note 533, at 396.

\textsuperscript{541} But if the Japanese manufacturers restrain competition only in the domestic market and can get excessive profits, foreign companies will enter the Japanese market. It is doubtful that Japanese enterprises can earn profits from the domestic market by the restraint of trade and export their products aggressively.
If there are efficient foreign competitors, the Japanese enterprises should compete with them in and out of the domestic market. The depression cartel system does not necessarily provide protection for all approved enterprises as long as efficient foreign competitors exist. There is, therefore, less possibility that the depression cartel system plays the role of export subsidies.

E. Factors Affecting the World Trade

1. World-wide depression

A depression cartel may not be allowed where a depression occurred only in the domestic market. Where only domestic demand is declined, Japanese enterprises will tend to convert their domestic sales to exports in order to make up for the decline in the domestic market. In this case, Japanese enterprises can survive in the world market without a formation of cartel.

Where the world market is also in a severe depression, even efficient enterprises having international competitiveness will face a hard time, and in some circumstances the depression cartel can be approved.

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542 If there are no foreign companies which can compete with Japanese enterprises effectively, a lawful cartel by Japanese companies may strongly affect the foreign market.

543 The conditions for an approval of a depression cartel are very strict. The depression cartel may not be allowed unless a considerable part of enterprises cannot continue their production. See Section 24-3 of the Antimonopoly Act and supra part VI.A.2.
2. Competitive advantage

This section will discuss the effects for an international trade where enterprises participating in a depression cartel possess the competitive advantage and where they do not.

Assume that in a certain industry Japanese enterprises possess the competitive advantage compared with foreign enterprises. Enterprises which possess the competitive advantage will try to maintain their amount of outputs by depriving a market share from others, including foreign competitors. A depression and Japan's competitive advantage will be a natural barrier against potential new entries from abroad. By the depression cartel, Japanese enterprises can prevent harmful losses among themselves during the recession. However, foreign enterprises will not suffer from the depression cartel because the depression cartel just adjusts supply by Japanese enterprises. What prevents foreign companies from the Japanese market is not the depression cartel but the depression and Japan's competitive advantage.

When the depression ends, only the market mechanism shall control the supply and demand. No cartel may be approved. If a lawful cartel remains, Japanese enterprises can restrain competition by the cartel in the domestic market. The competitive advantage of Japanese enterprises will make foreign companies hesitate to

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544 The depression cartel does not harm foreign enterprises but gives them advantages because the cartel will make Japanese products less attractive. Therefore, the participants of the cartel do not limit their output so much as to attract imported goods.

545 The purpose of the depression cartel system is temporary emergency relief in a severe recession. See supra note VI.A.1.
enter the Japanese market in spite of the fact that the market seems attractive because of the cartel. Further, the depression cartel subsidizes Japanese enterprises for their exports. It is one of the worst effects of the depression cartel.

If Japanese enterprises do not possess the competitive advantage against foreign enterprises, the depression cartel cannot be effective unless the Japanese market is closed from the international competition. Without protection such as tariffs and non-tariff barriers, foreign enterprises can freely engage in their business regardless of the existence of the depression cartel. If there were import barriers in the Japanese market, the depression cartel would not only protect inefficient Japanese enterprises from imports, but also give them export subsidies. Both consequences will badly affect the international trade order. Where Japanese enterprises do not possess international competitiveness, the Government should not apply the depression cartel system but should assist these enterprises to convert their business to other markets.

In summary, the depression cartel can be approved only when the enterprises in a depressed industry possess a relatively competitive advantage, and the cyclical depression is severe. By contrast, for enterprises which lost the competitive advantage

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546 If a lawful cartel still remains after the end of the recession, the Japanese enterprises can perform a balanced output restraint where they can earn excessive profit but foreign companies cannot enter the domestic market because of the quality difference. The wider the difference of competitiveness between Japanese companies and foreign companies, the more profits the Japanese cartelist can get.

547 The cartel in a recovered domestic market gives the Japanese enterprises excessive profits by which they can afford to export in low prices.

548 That is the Industrial Recovery Smoothing Act.
against foreign enterprises, the depression cartel should not be allowed, but instead, an
other adjustment policy is necessary to help them to withdraw their business
smoothly.

F. Assessment of the Depression Cartel

It is true that any cartel restrains competition to some extent. The OECD
concluded that "it is difficult . . . to conceive an effective system of competition in
which a large number of firms are protected or subsidized." The question here is
how the depression cartel is contrary to antitrust policy.

