Antitrust in the Global Trading System: Reconciling U.S., Japanese and EU Approaches

Peter Morici

This publication is made possible by a grant from the Japan-United States Friendship Commission
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# Table of Contents

## Introduction and Summary

- Framing the Issue ........................................ 3
- United States ............................................. 5
- European Union .......................................... 6
- Japan ....................................................... 7
- WTO and Antitrust ........................................ 9

## Structuring a Competition Policy Agreement

- Objectives .................................................. 10
- Standards of Enforcement .............................. 11
- Standards of Performance .............................. 14
- Dispute Settlement ........................................ 14
- Membership and Accession of New Members .... 15
- Comments ................................................... 15

## Part One:

### Antitrust In The United States, European Union And Japan

## Chapter 1: The Context of Antitrust Policy

## Chapter 2: U.S. Law

- Statutes ..................................................... 26
- Monopolization and Abuse of Dominance .......... 28
- Horizontal Restraints .................................. 29
- Vertical Restraints ....................................... 30
- Mergers ..................................................... 31
- Enforcement and Remedies ............................ 32
- Extraterritorial Application ............................ 34
## Antitrust in the Global Trading System

### Chapter 3: EU Law

| Statutes | 39 |
| Monopolization and Abuse of Dominance | 41 |
| Horizontal Restraints | 43 |
| Vertical Restraints | 44 |
| Mergers | 44 |
| Enforcement and Remedies | 46 |
| Extraterritorial Application | 47 |

### Chapter 4: Industrial Policy and Competition Policy in Japan

| Pre-World War II Policy | 52 |
| U.S. Occupation of Japan | 54 |
| Postwar Industrial Policy | 58 |
| Computers | 60 |
| Consumer Electronics and Semiconductors | 62 |
| Industrial Policies since the Early 1980s | 63 |
| Photographic Film | 65 |
| The Steel Cartel | 69 |

### Chapter 5: Japanese Antitrust Law

| Statutes | 73 |
| Monopolization and Abuse of Dominance | 78 |
| Horizontal Restraints | 81 |
| Vertical Restraints | 86 |
| Keiretsu and Vertical Restraints | 87 |
| Mergers | 90 |
| Enforcement and Remedies | 92 |
| Extraterritorial Application | 95 |
Chapter 6: Implications for a Competition Policy Agreement

Some Observations about U.S., EU and Japanese Law
97
Implications for a CPA
101

Part Two:
Antitrust As An International Commercial Issue

Chapter 7: International Agreements

WTO Agreements as Public Law
107
Antitrust and WTO Agreements
109
UNCTAD and the OECD
112
Bilateral Agreements
113

Chapter 8: Problems in International Enforcement

Chapter 9: Structuring a Competition Policy Agreement

Objectives
125
Standards of Enforcement
127
  Nondiscrimination
127
  Market Access
127
  Export-Related Activities
129
  Commercial Activities of Governments
129
  Industrial Policy and Administrative Guidance
129
  National Antitrust Enforcement Authority
129
  Private Actions
131
  Standing for Signatory Governments
131
  Status in Domestic Law
132
Standards of Performance
133
Dispute Settlement
133

-- iii --
INTRODUCTION AND SUMMARY

In December 1996, the World Trade Organization (WTO) established a working group on competition policy and trade. This group is addressing issues important to U.S. commercial interests, because restrictive business practices pose some of the most significant market access barriers U.S. exporters and foreign investors face in Japan and many other countries.

Unfortunately, the working group has achieved little consensus regarding the efficacy or the appropriate scope of a prospective WTO competition policy agreement (CPA). Conflicts concerning the requirements of similar statutes, and jurisdictional issues in enforcement, have been important flash points in U.S. relations with the European Union (EU) and other trading partners. The EU advocates establishing minimum standards for national antitrust rules and enforcement, and then encouraging the progressive harmonization of national regimes as an essential step toward further opening of global markets.

The United States, on the other hand, is skeptical about a CPA with binding obligations and enforcement. It advocates expanding cooperation among national authorities, through bilateral agreements, and fostering a culture of competition through the work of the Organization for Economic Cooperation and Development (OECD).

For their part, Japan and other Asian countries view the WTO working group as an opportunity to raise concerns about U.S. and EU dumping laws, a linkage the Americans and Europeans oppose.

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1WTO, Singapore Ministerial Declaration (Geneva: 1996); WT/MIN(96)/DEC/W.
2For example, the treatment of cartels and the keiretsu were central issues in the talks that resulted in the Structural Impediments Initiative Report (1991), and are important issues in the Enhanced Initiative begun in 1997.
4For example, the conflicting conclusions reached by the FTC and the EU Commission regarding the 1997 Boeing-McDonnell Douglas merger – see text at footnote 171.
6The EU proposal has undergone several iterations. As of this writing, see Leon Brittan, "The Need for a Multilateral Framework of Competition Rules," presented at the OECD Conference on Trade and Competition (Paris: June 29-30, 1999).
Across specific areas of antitrust law, national regimes vary in their approaches for achieving the benefits of competition. Some apply stricter standards to various aspects of firm behavior; some subject large firms to more regulation; some rely more on private suits and the courts to define policy; and some require enforcement authorities and the courts to consider industrial policy goals in shaping responses to specific situations.

Consequently, a CPA premised on harmonization is either impractical or it poses the danger of forcing national efforts to control restrictive business practices down to their lowest common denominator. However, a CPA that focused only on the special problems associated with international commerce could tolerate considerable diversity among national regimes, need not depreciate the quality of national enforcement, and could further open global markets.

A CPA meeting those objectives would not cause the convergence in national market structures necessary to end dumping. Nor would it provide adequate means to address dumping through antitrust enforcement. Neither, therefore, would it cause the United States and the EU to relent in their opposition to the repeal of dumping laws.

Yet, an effective CPA could reduce the frequency of dumping and dumping investigations.\(^8\) That seems far preferable to insisting on the inclusion of dumping in antitrust talks, which impedes progress toward a more open trading system.

This study examines antitrust law and enforcement in the three largest enforcement jurisdictions (the United States, the EU and Japan), considers how those regimes differ, and delineates the challenges those differences pose for fashioning an effective CPA. It then proposes how a CPA could be structured that accommodates diversity among national approaches to policy while also improving the contestability of international markets.

**Framing the Issue**

Competition policy is much broader than antitrust. It concerns all the various ways that governments can encourage and regulate rivalry among producers and consumers to maximize consumer welfare, promote growth, and ensure economic security. In addition to antitrust concerns, therefore, competition policy also includes intellectual property law (e.g., copyrights, patents, trademarks and the like); subsidies (industrial, regional-development, and export subsidies); and antidumping laws.

However, those three competition policy concerns are already being addressed. International standards for protecting intellectual property are being formulated through the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS), so any CPA should leave copyrights, patents and the like to that venue. Meanwhile, the Uruguay Round Agreement on Subsidies addresses various subsidies, ranging from outright cash grants to in-kind benefits, and efforts are best spent on refining that agreement. As for dumping, the WTO Antidumping Code

\(^8\)In its report proposing a CPA, the EU Group of Experts concluded that “cooperation between competition authorities will not, in the foreseeable future, make it possible to relinquish trade protection instruments. However, as the effectiveness of cooperation increases, instances of conflict likely to lead to the use of these instruments will decrease.” Director General IV - Competition, *Competition Policy in the New World Order: Strengthening International Cooperation and Rules – Report of the Group of Experts* (EU: Brussels, 1995), p. 15.
already establishes rules for national antidumping laws, and as argued above, a CPA would not make dumping vanish in any case.

The focus of this particular study is antitrust law – the regulation of monopolization and abuse of dominance, horizontal agreements (cartels), vertical agreements (contracts among firms along the production and distribution chain), and mergers and joint ventures.

The formulation of effective antitrust policy can be complex, considering that antitrust policies are often aimed at objectives other than ensuring competitive markets. For example, by considering industrial policy objectives when formulating remedies for restrictive business practices, granting special exemptions, or simply failing to scrutinize some firm behavior closely, antitrust policy can become a potent instrument of industrial policy.

In the United States, the European Union and Japan, the apparent requirements of the basic antitrust statutes are similar; yet, enforcement and norms for acceptable firm behavior vary greatly among these jurisdictions. In part, that diversity reflects important differences in how governments view the efficacy of industrial policy, government regulation of specific firm behaviors, and competition vs. collaboration among firms. In part, it also reflects objective geographic conditions and differences in the constitutional roles assigned to courts.

Part One of this study reviews antitrust law in the United States, the European Union, and Japan. Chapter 1 contains a brief introduction to the context in which national officials must define antitrust policy. Chapters 2 and 3 examine the origins and application of U.S. and EU law.

Because industrial policy has had the greatest influence on antitrust enforcement in Japan, the application of the Japanese Antimonopoly Law (AML) is best understood in the context of that policy. Accordingly, Chapter 4 presents a brief history of industrial policy and competition policy in Japan, and Chapter 5 examines the requirements and enforcement of the AML. Chapter 6 considers the implications of differences among U.S., EU and Japanese laws for the implementation of a CPA.

Part Two examines antitrust as an international commercial issue. Chapters 7 and 8 examine the place of antitrust in existing WTO agreements, the existing framework for cooperation among national authorities, and problems in international enforcement. Chapter 9 discusses how a CPA in the WTO could be structured to accommodate diversity among national regimes while addressing the principal problems in international enforcement.

**United States**

Generally, the Justice Department, the Federal Trade Commission (FTC) and U.S. courts have been insulated from statutory requirements and political pressures to pursue industrial policy considerations in the formation of antitrust policy. Exceptions may be cited, notably the treatment of R&D consortiums and agricultural cooperatives. However, as much as in any jurisdiction, antitrust law has focused on maximizing consumer welfare and economic efficiency. Competition has been the industrial policy of the United States, at least as compared to conditions in the EU and Japan.