1. Protection of inefficient enterprises

The OECD indicated that cartel agreements are more anticompetitive than
dominant firms and mergers because a cartel protects inefficient enterprises. It is,
however, unclear whether the depression cartel system of the Antimonopoly Act
and the Industry Recovery Smoothing Act really maintain inefficient enterprises and
excess productive capacities longer than the market mechanism does.

The MITI has argued that "without cartels or some other forms of government
intervention excess capacity would not be eliminated in Japan, and that only with

549 Competition Policy in Recession, supra note 516, at 29.

550 OECD, supra note 494, at 12; "From a positive adjustment point of view,
cartels are much more problematic than dominant firms and mergers, as they tend to
entail all the disadvantages of large firm size. Cartel agreements restrict the flow of
resources from inefficient to efficient firms, because cartels protect high-cost firms."

551 Antimonopoly Act § 24-3.
government encouragement can it be eliminated speedily and completely.\textsuperscript{552}

Section 24-3 of the Antimonopoly Act aims to adjust excess supply in a cyclical depression. As described in the former section, the depression cartel should not be allowed for enterprises which lost competitive advantage. Under the approved depression cartel, the member enterprises can jointly limit their output or eliminate excessive capacities.\textsuperscript{553}

Eliminating excessive capacities is one measure of rationalization for manufacturers to regain a competitive power. Nonetheless, few will voluntarily and immediately decrease their productive facilities because of the merit of mass production. Japanese manufacturers do not mind continuing their business for low profits under severe competition.\textsuperscript{554} Further, Japanese companies, unlike American ones, tend not to lay off their employees because of lifetime employment.\textsuperscript{555} When Japanese enterprises withdraw a part of their business, they should consider their

\textsuperscript{552} Uesugi, supra note 533, at 394.

\textsuperscript{553} Antimonopoly Act § 24-3(2).

\textsuperscript{554} See JAPAN EXTERNAL TRADE ORGANIZATION, supra note 6, at 102; Manufacturer’s net profits to sales (after tax profits / year sales) of Japan is much lower than that of the United States: 2.15 percent in Japan and 5.41 percent in the United States in 1987.

employees in the relevant section.\textsuperscript{556} Hence, it is very tough for Japanese companies to shrink or to withdraw their business.

Where the total productive capacity of relatively competitive facilities exceeds the total demand in the depressed market, even efficient enterprises may suffer until the least efficient ones finally withdraw due to the market mechanism. But, of course, there exists a dangerous possibility that the depression cartel will protect inefficient enterprises which otherwise should have withdrawn their business. The strict conditions for the approval of the depression cartel is necessary to utilize the system as a useful tool of adjustment.\textsuperscript{557} The Industry Conversion Smoothing Act obviously aims to smooth conversion or withdrawal of inefficient enterprises in a structural depression. However, it is arguable whether the joint business plan\textsuperscript{558} is really necessary in order to facilitate business conversion.

Thus, the strict and careful application of both laws is necessary to prevent maintaining less efficient enterprises.

\textsuperscript{556} Instead of a lay off, an employer usually uses two ways for their employees: (1) moving employees to other sections of the company or to their subsidiaries; and (2) inviting employees who hope to quit by using, for example, a high retirement allowance.

\textsuperscript{557} Indeed, the Section 24-3 of the Antimonopoly Act provides rigid conditions to form the depression cartel. \textit{See supra} part VI.A.2.

\textsuperscript{558} The Industry Conversion Smoothing Act § 9.
2. Innovation and economic growth

The OECD also suggested that cartels tend to "discourage the introduction of innovative processes and products for fear of upsetting the often delicate stability of cartel agreements." It is clear that an innovation is important for future economic growth. If the depression cartel gave enterprises a calm situation in which they can enjoy business without any effort of innovation, then the level of technology would not rise in Japan. The depression cartel provides enterprises a situation in which they can survive by their efforts.

The enterprises will promote innovative activities as long as they compete among themselves. Note that monetary investment is necessary for a new technological development. Though it is not true that competition may be restrained in order for the investment to research and development, too severe competition will deprive enterprises from innovating. The Industry Conversion Smoothing Act may promote development in technology since technological innovation can be expected when enterprises enter into an unexplored area.

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559 OECD, supra note 494, at 12.

560 OECD, supra note 494, at 14; "Innovation is crucial for future growth and positive adjustment, and there is no doubt that government have an important role to play in promoting creative investment and new technological developments."

561 Antimonopoly Act § 24-3(1)(i); The depression cartel can be approved only when entrepreneurs cannot overcome the crucial depression through the rationalization by themselves.
3. Consumer Protection

A cartel creates the danger of limiting output and increasing prices much above the operating costs. In any case, the consumer can get no direct profit from the lawful depression cartel. Therefore, the depression cartel should be limited to a minimum time period.

So long as the cartel works as a temporary relief for a cyclical severe depression, consumers' heavy burden of the depression cartel can be limited. The JFTC will cease an approval of the depression cartel when enterprises in the depressed industry can easily earn profits.\textsuperscript{562} Further, consumers are guaranteed to choose alternative products made by other non-member enterprises, including imported goods, even while the depression cartel is approved. Moreover, the depression cartel system can prevent a lawful monopoly which is a result of a single winner in competition. Consumers can get benefits of competition among competitive enterprises after the end of a depression.

The Antimonopoly Act explicitly provides the condition for an approval that the depression cartel has "no likelihood of unjustly injuring the interests of consumers in general,"\textsuperscript{563} although this language is not specific or clear. To repeat, the rigid application of Section 24-3 is necessary to minimize the consumers' inconvenience.

\textsuperscript{562} Antimonopoly Act § 66(1).

\textsuperscript{563} Antimonopoly Act § 24-3(4)(ii).
G. Enforcement

As of June 1991, seventy-three depression cartels\(^{564}\) have been approved by the JFTC.\(^{565}\) These cartels are permitted to engage in the following types of restrictions:\(^{566}\)

<table>
<thead>
<tr>
<th>Type of Restriction</th>
<th>Number of Cartels</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Restrictions on output</td>
<td>54 cartels</td>
</tr>
<tr>
<td>(b) Restraints on facilities</td>
<td>25</td>
</tr>
<tr>
<td>(c) Restraints on sales volume</td>
<td>11</td>
</tr>
<tr>
<td>(d) Restraints on prices</td>
<td>5</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>95</strong></td>
</tr>
<tr>
<td><strong>NET total</strong></td>
<td><strong>73</strong>(^{567})</td>
</tr>
</tbody>
</table>

The JFTC usually permits concerted activities only relating to restrictions on output, facilities, or sales.\(^{568}\) Most of the restrictions approved were among them. Price fixing was permitted only in exceptional cases in which restrictions on output had not been effective.\(^{569}\) All of them were approved in depressions between the 1950's and the 1970's, and have not been approved in recent cases.\(^{570}\)

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\(^{564}\) The same cartel which was approved to extend its period several times is deemed one cartel.

\(^{565}\) *The Status Quo and Improvement of Exemption*, *supra* note 363, at 3 itemized discussion.

\(^{566}\) *Id.*

\(^{567}\) There were twenty depression cartels which contained more than two types of restrictions in the joint actions approved by the JFTC. *Id.*

\(^{568}\) Antimonopoly Act § 24-3(2).

\(^{569}\) *The Status Quo and Improvement of Exemption*, *supra* note 363, at 3 itemized discussion.

\(^{570}\) The depression cartels approved to fix prices are as follows:

<table>
<thead>
<tr>
<th>Cartel Type</th>
<th>Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vinylchloride Resin</td>
<td>(11/18/58 - 03/31/59)</td>
</tr>
<tr>
<td>Sheet Celluloid</td>
<td>(12/02/58 - 11/30/59)</td>
</tr>
</tbody>
</table>
A drawback of the depression cartel is that too long a duration may maintain inefficient enterprises which would otherwise be phased out and may create an unhealthy tendency towards relying on joint activities which are widespread among enterprises in a depressed industry.\textsuperscript{571} The term of the depression cartel should be limited to period which the JFTC estimates the depression lasting, though an accurate estimate is difficult.\textsuperscript{572}

The JFTC hence approves only as a short period as possible, generally three months,\textsuperscript{573} while the Antimonopoly Act does not provide any limitation. Moreover, in the case the JFTC thought the depression cartel is no longer necessary, it ceases the approval before the examination.\textsuperscript{574} In brief, the JFTC tends to approve the

\begin{itemize}
    \item Hard Vinylchloride Tube (03/02/59 - 05/20/60)
    \item Alloy for Structures (01/27/65 - 09/30/77)
    \item Small Steel Bars (11/05/76 - 09/30/77).
\end{itemize}

IYORI \& UESUGI, \textit{supra} note 188, at 184-186.