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9Geographic conditions are defined here to include both physical and language barriers to competition among firms in different regions within the same jurisdictions.
U.S. enforcement focuses on ensuring that markets remain competitive. For example, U.S. law is tough on the abusive business practices of large (dominant) firms that may thwart competition, and on cartels. However, U.S. law is not inclined to regulate large firms seeking to defend or gain market share through fair means (e.g., innovation and superior business acumen), or to regulate agreements between large firms and their suppliers or distributors as long as these do not block market participation by other firms. U.S. merger policy is preemptive, seeking to ensure that competition is sustained.

Federal enforcement agencies vigorously seek out antitrust violations, using regional offices around the country. The suits brought in federal courts by private firms, individuals, and the several states play an important role in enforcement too. Criminal penalties are meted out for egregious violations like price fixing.

European Union

EU policymakers are required by statute to consider industrial policy goals when shaping important aspects of antitrust policy, and the regulation of specific firm behavior has enjoyed greater legitimacy in European polities than in the United States. EU policymakers have been confronted by language barriers and entrenched national distribution systems that could frustrate attempts to create a common market by lowering tariffs and other barriers to trade.

Furthermore, EU antitrust enforcement is not a federal system, in a way comparable to U.S. enforcement. Under the doctrine of direct effects, EU competition laws are enforceable in member-country courts, and private suits to obtain relief from private behavior that violates EU law must be brought in national courts. The Commission has sought to decentralize responsibility for enforcing aspects of competition law, distributing some responsibilities to member-country courts and national competition authorities. Although the Commission will act on information about restrictive business practices, it does not have regional offices to seek them out, as the U.S. Justice Department does. Moreover, EU law has no provisions for criminal penalties.

In contrast to the United States, the Commission has used antitrust orders and merger policy to enhance the competitiveness of European firms. EU authorities are more inclined to regulate aggressive pricing by large firms seeking to maintain or increase their market shares. EU law is much tougher on distribution agreements between large producers and retailers that may impede sales across member state borders.

Also, some restrictive business practices may go undetected if member-state antitrust authorities are disinclined to uncover them. For example, cartel enforcement is not as aggressive as in the United States. Private actions do not play a significant role in EU enforcement, because of the difficulties damaged parties have in finding an appropriate forum and gathering evidence when their complaint involves conduct in more than one member-state. Criminal prosecution does not provide a deterrent to violation of EU law.

In important ways, U.S. and EU laws would be difficult to reconcile in a CPA premised on harmonization. For example, the application of U.S. vertical restraint rules in Europe – coupled with natural protections engendered by language, culture and national frontiers – could contribute to a refragmentation of markets; whereas applying EU rules to U.S. conditions would be unnecessarily regulatory and could stifle healthy interbrand competition. On other issues, the
United States would not likely accept a CPA that legitimized the general intrusion of industrial policy into the application of antitrust law.

Japan

Since the Meiji Restoration (1868), Japan has used industrial policies to catch up and, more recently, to compete with Europe and the United States. Its competition policy was heavily influenced by German thinking, and is less inclined to embrace the Anglo-Saxon notions that private restraints of trade are \textit{prima facie} harmful.

For example, as early as the 1880s, cartels were used to neutralize what the Japanese viewed as the destabilizing consequences of excessive competition – i.e., cycles of overinvestment and contraction. Through industry associations, Japanese governments have used cartels to address the employment consequences of recession and the problems in maturing industries, to mobilize private resources in order to achieve public purposes, and to achieve specific development objectives.

After World War II, the U.S. occupation government imposed an antitrust law modeled after U.S. law. Following the American withdrawal, however, the Japanese law was weakened, and enforcement was subordinated to the needs of industrial policymakers. For example, in the mid-1960s, over one thousand government-sanctioned cartels were in place.

Since the late 1970s, Japanese antitrust enforcement has been somewhat resurgent, but the value of collaboration remains substantially ingrained in Japanese behavior. This is reflected in the continuing prominence of cartels and the purchasing practices of the \textit{keiretsu}, which cause tensions with trading partners.

Cartels in industries with chronic excess capacity, such as steel, for example, require public or private restraints on imports to maintain prices above international levels. In turn, that creates opportunities for Japanese dumping in foreign markets, and the combination of private import restraints and dumping tends to shift unemployment onto foreign producers.

In industries where Japanese firms have achieved dominant positions, such as video cassette recorders, and more recently, fax paper, they have run afoul of U.S. antitrust laws prohibiting price fixing. Although \textit{keiretsu} networks permit interbrand competition in Japan, their purchasing practices and control over distribution channels can impose significant barriers to foreign products and firms, as well as to new domestic competitors, in retail markets.

Following the Structural Impediments Initiative (SII) Report (1991), Japanese law and enforcement were strengthened, and Japan essentially has a U.S./EU style antitrust law. However, in most areas, enforcement by the Japanese Fair Trade Commission (JFTC) is much less aggressive than that of the U.S. and EU antitrust agencies. The remedies available through private suits are very limited, and Japanese courts are reluctant to embarrass their government with findings that oppose its policies or the actions of one of its key ministries.

\textsuperscript{10} The modern Japanese legal system is patterned after the Napoleonic Code and had been strongly influenced by the German Civil Code.


\textsuperscript{12} \textit{United States v. Nippon Paper}, 109 F.3rd 1 (1st Cir. 1997).
The continuing tension between collaboration and competition in Japanese policy makes negotiating an effective CPA much more difficult than merely establishing formal requirements for national law and enforcement. In Japan, what U.S. and European exporters and investors need is not better statutory guarantees. Rather, they need better access to remedies, through more aggressive JFTC enforcement, better access to private actions when the JFTC fails to act, and an alternative forum when the Japanese courts refuse to enforce the law. Lacking those, U.S. and European firms can lobby their governments to take action on their behalf through the WTO, but its practical jurisdiction has proven quite limited.

**WTO and Antitrust**

WTO agreements only address limited classes of restrictive business practices—dumping, certain practices of government-sanctioned monopolies in the services sector, discriminatory conduct by private standard-setting bodies, and abusive licensing practices for intellectual property. The failure of member governments to discipline other restrictive business practices could be addressed through the WTO nullification and impairment provisions by bringing a "nonviolation complaint," but in such cases, complainants face a much higher standard of proof than in cases involving direct violations of specific WTO rules. The U.S. could not overcome those hurdles to the satisfaction of the dispute settlement panel in the Kodak-Fuji case, and for all practical purposes, most restrictive business practices are not actionable through the WTO dispute settlement.

The primary effect of a CPA agreement would be to transform the failure of WTO members to address specific classes of private restrictive business practices—delineated by the language of a CPA—into "violation complaints." That would permit members to file complaints when other member governments do not address the anticompetitive practices, much as members may file complaints when another member provides an export subsidy or fails to address copyright piracy as required by TRIPS.

It is important to recognize that the WTO has no jurisdiction over private firms and individuals. A CPA would not establish a supranational authority, for example, to prosecute cartels or to review mergers. Rather, a CPA would establish standards for signatory-country enforcement against restrictive business practices when these adversely affect other signatories' international commerce, and it would provide signatories with a mechanism to obtain a relief when another signatory fails to meet its obligations under the agreement.

**Structuring a Competition Policy Agreement**

Negotiators endeavoring to structure an effective CPA would have to address five sets of issues: overall objectives, standards of enforcement, standards of performance, dispute settlement, and membership.

**Objectives**

A CPA should ensure that restrictive business practices undertaken within the territory of any signatory state do not deny or impede market access by products and firms of other signatory states, or impose substantial harm on consumers or producers in other signatory states.

Achieving those objectives is complicated by the imposition of industrial policy objectives on antitrust enforcement. Generally, WTO agreements regulating other aspects of
government policy countenance industrial policies if they do not compromise the market access benefits that member states expect from the agreements. Consistency would require that ensuring the contestability of markets should be the primary goal of a CPA.

**Standards of Enforcement**

The agreement should contain substantive obligations regarding nondiscrimination, market access, export-related activities, the commercial activities of governments, industrial policy and administrative guidance, powers of national antitrust enforcement authorities, private actions, the standing of signatory governments in other signatories' courts, and the status of CPA obligations in domestic law.

**Nondiscrimination**

Signatories should be obligated to extend national treatment and most-favored-nation treatment regarding antitrust law and enforcement, and regarding all other laws and acts of government regulating or affecting the contestability of markets, to the products, firms and nationals of other signatories.

**Market Access**

Signatories should be obligated to declare illegal, and to take action against, restrictive business practices or policies that deny or impede opportunities for the products and firms of other signatories to contest markets. These restrictive practices should include: monopolization and abuses of dominance, explicit and implicit agreements among firms, and other anticompetitive business practices; structures of industrial organization; and practices that deny or limit access of importers and foreign firms to suppliers and distribution channels.

In addition, signatories should be obligated not to implement laws, regulations, or policies that limit the ability of importers and foreign firms to price, or to undertake nonprice activities, to contest markets or to defend market shares; nor should they impose on foreign firms criteria or standards of behavior in the application of antitrust law, including merger review, different from those imposed on domestic firms in comparable situations.

**Export-Related Activities**

Signatories should be obligated to take action against restrictive business practices that harm other signatories' consumers and producers. Signatories should be obligated to respond to requests for positive comity in this regard.

**Commercial Activities of Governments**

These obligations should apply to the behavior of public commercial enterprises and the commercial activities of governments.

**Industrial Policy and Administrative Guidance**

These obligations should apply to restrictive business practices without regard to whether behavior is required, permitted, or suggested by law, by government policy or action, or by government advice or administrative guidance.
National Antitrust Enforcement Authority

Each signatory should be required to establish a national antitrust enforcement authority (national authority)\(^\text{13}\) with adequate investigative and remedial powers to take action against practices that violate the agreement.

National law should guarantee the political independence of the national authority and require signatory governments to provide it with adequate financial resources to meet obligations under the CPA – in particular, adequate resources to respond effectively to the petitions of other signatory governments and private parties.

Private Actions

Signatories should be obligated to provide private persons the right to bring civil suits, as well as access to adequate discovery and the right to effective remedies, including injunctive relief, damage awards, and costs.

Further, signatories should be obligated to provide private persons with the right to bring suits in national and EU courts, in order to challenge the decisions of national authorities, laws, and acts of government that violate obligations of the agreement.

Standing for Signatory Governments

Signatories should permit other signatories to bring civil suit for remedies as *paren patriae* for injuries sustained by their domiciliaries in a designated national or EU court. This would help compensate for the difficulties foreign persons encounter in seeking private remedies for violations of EU law in EU member state courts.

In cases brought by or against their domiciliaries, signatories should be permitted to appeal court decisions before appellate courts or a WTO dispute settlement panel (discussed below).

Further, signatories should be permitted to bring suits in national or EU courts to challenge the decisions of national authorities, laws, and acts of government that violate obligations of the agreement. Signatories should be permitted to appeal the judgments and remedies rendered either before appellate courts or before a WTO panel.

Status in Domestic Law

Signatories should be obligated to conform their laws, regulations, and administrative procedures to ensure that administrative agencies and national courts are required to adhere to the obligations of the agreement as domestic law.

Standards of Performance

TRIPS defines procedural requirements for civil and criminal enforcement. For example, these specify minimum requirements regarding notice, representation, evidence, and protection of confidentiality, and require decisions to be reasoned and based on the facts in the case. Similar

\(^{13}\) In the United States, the FTC and the Antitrust Division of the Justice Department would share this status. In the EU, both the Commission and EU member enforcement agencies would enjoy this status.
requirements should be written into a CPA, and failure to comply should be grounds for a finding of noncompliance by a WTO panel.

**Dispute Settlement**

Complaints should be heard by a permanent WTO dispute settlement panel whose membership includes sitting and retired antitrust enforcement officials, practitioners, and judges. Obligations that would result from a finding of violation should depend on the nature of the dispute:

When a signatory is found to have a nonconforming law, regulation, or practice, it should be required to propose a satisfactory plan to remedy the situation within thirty days, or pay the complainant monetary damages, the amount and frequency of which would be determined by the panel, to compensate for the harm imposed (compensatory damages).

When a signatory is found to have imposed costs on a complainant's consumers or firms, it should be required to correct the offense and pay compensatory damages. The complainant could choose to transfer those payments to the harmed consumers and firms.

When a signatory appeals the decision of another signatory's national authority or court, the decision should be remanded to the authority or court whose finding violated the agreement. If the national authority or court repeatedly failed to act on the instructions of the dispute settlement panel, or its actions imposed costs on the complainant’s consumers or firms, its government should be required to pay compensatory damages to the complainant.

**Membership and Accession of New Members**

Initial participants should include those OECD countries and developing countries who have in place adequate antitrust laws and enforcement.

Many developing countries lack reliable legal systems necessary to implement effective antitrust regimes. Yet, for developing countries, eventual membership in the CPA would offer important benefits – for example, the benefits flowing from the regulation of cartels and vertical restraints. Therefore, the agreement should contain an accession clause outlining admission standards for new members.

**Comments**

The market access, export, and government commercial activities provisions would require signatory governments to take action against those restrictive business practices within their territories that deny or impede market access to, or impose harm on, other signatories' producers and consumers. Those provisions would also establish classes of business practices to which enforcement obligations apply.

The provisions regarding the investigative and remedial powers, political independence, and financial resources of national authorities should better ensure that those authorities have the tools, the will, and the means to act against practices that violate the CPA.
Together, these provisions would give U.S. consumers and producers, or the Justice Department acting on their behalf, better prospects for success when petitioning the JFTC, the European Commission, and other national authorities to investigate cartels, practices that deny access to distribution channels, and other anticompetitive practices.

Should the JFTC, the European Commission, or another national authority be disinclined to remedy harm to U.S. consumers and producers, the private actions provisions would better equip U.S. consumers and producers to seek relief through the courts. The *paren patriae* provisions would permit the U.S. government to bring suit in other signatories' courts on behalf of U.S. consumers and producers who may be ill-equipped to avail themselves of remedies – for example, owing to the high cost of bringing a suit or owing to the multinational incidence of anticompetitive conduct. The standing for signatories to appeal administrative and court decisions involving their domiciliaries, and to challenge laws, regulations, directives, and advice that violate the CPA, is proposed for similar reasons.

Should national courts be disinclined to find restrictive business practices harming to foreign interests, or to act against or embarrass their national authority or incumbent government, the national-treatment and the status-in-domestic-law provisions should clarify their obligations.

Should national courts nevertheless fail to act in accordance with the requirements of the CPA, the dispute settlement provisions would permit signatory governments to seek review and remand of both administrative and court decisions through WTO dispute settlement, and ultimately, to obtain monetary compensation.

The industrial policy and the administrative guidance provisions would require that antitrust considerations prevail in the event of conflicts between antitrust law and other laws, government policies, or administrative guidance. These provisions, along with national treatment and market access provisions, would give foreign firms and their governments standing to challenge in national courts and the WTO those decisions – for example in merger review – that impose conditions not imposed on domestic firms in similar circumstances, or that arbitrarily advantage domestic competitors at their expense.

Although a CPA with the provisions outlined above would bring some national regimes into closer alignment, it would not require the strict harmonization of national regimes. For example, U.S., EU and Japanese enforcement authorities could continue to apply different policies toward large-firm behavior and abuse of dominance. However, they would be obliged to treat foreign and domestic firms on equal terms, and to address the abuse of dominance by their own firms when other signatories' consumers and producers are harmed.

Under such a CPA, U.S. authorities could continue to apply more lenient policies toward vertical arrangements than does the European Commission, with each continuing policies appropriate to their geographic and historical circumstances.

However, to the extent *keiretsu* practices deny U.S. and EU firms access to Japanese markets, these firms and their governments would have much better access to remedies in Japanese courts, and ultimately through WTO dispute settlement. In turn, Japanese compliance with the CPA could take many forms. For example, it could rely on administrative guidance (effective, proactive industry programs to open procurement and distribution channels to foreign firms) or the JFTC could address *keiretsu* relationships in ways that are more similar to EU policies toward vertical restraints.
INTRODUCTION AND SUMMARY

In December 1996, the World Trade Organization (WTO) established a working group on competition policy and trade.\(^1\) This group is addressing issues important to U.S. commercial interests, because restrictive business practices pose some of the most significant market access barriers U.S. exporters and foreign investors face in Japan\(^2\) and many other countries.\(^3\)

Unfortunately, the working group has achieved little consensus regarding the efficacy or the appropriate scope of a prospective WTO competition policy agreement (CPA). Conflicts concerning the requirements of similar statutes,\(^4\) and jurisdictional issues in enforcement,\(^5\) have been important flash points in U.S. relations with the European

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Union (EU) and other trading partners. The EU advocates establishing minimum standards for national antitrust rules and enforcement, and then encouraging the progressive harmonization of national regimes as an essential step toward further opening of global markets.\(^6\)

The United States, on the other hand, is skeptical about a CPA with binding obligations and enforcement. It advocates expanding cooperation among national authorities, through bilateral agreements, and fostering a culture of competition through the work of the Organization for Economic Cooperation and Development (OECD).\(^7\)

For their part, Japan and other Asian countries view the WTO working group as an opportunity to raise concerns about U.S. and EU dumping laws, a linkage the Americans and Europeans oppose.

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Consequently, a CPA premised on harmonization is either impractical or it poses the danger of forcing national efforts to control restrictive business practices down to their lowest common denominator. However, a CPA that focused only on the special problems associated with international commerce could tolerate considerable diversity among national regimes, need not depreciate the quality of national enforcement, and could further open global markets.

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Yet, an effective CPA could reduce the frequency of dumping and dumping investigations. That seems far preferable to insisting on the inclusion of dumping in antitrust talks, which impedes progress toward a more open trading system.

This study examines antitrust law and enforcement in the three largest enforcement jurisdictions (the United States, the EU and Japan), considers how those regimes differ, and delineates the challenges those differences pose for fashioning an effective CPA. It then proposes how a CPA could be structured that accommodates diversity among national approaches to policy while also improving the contestability of international markets.

**Framing the Issue**

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The formulation of effective antitrust policy can be complex, considering that antitrust policies are often aimed at objectives other than ensuring competitive markets. For example, by considering industrial policy objectives when formulating remedies for restrictive business practices, granting special exemptions, or simply failing to scrutinize some firm behavior closely, antitrust policy can become a potent instrument of industrial policy.

In the United States, the European Union and Japan, the apparent requirements of the basic antitrust statutes are similar; yet, enforcement and norms for acceptable firm behavior vary greatly among these jurisdictions. In part, that diversity reflects important differences in how governments view the efficacy of industrial policy, government regulation of specific firm behaviors, and competition vs. collaboration among firms. In part, it also reflects objective geographic conditions and differences in the constitutional roles assigned to courts.

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9Geographic conditions are defined here to include both physical and language barriers to competition among firms in different regions within the same jurisdictions.
Part One of this study reviews antitrust law in the United States, the European Union, and Japan. Chapter 1 contains a brief introduction to the context in which national officials must define antitrust policy. Chapters 2 and 3 examine the origins and application of U.S. and EU law.