\textsuperscript{571} IYORI \& UESUGI, \textit{supra} note 188, at 115.

\textsuperscript{572} \textit{THE STATUS QUO AND IMPROVEMENT OF EXEMPTION}, \textit{supra} note 363, at 3 itemized discussion.

\textsuperscript{573} \textit{Id.} at 4.

\textsuperscript{574} The depression cartels which ceased before the expiration are as follows:
    \begin{itemize}
        \item Ferro Alloys (11/18/65 - 09/30/66)
        \item Cotton Yarn \& Spun Rayon Yarn (10/01/65 - 06/30/67)
        \item Steel Vessels (04/01/87 - 09/30/89)
        \item Large Diesel Engine for Vessels (04/01/87 - 09/30/89).
    \end{itemize}

\textit{THE STATUS QUO AND IMPROVEMENT OF EXEMPTION}, \textit{supra} note 363, at 4; JFTC ANNUAL REPORT, \textit{supra} note 476, at 122-123; \textit{Japan Shipyards Set to End Production Cartel}, \textit{supra} note 477.

\textit{See also} Antimonopoly Act § 66(1).
depression cartel to only the extent necessary with respect to both types of restrictions and the time limitation.

H. Examination of the Current Enforcement: Shipbuilders

Only for two industries, shipbuilders and manufacturers of large diesel engines for vessels, has the JFTC approved depression cartels since 1984 under the Antimonopoly Act. This section will examine the depression cartel approved for a shipbuilding industry.

1. Background for approval

Japan’s 33 shipbuilders, on March 13, 1987, filed an application to the JFTC for an approval of a depression cartel which would restrict their output under Section 24-3 of the Antimonopoly Act.

Japan has been the leading shipbuilding country in the world since the 1950’s because of their competitive advantage such as superior technologies, use of low price and high quality steel, good process control, and dependable delivery.

\[575\] See JFTC ANNUAL REPORT, supra note 14, at 54-55 app.; JFTC ANNUAL REPORT, supra note 476, at 121-123.

\[576\] See JFTC ANNUAL REPORT, supra note 476, at 121-22.

\[577\] NIPPON STEEL HUMAN RESOURCES DEVELOPMENT CO., LTD., supra note 1, at 119-20; The reasons the Japanese shipbuilding industry has grown to the best one said to be (1) "successful development of welding technology, the block construction method, pre-equipping of ships (ordinary, equipping is done after the launching, while pre-equipping partially fits out the vessel while under construction), and other technologies which the industry has succeeded in developing;" (2) "a supply of low-priced, high-quality steel" from Japanese steel manufacturers; (3) "good process
However, the oil shocks of 1973 and 1979 changed the circumstances. Due to a decline in marine transport volume and surplus tonnage, orders for new shipbuilding sharply fell. The total orders the industry received in 1986 were approximately 4,830 thousand gross tons which was decreased by 25.1 percent from the previous year. Further, the total tonnage of new ships completed in 1986 was less than half of the peak in 1975. Sales prices had been below the average costs since the latter part of 1985. Although the shipbuilding companies worked to streamline their operations by, for instance, "consolidating their shipbuilding facilities, reinforcing their non-shipbuilding operations, and redeploying their personnel," the total deficit of 33 shipbuilders reached 410 million yen (approximately 3.2 million dollars) in the 1985 fiscal year. Among seven major shipbuilders, only the largest one showed a net profit in the 1986 fiscal year.

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578 NIPPON STEEL HUMAN RESOURCES DEVELOPMENT CO., LTD., supra note 1, at 120.

579 JFTC ANNUAL REPORT, supra note 476, at 122.


581 JFTC ANNUAL REPORT, supra note 476, at 122.

582 NIPPON STEEL HUMAN RESOURCES DEVELOPMENT CO., LTD., supra note 1, at 120.

583 JFTC ANNUAL REPORT, supra note 476, at 122.

584 Three Major Japan Shipyards in Talks on Link, Reuters, Jan. 4, 1988, available in LEXIS, Nexis Library; Only Mitsubishi Heavy Industries Ltd. could keep its net
2. Content of restriction

The JFTC approved a depression cartel among 33 shipbuilders with respect to restriction on output from April 1, 1987 to March 31, 1988. The depression cartel among shipbuilders was approved to extend twice, one year each, because of the lasting severe depression in the shipbuilding industry. But in the middle of the third year, the JFTC recommended the member shipbuilders to end the cartel early due to the recovery of the shipbuilding market after ten years recession. The shipbuilding industry accepted this recommendation and broke up the cartel on September 30, 1989, six months earlier than its legal expiration.

During the two and a half years the cartel was permitted, the total output of the 33 shipbuilders was limited. Moreover, each shipbuilder agreed with the Ministry of Transport to reduce its excessive productive facilities under a government-driven restructuring plan. The JFTC approved only the output restriction as a lawful

profit.

585 JFTC ANNUAL REPORT, supra note 476, at 122.


587 Japan Shipyards Set to End Production Cartel, supra note 477.

588 The maximum total production among member shipbuilders was approximately 3 million compensated gross registered tons (hereinafter cgrt) for ships over 2,500 cgrt in the first year, and 2.4 million cgrt in the next year and a half. JFTC ANNUAL REPORT, supra note 476, at 122; Japan Shipyards Set to End Production Cartel, supra note 477.

589 Shipbuilders consequently agreed to trim their total productive capacity by more than 20 percent to 4.6 million cgrt. The peak of Japanese shipbuilding capacity was 9.8 million cgrt 1974 fiscal year. Japan Shipyards Set to End Production Cartel,
activity, and accordingly shipbuilders separately filed plans to cut their capacities.\textsuperscript{590} Nine of the 33 companies withdrew from shipbuilding business.\textsuperscript{591}

3. Assessment of the shipbuilders output restriction

This cartel involved no foreign shipbuilders, nor did it protect Japanese shipbuilders from international competition. Foreign shipbuilders at least did not suffer from the depression cartel.\textsuperscript{592}

Buyers all over the world could choose any shipbuilders they wished. When all Japanese shipbuilders had received orders up to the limit designated by the cartel, they could not accept orders from buyers. The buyers nevertheless could place orders to other shipbuilders, for example, in Korea and Germany. Demand in the world had declined. Total tonnage of ships completed fell by 27 percent in 1987 and by 35 percent from 1986 to 1988.\textsuperscript{593} It is hard to say that the depression cartel deprived buyers of the right to choose Japanese shipbuilders.\textsuperscript{594}

\textsuperscript{590} \textit{Three Major Japan Shipyards in Talks on Link, supra} note 584.

\textsuperscript{591} \textit{Japan Shipyards Set to End Production Cartel, supra} note 477.

\textsuperscript{592} Foreign shipbuilders could take a business opportunities while the depression cartel was formed.

\textsuperscript{593} \textit{LLOYD’S REGISTER OF SHIPPING STATICAL TABLE, supra} note 580, at 37-38; Total gross tonnage of ships completed in the world was: 16,844,909 in 1986; 12,259,419 in 1987; and 10,909,340 in 1988.

\textsuperscript{594} If Japanese shipbuilders had naturally been offered from buyers more than the limit, the market might have recovered from the recession. The restraint on output would prohibit an extremely attractive sales offer which must bring deficits to the
Further, the cartel did not play a role of export subsidies. It was impossible for Japanese shipbuilders to expand their exports by the low prices achieved by profits from the domestic market. Under this depression cartel, shipbuilders could not earn excessive profits which affords low prices to attract consumers abroad. This production restriction among shipbuilders does not seem contrary to the order of international trade.

4. Effect of the restriction

Japan’s shipbuilding industry recovered after the support by the depression cartel. After the end of the cartel, the growth of Japanese shipbuilders exceeded that of others. While the amount of ships built in the world raised by 21 percent from 1988 to 1989, Japan increased its output by 33 percent.595 Orders for new shipbuilding Japan received in 1989 were nearly a half of the total in the world and increased by 136.4 percent from the previous year.596 It is clear that Japan’s shipbuilders regained their competitive advantage while they underwent retrenchment and became efficient manufacturers under the depression cartel approved by the JFTC.

shipbuilders.

595 LLOYD’S REGISTER OF SHIPPING STATICAL TABLE, supra note 580, at 37-38; With respect to the total gross tonnage of ships completed, the world increased from 10,909,340 in 1988 to 13,236,169 in 1989; Japan increased from 4,040,199 to 13,236,109.

The market share of Japan increased from 37 percent in 1988 to 41 percent in 1989. Id.