Because industrial policy has had the greatest influence on antitrust enforcement in Japan, the application of the Japanese Antimonopoly Law (AML) is best understood in the context of that policy. Accordingly, Chapter 4 presents a brief history of industrial policy and competition policy in Japan, and Chapter 5 examines the requirements and enforcement of the AML. Chapter 6 considers the implications of differences among U.S., EU, and Japanese laws for the implementation of a CPA.

Part Two examines antitrust as an international commercial issue. Chapters 7 and 8 examine the place of antitrust in existing WTO agreements, the existing framework for cooperation among national authorities, and problems in international enforcement. Chapter 9 discusses how a CPA in the WTO could be structured to accommodate diversity among national regimes while addressing the principal problems in international enforcement.

United States

Generally, the Justice Department, the Federal Trade Commission (FTC) and U.S. courts have been insulated from statutory requirements and political pressures to pursue industrial policy considerations in the formation of antitrust policy. Exceptions may be cited, notably the treatment of R&D consortia and agricultural cooperatives. However, as much as in any jurisdiction, antitrust law has focused on maximizing consumer welfare and economic efficiency. Competition has been the industrial policy of the United States, at least as compared to conditions in the EU and Japan.

U.S. enforcement focuses on ensuring that markets remain competitive. For example, U.S. law is tough on the abusive business practices of large (dominant) firms that may thwart competition, and on cartels. However, U.S. law is not inclined to regulate large firms seeking
to defend or gain market share through fair means (e.g., innovation and superior business acumen), or to regulate agreements between large firms and their suppliers or distributors as long as these do not block market participation by other firms. U.S. merger policy is preemptive, seeking to ensure that competition is sustained.

Federal enforcement agencies vigorously seek out antitrust violations, using regional offices around the country. The suits brought in federal courts by private firms, individuals, and the several states play an important role in enforcement too. Criminal penalties are meted out for egregious violations like price fixing.

European Union

EU policymakers are required by statute to consider industrial policy goals when shaping important aspects of antitrust policy, and the regulation of specific firm behavior has enjoyed greater legitimacy in European polities than in the United States. EU policymakers have been confronted by language barriers and entrenched national distribution systems that could frustrate attempts to create a common market by lowering tariffs and other barriers to trade.

Furthermore, EU antitrust enforcement is not a federal system, in a way comparable to U.S. enforcement. Under the doctrine of direct effects, EU competition laws are enforceable in member-country courts, and private suits to obtain relief from private behavior that violates EU law must be brought in national courts. The Commission has sought to decentralize responsibility for enforcing aspects of competition law, distributing some responsibilities to member-country courts and national competition authorities. Although the Commission will act on information about restrictive business practices, it does not have regional offices to seek them out, as the U.S. Justice Department does. Moreover, EU law has no provisions for criminal penalties.

In contrast to the United States, the Commission has used antitrust orders and merger policy to enhance the competitiveness of European firms. EU authorities are more inclined to regulate aggressive pricing by large firms seeking to maintain or increase their market shares. EU law is much tougher on distribution agreements between large
producers and retailers that may impede sales across member state borders.

Also, some restrictive business practices may go undetected if member-state antitrust authorities are disinclined to uncover them. For example, cartel enforcement is not as aggressive as in the United States. Private actions do not play a significant role in EU enforcement, because of the difficulties damaged parties have in finding an appropriate forum and gathering evidence when their complaint involves conduct in more than one member-state. Criminal prosecution does not provide a deterrent to violation of EU law.

In important ways, U.S. and EU laws would be difficult to reconcile in a CPA premised on harmonization. For example, the application of U.S. vertical restraint rules in Europe – coupled with natural protections engendered by language, culture and national frontiers – could contribute to a refragmentation of markets; whereas applying EU rules to U.S. conditions would be unnecessarily regulatory and could stifle healthy interbrand competition. On other issues, the United States would not likely accept a CPA that legitimized the general intrusion of industrial policy into the application of antitrust law.

Japan

Since the Meiji Restoration (1868), Japan has used industrial policies to catch up and, more recently, to compete with Europe and the United States. Its competition policy was heavily influenced by German thinking,¹⁰ and is less inclined to embrace the Anglo-Saxon notions that private restraints of trade are prima facie harmful.

For example, as early as the 1880s, cartels were used to neutralize what the Japanese viewed as the destabilizing consequences of excessive competition – i.e., cycles of overinvestment and contraction. Through industry associations, Japanese governments have used cartels to address the employment consequences of recession and the problems in

¹⁰ The modern Japanese legal system is patterned after the Napoleonic Code and had been strongly influenced by the German Civil Code.
maturing industries, to mobilize private resources in order to achieve public purposes, and to achieve specific development objectives.

After World War II, the U.S. occupation government imposed an antitrust law modeled after U.S. law. Following the American withdrawal, however, the Japanese law was weakened, and enforcement was subordinated to the needs of industrial policymakers. For example, in the mid-1960s, over one thousand government-sanctioned cartels were in place.

Since the late 1970s, Japanese antitrust enforcement has been somewhat resurgent, but the value of collaboration remains substantially ingrained in Japanese behavior. This is reflected in the continuing prominence of cartels and the purchasing practices of the keiretsu, which cause tensions with trading partners.

Cartels in industries with chronic excess capacity, such as steel, for example, require public or private restraints on imports to maintain prices above international levels. In turn, that creates opportunities for Japanese dumping in foreign markets, and the combination of private import restraints and dumping tends to shift unemployment onto foreign producers.

In industries where Japanese firms have achieved dominant positions, such as video cassette recorders, and more recently, fax paper, they have run afoul of U.S. antitrust laws prohibiting price fixing. Although keiretsu networks permit interbrand competition in Japan, their purchasing practices and control over distribution channels can impose significant barriers to foreign products and firms, as well as to new domestic competitors, in retail markets.

Following the Structural Impediments Initiative (SII) Report (1991), Japanese law and enforcement were strengthened, and Japan essentially has a U.S./EU style antitrust law. However, in most areas, enforcement by the Japanese Fair Trade Commission (JFTC) is much less

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aggressive than that of the U.S. and EU antitrust agencies. The remedies available through private suits are very limited, and Japanese courts are reluctant to embarrass their government with findings that oppose its policies or the actions of one of its key ministries.

The continuing tension between collaboration and competition in Japanese policy makes negotiating an effective CPA much more difficult than merely establishing formal requirements for national law and enforcement. In Japan, what U.S. and European exporters and investors need is not better statutory guarantees. Rather, they need better access to remedies, through more aggressive JFTC enforcement, better access to private actions when the JFTC fails to act, and an alternative forum when the Japanese courts refuse to enforce the law. Lacking those, U.S. and European firms can lobby their governments to take action on their behalf through the WTO, but its practical jurisdiction has proven quite limited.

**WTO and Antitrust**

WTO agreements only address limited classes of restrictive business practices – dumping, certain practices of government-sanctioned monopolies in the services sector, discriminatory conduct by private standard-setting bodies, and abusive licensing practices for intellectual property. The failure of member governments to discipline other restrictive business practices could be addressed through the WTO nullification and impairment provisions by bringing a "nonviolation complaint," but in such cases, complainants face a much higher standard of proof than in cases involving direct violations of specific WTO rules. The U.S. could not overcome those hurdles to the satisfaction of the dispute settlement panel in the Kodak-Fuji case, and for all practical purposes, most restrictive business practices are not actionable through the WTO dispute settlement.

The primary effect of a CPA agreement would be to transform the failure of WTO members to address specific classes of private restrictive business practices – delineated by the language of a CPA – into "violation complaints." That would permit members to file complaints when other member governments do not address the anticompetitive practices, much
as members may file complaints when another member provides an export subsidy or fails to address copyright piracy as required by TRIPS.

It is important to recognize that the WTO has no jurisdiction over private firms and individuals. A CPA would not establish a supranational authority, for example, to prosecute cartels or to review mergers. Rather, a CPA would establish standards for signatory-country enforcement against restrictive business practices when these adversely affect other signatories' international commerce, and it would provide signatories with a mechanism to obtain a relief when another signatory fails to meet its obligations under the agreement.

**Structuring a Competition Policy Agreement**

Negotiators endeavoring to structure an effective CPA would have to address five sets of issues: overall objectives, standards of enforcement, standards of performance, dispute settlement, and membership.

**Objectives**

A CPA should ensure that restrictive business practices undertaken within the territory of any signatory state do not deny or impede market access by products and firms of other signatory states, or impose substantial harm on consumers or producers in other signatory states.

Achieving those objectives is complicated by the imposition of industrial policy objectives on antitrust enforcement. Generally, WTO agreements regulating other aspects of government policy countenance industrial policies if they do not compromise the market access benefits that member states expect from the agreements. Consistency would require that ensuring the contestability of markets should be the primary goal of a CPA.

**Standards of Enforcement**

The agreement should contain substantive obligations regarding nondiscrimination, market access, export-related activities, the
commercial activities of governments, industrial policy and administrative guidance, powers of national antitrust enforcement authorities, private actions, the standing of signatory governments in other signatories’ courts, and the status of CPA obligations in domestic law.

**Nondiscrimination**

Signatories should be obligated to extend national treatment and most-favored-nation treatment regarding antitrust law and enforcement, and regarding all other laws and acts of government regulating or affecting the contestability of markets, to the products, firms and nationals of other signatories.

**Market Access**

Signatories should be obligated to declare illegal, and to take action against, restrictive business practices or policies that deny or impede opportunities for the products and firms of other signatories to contest markets. These restrictive practices should include: monopolization and abuses of dominance, explicit and implicit agreements among firms, and other anticompetitive business practices; structures of industrial organization; and practices that deny or limit access of importers and foreign firms to suppliers and distribution channels.

In addition, signatories should be obligated not to implement laws, regulations, or policies that limit the ability of importers and foreign firms to price, or to undertake nonprice activities, to contest markets or to defend market shares; nor should they impose on foreign firms criteria or standards of behavior in the application of antitrust law, including merger review, different from those imposed on domestic firms in comparable situations.

**Export-Related Activities**

Signatories should be obligated to take action against restrictive business practices that harm other signatories' consumers and producers. Signatories should be obligated to respond to requests for positive comity in this regard.
Commercial Activities of Governments

These obligations should apply to the behavior of public commercial enterprises and the commercial activities of governments.

Industrial Policy and Administrative Guidance

These obligations should apply to restrictive business practices without regard to whether behavior is required, permitted, or suggested by law, by government policy or action, or by government advice or administrative guidance.

National Antitrust Enforcement Authority

Each signatory should be required to establish a national antitrust enforcement authority (national authority) with adequate investigative and remedial powers to take action against practices that violate the agreement.

National law should guarantee the political independence of the national authority and require signatory governments to provide it with adequate financial resources to meet obligations under the CPA – in particular, adequate resources to respond effectively to the petitions of other signatory governments and private parties.

Private Actions

Signatories should be obligated to provide private persons the right to bring civil suits, as well as access to adequate discovery and the right to effective remedies, including injunctive relief, damage awards, and costs.

Further, signatories should be obligated to provide private persons with the right to bring suits in national and EU courts, in order to challenge the decisions of national authorities, laws, and acts of government that violate obligations of the agreement.

13In the United States, the FTC and the Antitrust Division of the Justice Department would share this status. In the EU, both the Commission and EU member enforcement agencies would enjoy this status.
Standing for Signatory Governments

Signatories should permit other signatories to bring civil suit for remedies as *paren patriae* for injuries sustained by their domiciliaries in a designated national or EU court. This would help compensate for the difficulties foreign persons encounter in seeking private remedies for violations of EU law in EU member state courts.

In cases brought by or against their domiciliaries, signatories should be permitted to appeal court decisions before appellate courts or a WTO dispute settlement panel (discussed below).

Further, signatories should be permitted to bring suits in national or EU courts to challenge the decisions of national authorities, laws, and acts of government that violate obligations of the agreement. Signatories should be permitted to appeal the judgments and remedies rendered either before appellate courts or before a WTO panel.

Status in Domestic Law

Signatories should be obligated to conform their laws, regulations, and administrative procedures to ensure that administrative agencies and national courts are required to adhere to the obligations of the agreement as domestic law.

Standards of Performance

TRIPS defines procedural requirements for civil and criminal enforcement. For example, these specify minimum requirements regarding notice, representation, evidence, and protection of confidentiality, and require decisions to be reasoned and based on the facts in the case. Similar requirements should be written into a CPA, and failure to comply should be grounds for a finding of noncompliance by a WTO panel.

Dispute Settlement

Complaints should be heard by a permanent WTO dispute settlement panel whose membership includes sitting and retired antitrust enforcement officials, practitioners, and judges. Obligations that would
result from a finding of violation should depend on the nature of the dispute:

When a signatory is found to have a nonconforming law, regulation, or practice, it should be required to propose a satisfactory plan to remedy the situation within thirty days, or pay the complainant monetary damages, the amount and frequency of which would be determined by the panel, to compensate for the harm imposed (compensatory damages).

When a signatory is found to have imposed costs on a complainant's consumers or firms, it should be required to correct the offense and pay compensatory damages. The complainant could choose to transfer those payments to the harmed consumers and firms.

When a signatory appeals the decision of another signatory's national authority or court, the decision should be remanded to the authority or court whose finding violated the agreement. If the national authority or court repeatedly failed to act on the instructions of the dispute settlement panel, or its actions imposed costs on the complainant's consumers or firms, its government should be required to pay compensatory damages to the complainant.

Membership and Accession of New Members

Initial participants should include those OECD countries and developing countries who have in place adequate antitrust laws and enforcement.

Many developing countries lack reliable legal systems necessary to implement effective antitrust regimes. Yet, for developing countries, eventual membership in the CPA would offer important benefits – for example, the benefits flowing from the regulation of cartels and vertical restraints. Therefore, the agreement should contain an accession clause outlining admission standards for new members.
Comments

The market access, export, and government commercial activities provisions would require signatory governments to take action against those restrictive business practices within their territories that deny or impede market access to, or impose harm on, other signatories' producers and consumers. Those provisions would also establish classes of business practices to which enforcement obligations apply.

The provisions regarding the investigative and remedial powers, political independence, and financial resources of national authorities should better ensure that those authorities have the tools, the will, and the means to act against practices that violate the CPA.

Together, these provisions would give U.S. consumers and producers, or the Justice Department acting on their behalf, better prospects for success when petitioning the JFTC, the European Commission, and other national authorities to investigate cartels, practices that deny access to distribution channels, and other anticompetitive practices.

Should the JFTC, the European Commission, or another national authority be disinclined to remedy harm to U.S. consumers and producers, the private actions provisions would better equip U.S. consumers and producers to seek relief through the courts. The *paren patriae* provisions would permit the U.S. government to bring suit in other signatories' courts on behalf of U.S. consumers and producers who may be ill-equipped to avail themselves of remedies – for example, owing to the high cost of bringing a suit or owing to the multinational incidence of anticompetitive conduct. The standing for signatories to appeal administrative and court decisions involving their domiciliaries, and to challenge laws, regulations, directives, and advice that violate the CPA, is proposed for similar reasons.

Should national courts be disinclined to find restrictive business practices harming to foreign interests, or to act against or embarrass their
national authority or incumbent government, the national-treatment and the status-in-domestic-law provisions should clarify their obligations.

Should national courts nevertheless fail to act in accordance with the requirements of the CPA, the dispute settlement provisions would permit signatory governments to seek review and remand of both administrative and court decisions through WTO dispute settlement, and ultimately, to obtain monetary compensation.

The industrial policy and the administrative guidance provisions would require that antitrust considerations prevail in the event of conflicts between antitrust law and other laws, government policies, or administrative guidance. These provisions, along with national treatment and market access provisions, would give foreign firms and their governments standing to challenge in national courts and the WTO those decisions – for example in merger review – that impose conditions not imposed on domestic firms in similar circumstances, or that arbitrarily advantage domestic competitors at their expense.

Although a CPA with the provisions outlined above would bring some national regimes into closer alignment, it would not require the strict harmonization of national regimes. For example, U.S., EU and Japanese enforcement authorities could continue to apply different policies toward large-firm behavior and abuse of dominance. However, they would be obliged to treat foreign and domestic firms on equal terms, and to address the abuse of dominance by their own firms when other signatories’ consumers and producers are harmed.

Under such a CPA, U.S. authorities could continue to apply more lenient policies toward vertical arrangements than does the European Commission, with each continuing policies appropriate to their geographic and historical circumstances.

However, to the extent *keiretsu* practices deny U.S. and EU firms access to Japanese markets, these firms and their governments would have much better access to remedies in Japanese courts, and ultimately through WTO dispute settlement. In turn, Japanese compliance with the CPA could take many forms. For example, it could rely on administrative guidance (effective, proactive industry programs to open procurement and
distribution channels to foreign firms) or the JFTC could address *keiretsu* relationships in ways that are more similar to EU policies toward vertical restraints.
PART ONE

Antitrust in the United States, European Union and Japan
Chapter 1:  
The Context of Antitrust Policy

The purpose of antitrust laws and enforcement is to ensure the benefits of competition within the broader context of national economic policy. In various jurisdictions, this has entailed preserving the contestability of markets, regulating firm behavior, and adjusting antitrust policies to complement industrial and social policies.

In a perfect world, all markets would have many buyers and sellers, and no single producer or purchaser would possess market power – the ability to influence market prices through their individual actions. Consumers would enjoy the lowest sustainable prices, and firms would receive profits just adequate to maintain their participation in particular lines of business, but no more.\(^\text{14}\) Competition would allocate labor and capital to their most productive uses, and consumer welfare and economic efficiency would be maximized.

However, several conditions, separately or together, may prevail to limit competition and may permit firms to accrue economic rent by charging prices that exceed costs.\(^\text{15}\) For example, firms in the same line of business may enter into contracts in restraint of trade (\emph{horizontal restraints}), in order to limit production, set prices, or deny market access to imports – in common usage: price, production and import cartels.

Alternatively, one or a few firms may possess superior management acumen or superior product and process technologies. Or, in decreasing-cost industries, several firms may choose to merge or form joint ventures. In either case, firms achieving large market shares may

\(^{14}\)Economists refer to profits just adequate to maintain a firm in a particular line of business as "normal profits," and any profits received above normal profits are termed "extranormal profits" or "rents."

\(^{15}\)See footnote 14.
engage in practices regulators consider *abuse of dominance*: for example, further increasing their market positions through predatory pricing and price discrimination.

Also, large firms may engage in practices known as *vertical restraints*: imposing resale price maintenance agreements on their distributors, assigning distributors exclusive territories, or imposing other conditions on the business decisions of their suppliers and distributors.

Sometimes the optimal antitrust policy is clear. For example, most cartels only serve to enrich their participants at the expense of consumer welfare and economic efficiency. It follows, therefore, that laws prohibiting explicit and implicit contracts in restraint of trade generally enhance consumer welfare and economic efficiency.

Often, though, defining the optimal policy is difficult, and usually entails weighing the costs and benefits of action versus inaction. For example, mergers may permit firms to achieve economies of scale in production and R&D; however, incentives to reduce prices aggressively and to innovate may be lacking in highly concentrated markets. Defining how concentrated markets can become without substantially harming price competition and innovation is often situational: How big is too big? Twenty-five percent? Fifty percent? Seventy-five percent?