596 JAPAN EXTERNAL TRADE ORGANIZATION, supra note 6, at 43; Japanese shipbuilders received orders for 741 ships, 9.7 million gross tons while orders for 1720 ships, 19.3 million gross tons were placed in the world.
The output restriction in the depressed shipbuilding industry is one successful example of an adjustment policy during a recession. It did not protect nine inefficient shipbuilders, which withdrew their business. Consumers' were kept from unjustly injuries as much as possible. The cartel was approved for only a proper period and was terminated even before the legal expiration. It did not restrain competition with foreign shipbuilders nor caused them bad effects.

Although a formation of a cartel in a recession may be dangerous for fair and free competition, it is possible to use the cartel as a useful adjustment tool as long as Section 24-3 of the Antimonopoly Act is strictly and carefully enforced.
VII. CONCLUSION

Japan strictly prohibits the horizontal restraint of trade no less than the United States. The notable difference in general is that, in order to apply the Antimonopoly Act, it must be proved that the cartel substantially restrains competition. The market power of defendants is an important factor to judge whether the cartel substantially restrains competition. In the United States, the horizontal restraint is held illegal regardless of the defendants’ market power.\(^597\) While the Antitrust laws in the United States prohibit the acts constituting horizontal restraints, the Antimonopoly Act in Japan eliminates the adverse effect on free and fair competition.

The most important difference is in regard to the exemption system from antitrust liabilities. Japan has the extensive exemption system including the cartel formed in a recession. The Antimonopoly Act itself has exemption provisions in addition to some separate exemption laws. Further, the Industry Conversion Smoothing Act has no exemption provision but has a similar effect to exemptions.

Why does Japan rely upon the exemption system? One reason seems to be that Japan did not have a concept of free and fair trade competition before World War II, and such a concept, which was introduced from the United States, is not the same as the American one. For instance, the lawful depression cartel shows that Japan has the

\(^{597}\) Cf. Group boycotts are recognized as an exception.
intention to eliminate harmful effects caused by excessive competition as well as to keep free competition. However, the important effect of the exemption system is to clarify lawful exceptional cases which seem to have an anticompetitive effect but have a redeeming virtue otherwise unattainable. By showing such exceptional cases, other horizontal restraints can be held illegal without a doubt. The public is not left uncertain.

On the other hand, the Antitrust laws in the United States analyze the horizontal restraint involving some procompetitive effects under either the per se rule or the rule of reason analysis. Nevertheless, the standard of when and how the courts decide an applicable doctrine is still vague.

The exemption system is possibly dangerous to free and fair competition and consumers. In order to minimize the detrimental effects, the rigid and prudent application of the exemption system is necessary. Especially recently, Japan is decreasing the usage of the exemption system.\textsuperscript{598} Moreover, Japan reviews the current exemption systems to diminish them.\textsuperscript{599}

It is, nonetheless, also true that the proper application of the exemption system, for example the depression cartel among shipbuilders, can support an industry with less anticompetitive effects and without adverse effects on the international trade order. The successful depression cartel may consequently keep competitive entities.

\textsuperscript{598} THE ANNUAL REPORT, \textit{supra} note 14, at 54-59 app.

\textsuperscript{599} THE STATUS QUO AND IMPROVEMENT OF EXEMPTION, \textit{supra} note 363, at 5, 21-30 general remarks.
Finally, it is the author's hope that the United States and Japan will deepen a mutual understanding concerning the Antitrust policy. A heated but dispassionate discussion between them is indispensable. Thereby, free and fair competition in the world trade will be successfully kept.

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600 The United States and Japan have discussed their competition policies. But usually, for example in SII, the United States has requested Japan strict implementation of the Antimonopoly Act. E.g. The Antimonopoly Act: Difference Foundation Between Japan and the United States, supra note 8.

However, on June 8, 1992, the MITI issued the report named "the Unfair Trade Report in 1992" which is criticizing unfair trade policies and regulations in Japan and several countries including the United States. This report shows that Japan changed its passive attitude from just accepting foreign countries' criticism toward a positive attitude counter-arguing its belief. Tsūsan Kaizen Motome Sekkyoku Shisei [The MITI Shows the Positive Attitude Seeking Improvement], ASAHI SHIMBUN [ASAHI NEWSPAPER], June 9, 1992, at 9.


The author hopes that this movement will encourage an animated discussion rather than an emotional one.