Predatory pricing and price discrimination provide other examples. It may not be good policy to permit large firms to drive out competitors and then gouge consumers; however, strict controls on the pricing policies of large firms can chill competition and create a price umbrella for smaller, less-efficient firms. Such regulation of large firms may deny consumers the benefits of lower costs and the greater innovative capacities that larger firms often enjoy.

In some markets, vertical arrangements may raise prices and profits, while in other markets they may facilitate the entry of new competitors, improve service and product quality, lower costs and prices, and enhance consumer welfare and economic efficiency. Which of these proves true will depend on such factors as the scope of the market, the geographic and historic barriers to the creation of markets large enough to sustain several efficient producers, the culture of competition (or
collaboration) embraced by managers, and the ease of consumer access to reliable product information. Reaching sound judgments about vertical restraints is difficult, and establishing guidelines for acceptable business behavior is even tougher.

Moreover, we do not live in a static world. Innovation is the wellspring of progress, but managers do not risk investments in product development because they are noble. They create new products to achieve competitive advantages and, at least for a period, to accrue rent. The benefits to consumers and to the economy as a whole can far outweigh the costs created by permitting firms to acquire these extranormal profits. Such considerations motivate the monopoly rights that governments grant through patents and copyrights.

Safeguarding consumer welfare and maximizing efficiency are not the only goals of national economic policy, and an antitrust policy defined by consideration of those goals alone may run counter to industrial and social policy objectives – consider, for example, the special treatment enjoyed by agricultural cooperatives.

Furthermore, enforcing competition may advantage more efficient foreign firms and drive domestic firms from markets, creating questions about whether antitrust policy should maximize consumer welfare even when these benefits are obtained at the expense of domestic producers. Should antitrust policy be motivated by the cosmopolitan and free-trade values of promoting global welfare? Or, should more parochial and mercantilist values prevail?

Policymakers in the United States, the EU, Japan, and other countries have responded to these issues in quite different ways, resulting in very different enforcement of reasonably similar statutes.
Chapter 2: U.S. Law

Promoting consumer welfare and economic efficiency have been the primary goals of U.S. antitrust policy.\textsuperscript{16} Although industrial and social policy considerations occasionally have crept into antitrust policy, it is fair to state that competition has been the industrial policy of the United States.\textsuperscript{17}

This reflects several trends in U.S. history. First, U.S. common law in the period preceding the Sherman Act (1890) moved in the direction of laissez faire principles. In the second half of the nineteenth century, the legal system in the United States moved away from the earlier mercantilist approach, where the government played a direct role in regulating the economy, towards a more hands-off approach, allowing businesses to operate freely in the market. This move reflected broader trends in society and the economy, including the rise of industrialization and the growth of large corporations.


\textsuperscript{17}Eleanor M. Fox, "US and EU Competition Law: A Comparison," in Graham and Richardson, Global Competition Policy, p. 340.
century, most court decisions treated agreements fixing prices or dividing territories as unlawful.\textsuperscript{18}

Second, the great American period of industrialization and western expansion after the Civil War, though assisted by friendly federal policies regarding land and railroads, was largely the consequence of private initiative. It was characterized by intense competition and relentless rent-seeking invention and innovation. In fact, the Sherman Act was a reaction to market power achieved by the great trusts.

Third, Americans may seek refuge in government action for essential tasks they believe markets cannot effectively handle, but they are ever suspicious of the wisdom of the Sovereign in ways that their corporatist cousins in Europe, and even Canada, are not.

\section*{Statutes}

The Sherman Act, the Clayton Act (1914) and the Federal Trade Commission Act (1914) provide the essential framework for federal antitrust enforcement in the United States. These have been variously amended, most importantly by the Robinson-Patman Act (1934), Cellar-Kefauver Act (1950) and the Hart-Scott-Rodino Act (1976).

Section 1 of the Sherman Act provides the basic prohibition against cartels, cartel-like activities, and various other agreements among persons and firms, that may limit competition:

\begin{quote}
Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony….
\end{quote}

Section 2 outlaws attempts to monopolize and to abuse monopoly power:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony….

Section 2 of the Clayton Act provides more specifics regarding attempts to monopolize. It prohibits price discrimination if its effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition..."

Section 3 of the Clayton Act prohibits tying agreements and exclusive dealing if the effect "may be to substantially lessen competition or to tend to create a monopoly."

Section 7 of the Clayton Act prohibits the acquisition of one business by another, in whole or in part, "where in any line of commerce or any activity affecting commerce, in any section of the country, the effect of such an acquisition may be substantially to lessen competition, or to tend to create a monopoly." This provides the basis for the Justice Department or the FTC, for states, or for private parties, to challenge mergers. The Hart-Scott-Rodino Act requires prior notification of large mergers.

According to Section 5 of the FTC Act, “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” Also, the Act established the FTC and gave the FTC authority to enforce Section 5. Its jurisdiction regarding unfair methods of competition has been interpreted to give it concurrent jurisdiction with the Justice Department to enforce the Sherman and the Clayton Act, but it has no criminal jurisdiction.

Overall, the language of these laws is general and lacking in substantial detail. It has been left to courts through their decisions – and to some extent to the Justice Department and the FTC, by their choices of
investigations they wish to pursue – to give meaning to terminology such as "monopolize," "substantially lessen competition," and "unfair methods of competition."

Areas of enforcement may be divided into four categories: monopolization and abuse of dominance, horizontal restraints, vertical restraints, and mergers.

**Monopolization and Abuse of Dominance**

The Sherman Act does not make the mere possession of a monopoly illegal, and a firm does not have to be the sole supplier to commit a violation. Rather, an unlawful act of monopolization requires that the firm possess monopoly power – the ability independently to influence market prices or exclude competitors in a relevant market – and the willful acquisition or maintenance of that power.

Monopolies maintained or obtained through superior business skill or technological superiority are not illegal. Rather, there must be a purposeful act – an abuse such as predatory pricing, coercive conduct, or economically exclusionary conduct – to constitute violation of the law. Attempts to achieve monopoly power through such means are illegal when a dangerous probability of success and specific intent can be proved.

In recent decades, the courts have been sympathetic to monopolists' efforts to maintain their market position through fair methods of competition, but it can be difficult to anticipate how courts will draw the line between exercise of superior skill, foresight and industry, on the one hand, and predatory and economically exclusionary conduct, on the other.

Predatory pricing, when undertaken by a monopolist, may constitute unlawful monopolization in violation of Section 2 of the Sherman Act. Generally, to prove predatory pricing (monopolization or attempted monopolization), it must be established that there is below-cost pricing (e.g., price below marginal cost, with average variable cost as a
proxy) and also a probability of success.\(^{19}\) The latter criteria requires that the monopolist must have the potential to recover its investment in below-cost pricing by charging higher prices in the future, the potential for “recoupment” and harm to consumers. This can be affected by the presence of potential competitors – for example, in neighboring markets.

The courts recognize the potentially chilling effects on competition that could result from aggressive enforcement against predatory pricing. The recoupment condition essentially requires that the potential for harm to consumers must be present and that charges of predatory pricing may not be invoked by less capable competitors when the potential for harm to consumers is not present.

Practices such as imposing price maintenance agreements on distributors, tying agreements, or exclusive distributorship and exclusive dealing agreements may violate the prohibition on monopolization in Section 2 of the Sherman Act or Section 3 of the Clayton Act. These are discussed below under vertical restraints.

**Horizontal Restraints**

Horizontal restraints refer to agreements among firms selling competing products, as distinguished from vertical restraints, which refer to agreements and practices that may affect relationships between businesses and their suppliers, customers or distributors. Generally, U.S. law treats horizontal agreements more strictly than it does agreements among noncompetitors.

The courts have established some activities as per se violations, including agreements that have the effect of: raising, depressing, fixing or stabilizing prices; establishing terms of sale such as credit terms, discounts and rebates, and transportation costs; or dividing markets among competitors geographically or by product line. Also illegal, under

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\(^{19}\) How these standards are to be applied has not been fully clarified by the courts. See Fox and Pitofsky, "United States," pp. 255-56.
some circumstances, are agreements among a group of firms not to deal with a person or firm outside the group (group boycotts).\footnote{Generally, individual firms, even those with some measure of market power, do enjoy the right to deal with whomever they choose, and may refuse to deal with some potential customers. However, monopolists may not deny other firms access to an "essential facility," which would have the effect of blocking market entry.}

Agreements need not be express; they may be implied – for example, through lock-step pricing or conscious parallelism. Importantly, persons and firms can only conspire with separate persons and firms – you cannot conspire with yourself, and the courts have found that a firm cannot conspire with a wholly-owned subsidiary.

Joint ventures among competitors are per se illegal if their purpose is per se illegal – e.g., steel companies cannot establish a joint venture to set steel prices. Joint ventures to achieve integrative efficiencies but lacking such collusive purposes, such as R&D joint ventures,\footnote{The National Cooperative Research Act (1984) requires a rule-of-reason test for qualifying R&D joint ventures, and provides safe harbor for ventures whose participants have less than a twenty percent market share.} are evaluated much like mergers and are subject to a rule of reason. Regulators and the courts balance potential anticompetitive effects against the legitimate interests served. Market structure is important. That is, joint ventures are more likely to be tolerated in industries that are very competitive than in those that are more concentrated. Overall, though, joint ventures, lacking anticompetitive purposes, are treated leniently.\footnote{Fox, "US and EU Competition Law: A Comparison," p. 349.}

Vertical Restraints

Agreements among firms at various points in the production and distribution chain may violate Sections 1 or 2 of the Sherman Act or Section 3 of the Clayton Act. Generally, enforcement of these provisions has eroded since the early 1980s, owing to views that vertical restraint agreements may serve positive competitive purposes, such as fostering
better service or the entry of new competitors, and that interbrand competition will discipline the firms participating in them.

A minimum-price maintenance agreement between manufacturers and retailers is a per se violation. However, it has become more difficult in recent years to persuade courts that an agreement is present. For example, producers may establish suggested list prices and announce a policy only to deal with distributors that adhere to it. Generally, if they act independently of distributors, producers may cancel a distributor that violates list prices but they cannot become engaged in a cycle of canceling and reinstatement.

In tying agreements, manufacturers require customers to purchase one product (the tied product) as a condition for purchasing another product (the tying product). To prove a violation, a plaintiff must demonstrate that the tying and tied products are separate, that the seller has market power in the tying product, and that the arrangement involves more than a de minimis amount of commerce.

The rule of reason applies to other, nonprice vertical restraints. Generally, manufacturers may choose an exclusive distributor or limit the number of distributors for its products in a specific geographic area. In such cases, the courts have permitted limitations on intrabrand competition if interbrand competition is sufficient or if the arrangements promote interbrand competition. Similarly, exclusive dealing arrangements, where distributors agree to handle only one producer’s products, are permitted if they do not foreclose a substantial share of the market to other producers or increase the potential for price coordination in ologopolistic markets.

**Mergers**

Firms are required to give notice of mergers and acquisitions to the Justice Department when: one party has sales or assets exceeding $100 million and the second party has sales or assets exceeding $10 million, and the acquiring firm will have an interest of at least $15 million or fifteen percent of the acquired firm. The Justice Department or FTC then evaluate the merger for its potential effects on competition, and
indicate whether it will be challenged. Such reviews and challenges are critical to public policy, because the challenge of mergers through private law suits is difficult.

Three phrases are central to the courts' application of section 7 of the Clayton Act: "line of commerce," "section of the country," and "may be to substantially lessen competition." The first two entail defining the relevant market, and the courts have emphasized the interchangability of products and the geographic area where the merger will have an immediate and direct effect on competition. Since the thrust of Section 7 is preventative (i.e., to halt anticompetitive effects before they happen), courts require that there be a reasonable likelihood that the merger will lessen competition. Justice Department and FTC analysis focuses on the post-merger market concentration, as measured by the Herfindahl-Hirschman Index, and the market share of the post-merger firm.23

Justice Department and FTC merger guidelines indicate that, in addition to market concentration, consideration should be given to ease of entry, factors that could enable cartel-like behavior (collusion or conscious parallelism), a history of collusion in the market, and the efficiencies created by the merger that could not be expected in its absence. To win approval for mergers and acquisitions, firms will often agree to sell parts of the assets of the newly combined entity.

**Enforcement and Remedies**

Violations of Sections 1 and 2 of the Sherman Act are felonies, but as a practical matter, criminal proceedings are generally reserved for situations where there is strong evidence of a per se violation or egregious predatory conduct. Penalties can include fines and jail terms up to three years.

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23 The Herfindahl-Hirschman Index is obtained by adding the squares of the market shares of firms in the relevant market. According to the Horizontal Merger Guidelines, a post merger HHI of less than 1000 is likely to leave a merger unchallenged, and a post merger HHI of more than 1800 is likely to result in a government challenge. An HHI in between is likely to result in the scrutiny of other factors to determine whether there is a potential for collusive behavior or potential for a single firm to achieve anticompetitive effects.
years. Generally, violations of the Clayton Act and FTC Act are not criminal acts.  

The Justice Department, the FTC, private parties (including foreign individuals and firms), the States (for damage to themselves), the States Attorneys General (on behalf of damages to consumers in their jurisdictions), and foreign governments, may bring civil suits to obtain remedies in federal courts. Equitable relief may include injunctions, divestiture and cancellation of contracts. In most instances, injured parties may sue for treble damages, costs and attorney fees.

Private actions by firms and the several states have been important in giving meaning to the general language of the Sherman and Clayton Acts and in shaping U.S. antitrust law and competition policy. In addition, private actions, coupled with the common law reliance on precedent and an independent judiciary, can somewhat insulate the interpretation and enforcement of the law from shifts in the political environment and changes in the economic ideology of the sitting administration. In particular, should political appointees at the Justice Department and the FTC be disinclined to act on the legitimate complaints of private parties and the states about the conduct of a monopolist, those private parties and states can go to court and obtain relief.

In shaping policy through the cases they choose and the settlements they negotiate, the Justice Department and FTC cannot ignore the views of private parties and the States Attorneys General if those views are supported by the facts, precedent and contemporary scholarship concerning the efficacy of established law. All of this is in sharp contrast to the EU and Japanese systems, where private actions are much less important, the civil law tradition gives less weight to past findings, and the interpretation and application of statutes is much more administrative than judicial.

**Extraterritorial Application**

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24 Certain international price discrimination is a criminal offense.
The language of the Sherman Act expressly includes foreign commerce of the United States – import and export trade. For activities outside the United States, such as foreign cartels raising prices in the United States, the courts have established two tests for subject matter jurisdiction over foreign activities: (1) the effects test and (2) the balancing test. According to the effects doctrine, U.S. law applies to foreign conduct when it has a direct, substantial, and reasonably foreseeable effect.

Having established effect, the court must then consider the degree of conflict with foreign law or policy, the nationality of the parties and the location or principal place of business, the extent to which foreign enforcement might be expected to achieve full compliance, the relative significance of the effects to the United States and other nations involved, whether the explicit purpose was to harm U.S. commerce, the foreseeability of anticompetitive effects, and the importance of violations to commerce within the United States relative to commerce abroad.\footnote{Timberland Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).} Although concerns about comity are important to the courts, it is important to recognize that comity "is more a matter of grace than a matter of obligation."\footnote{United States v. Nippon Paper, 109 F.3rd 1 (1st Cir. 1977).}

Regarding foreign state involvement, the Foreign Sovereign Immunities Act (1976) grants sovereign immunity for foreign governmental actions, but not for commercial actions. Under the Act, immunity is generally denied for:

(1) commercial actions carried on in the United States by a foreign state, (2) acts performed in the United States in connection with the foreign sovereign's activities elsewhere, and (3) acts committed outside the United States in connection with commercial activities

\footnote{Timberland Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).} \footnote{United States v. Nippon Paper, 109 F.3rd 1 (1st Cir. 1977).}
elsewhere, if the act has a "direct effect" in the U.S.\textsuperscript{27}

In 1978, a Polish governmental organization engaged in the manufacture and sale of golf carts was found not to be immune.\textsuperscript{28} In 1981, however, the Organization of Petroleum Exporting Countries escaped the reach of the Foreign Sovereign Immunities Act by virtue of the Acts of State Doctrine.\textsuperscript{29}

The Foreign Trade Antitrust Improvements Act, enacted by Congress in 1982, permits U.S. firms to establish export cartels as long as they do not raise prices to U.S. consumers.\textsuperscript{30} Germany, Canada, Japan, the United Kingdom, Australia, and other nations offer similar exemptions.\textsuperscript{31}

It is currently U.S. government policy to pursue foreign cartels that raise prices in U.S. markets, and also to open foreign markets to U.S. exports. As a practical matter, cooperation from foreign governments is generally necessary to achieve success, especially as it relates to foreign market opening. Many foreign governments resent the long reach of U.S. law, and have adopted blocking and claw-back statutes, which limit U.S.

\textsuperscript{27}Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice, pp. 706-707.


\textsuperscript{29}See footnote 174.

\textsuperscript{30}For foreign commerce, other than U.S. import commerce, the Sherman Act and the FTC Act are declared not to apply unless the conduct has a direct, substantial, and reasonably foreseeable affect on U.S. commerce or on U.S. export trade. The effect of this convoluted language is to permit U.S. firms to form export cartels as long as their activities do not raise prices in the United States or otherwise harm U.S. competition.

\textsuperscript{31}August, International Business Law, p. 181.
access to evidence abroad and allow defendants to bring suit in their home country to recover punitive damage awards.\textsuperscript{32}

The Justice Department emphasizes a three-pronged approach to international enforcement issues. First is the model of international cooperation and coordination, where national authorities seek to coordinate their efforts and, where appropriate, conduct parallel investigations and enforcement activities. Second is the model of positive comity, in which an antitrust authority in one country makes a preliminary determination that there are reasonable grounds for an antitrust investigation in another country, typically because a firm in its territory has been denied market access by anticompetitive behavior. It then requests the foreign authority to conduct an investigation. Third is the application of domestic laws to conduct that has occurred, in whole or in part, outside its jurisdiction, in conjunction with cooperation and positive comity.

The United States has entered into bilateral cooperation agreements with Canada, Australia, Brazil, Germany, Israel, Japan, and the EU, in which authorities agree to take into account the enforcement activities and interests of the other party in conducting investigations. Also, the United States has with Canada a Mutual Legal Assistance in Criminal Matters Treaty (MLAT), which permits antitrust authorities to share confidential investigation information and conduct joint investigations. The International Antitrust Enforcement Assistance Act (1994) authorizes U.S. antitrust agencies to enter into similar mutual-assistance agreements with other countries, and such a treaty was signed with Australia in 1999.

Chapter 3:

EU Law

The Treaty of Rome (1957) grants the European Commission broad authority to establish a European antitrust law that preempts member-state laws when conflicts arise. Also, the Treaty gives the Commission authority to regulate other aspects of member-state competition policy.

For several reasons, the EU antitrust law that has emerged differs from U.S. law in important ways. First, whereas U.S. law emerged as a reaction to the perceived abuses of large trusts, the Commission was assigned authority over competition policy to ensure that the benefits of


34In addition to its antitrust authority, the Commission has the authority to disallow and order the repayment of industrial subsidies, regional aids and export subsidies bestowed by national and subnational governments. In both areas of policy, the Commission may draft regulations, require firms and national governments to report their activities, disallow national policies, and levy fines. Although Commission orders may be appealed to the Court of First Instance (CFI) and the European Court of Justice (ECJ), they have direct effect in member-country courts. That is, the Commission has access to the enforcement apparatus of member-country courts to ensure compliance with its orders.
trade and economic integration in the common market were not frustrated by private business practices and national industrial policies.

For example, as the member states removed tariff and nontariff barriers, private firms could have recreated barriers to intracommunity trade through cartels and vertical arrangements that divide markets geographically, or national governments could have replaced trade protection with subsidies. Article 3 states that the activities of the Community shall include:

(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect

(g) the institution of a system ensuring that competition in the common market is not distorted

Second, in the early decades after the Treaty of Rome, the size of firms was not considered a paramount issue, as it was in the United States at the time of the Sherman Act. European industry was quite fragmented (for example, Italy, Germany and France each had more than one major automobile manufacturer), and policymakers feared that European firms would not be large enough to compete with U.S. multinational corporations (MNCs) in a Europe without commercial policy frontiers.

Third, the Treaty of Rome requires that the goal stated in Article 3(g) be balanced by other economic and social policy considerations, including EU industrial policy. In articulating that balance, EU officials have had to cope with various differences among members in their competition policy traditions, levels and methods of government intervention in the markets, and approaches to the extraterritorial application of law. With regard to each of those, some EU states share much in common with the United States, while others do not.

For example, in the United Kingdom, tolerance of explicit cartels has been minimal, whereas in Germany cartels have been used to achieve specific policy objectives. In recent years, privatization and laissez faire have been the norm in the United Kingdom, whereas dirigiste industrial
policies have been pursued in France. UK law is very restrictive in its extraterritorial application, whereas German antitrust law is expansive.

Fourth, under the doctrine of direct effects, EU competition laws are enforceable in member-country courts, and the Commission has sought to decentralize aspects of enforcement to those courts and to national competition authorities. The Commission does not have regional offices monitoring for violations; instead, it must rely on complaints and the activities of national antitrust agencies. Also, private actions cannot be brought before the European Court of First Instance (CFI) but rather must be pursued in member-country courts under member-country or EU law.

Statutes

Articles 85 and 86 of the Treaty of Rome are the primary statutes regarding competition policy. On literal reading, the practices they prohibit are quite similar to those prohibited by the Sherman Act, as modified by the Clayton Act and other U.S. legislation.

Article 85 provides for the regulation of cartels and cartel-like activities, of various other horizontal and vertical arrangements among firms, and of price discrimination. Paragraph 1 states:

The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d)

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apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Nevertheless, the potentially sweeping consequences of that language are modified by Paragraph 3, which states that Paragraph 1 may be declared inapplicable in the case of any agreement, decision and concerted practice that “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit….”

Article 86 addresses abuse of dominance:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical developments to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The EU Merger Regulation (1990) provides for the prior notification and review of mergers by the Commission.

The Commission enforces these provisions. It has developed an elaborate system of prior notification for conduct that may violate 85(1)
but satisfies the requirements of 85(3). It issues individual and block exemptions for agreements having characteristics satisfying those requirements, and through exemptions, industrial policy considerations may infiltrate enforcement policy:

Exemption...allows at least potentially for the pursuit of goals other than competition and market integration. This gives the Commission scope to weigh up anti-competitive costs against disadvantages to be had elsewhere – possibly in terms of European competitiveness, or social and regional benefits.

For example, the Commission has exempted exclusive car dealership arrangements, as well as a crisis cartel in chemical fibers, and helped organize a cartel in steel.

**Monopolization and Abuse of Dominance**

As in the United States, the mere possession of monopoly power does not constitute a violation of EU antitrust law. Abuse of power must be present. However, for the cases it pursues, the Commission is more inclined than U.S. authorities to find that a firm possess monopoly power and to impose restrictions on the behavior of firms possessing such power.

The European Commission and courts tend to draw narrower boundaries in defining relevant markets, and they apply lower market

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36 For some classes of business practice, this system establishes an EU analog to the U.S. rule of reason.


share standards to establish monopoly power within those markets than do their U.S. counterparts. 40

Firms found to have monopoly power face more constraints on their behavior in the European Union than in the United States. Whereas U.S. policy is sympathetic to the efforts of large firms to maintain market shares through fair means, so as not to chill competition and lessen benefits to consumers, EU enforcement focuses more on protecting smaller firms that compete with larger firms.

For example, in predatory pricing cases, U.S. courts generally require both below-average-cost pricing and the potential for recoupment. In the European Union, recoupment is not a condition, and predatory pricing may be found when the primary effect is to harm competing firms and not to create any potential for harm to consumers. Although firms in the United States may price to meet the competition, firms in the European Union may risk being found guilty of an abuse even when they price above average cost, if the effect is to harm competitors. Firms enjoying monopoly power are more constrained than their competitors, for example, in their freedom to offer discounts and rebates to regular customers or those they deal with exclusively. 41

Also, in the United States, firms are generally free to deal, or refuse to deal, with whomever they choose, as long as they do not deny competitors or potential competitors an essential facility. In the European Union, firms with monopoly power have a broad obligation to satisfy the demands of the market. In the United States, firms that legally acquire a monopoly may restrict supply and drive up prices, whereas in the European Union, such rent-seeking behavior is discouraged. 42

**Horizontal Restraints**

U.S. and EU law are perhaps most similar in their interpretation regarding cartel-like behavior. The Commission and the EU courts take a fairly severe view of agreements to fix prices, divide markets, or set production and sales quotas. As in the United States, agreements need not be explicit, and parallel behavior among competitors may result in violations.

However, those statements are subject to important caveats. First, U.S. law treats price fixing and other hard-core cartel activities as criminal offenses, whereas EU law has no provision for such action.

Second, unlike U.S. law, EU law provides for crisis cartels to promote rationalization in industries with chronic excess capacity, and small- and medium-sized firms may enter into agreements to specialize in certain product markets. For example, 152 rationalization cartels among small- and medium-sized firms were permitted by German authorities in 1992.44

Third, U.S. enforcement against cartel activities is far more aggressive than EU efforts. The Justice Department devotes substantial staff, dispersed among its regional offices, to finding and prosecuting cartel arrangements. The European Commission devotes far fewer staff to those efforts, and individual national governments are expected to provide the analog of Justice Department regional efforts. Prior to the Treaty of Rome, "cartels were a customary way of doing business...and there is a serious question concerning whether EC law...and EC enforcement have reduced the level of secret cartels significantly."45

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43 A hard-core cartel may be defined as an agreement among competitors to fix prices, rig bids, establish production controls or quotas, or divide markets for the purpose of raising participants' profits.

44 Kai-Uwe Kuhn, "Germany" in Graham and Richardson, Global Competition Policy, p. 122.

The European Union, like the United States, treats joint ventures leniently. However, the Commission often imposes conditions, such as striking exclusivity clauses, that would not likely be treated as anticompetitive in the United States.46

**Vertical Restraints**

Like U.S. law, EU law treats resale-price-maintenance agreements as per se violations. Tying agreements are normally illegal "if they increase the [market] share of the dominant firms and do not pass a stringent test of objective justification."47

EU law regarding exclusive distribution agreements has been substantially animated by the desire to ensure that private practices do not restrict intracommunity trade. Whereas U.S. courts have become increasingly receptive to arguments about the efficiency benefits that may be created by exclusive distribution agreements, the European Commission and courts consider agreements that draw tight territorial lines at country borders to be among the most egregious of restraints. Similarly, agreements that require distributors to charge higher prices for exports than for domestic sales, or that impede parallel imports, are illegal.48

**Mergers**

During the early years of the European Union, policymakers viewed mergers as beneficial. Combining entities from more than one member state was seen as a way of addressing the balkanization of production and distribution, and a way to build firms capable of competing with U.S. MNCs.

More recently, however, EU policymakers have become more sensitive to the potentially anticompetitive consequences of mergers and,

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in 1990, the Commission implemented prior notification and review of mergers.

Under the EU Merger Regulation, firms must give notice to the Commission of all mergers, acquisitions, joint ventures and other business combinations having a community dimension. Mergers are defined to have a community dimension if the worldwide sales of the combined firms exceed $5 billion European Currency Units (ECUs) and the aggregate sales within the European Union exceed $250 million. Even if those criteria are met, a merger does not qualify as having a community dimension if more than two-thirds of aggregate EU-wide profit is generated in only one member state.

Once such a determination is made, the Commission's Merger Task Force reviews whether the merger is compatible with the common market. A merger that creates or strengthens a dominant position so as to "significantly impede" effective competition in the European Union is incompatible with the common market. Among the criteria used to assess compatibility are market share (if the market share of the new entity does not exceed 25 percent, it is presumed to be compatible), practical or legal barriers to market entry, notice of supply and demand in relevant markets, competition from outside the EU, and the structure of markets.49

On a substantive level, the objectives of merger and joint-venture review in the United States and the European Union seem quite similar. However, the inherent political nature of European Commission decisionmaking creates opportunities for greater influence by industrial policy in the European Union than in the United States. Recent cases where the goals of bolstering European competitiveness played a role include the 1997 Boeing-McDonnell Douglas merger,50 the 1993 Philips,

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50See text at footnote 171.
Enforcement and Remedies

Enforcement in the European Union is much more administrative and less judicial than in the United States. The Commission investigates alleged violations of Articles 85 and 86, but before deciding that the law has been violated, it issues a statement of objections. The infringing firm(s) may request a hearing, which is private. Contracts that are found to violate 85(1) and that do not meet the conditions for an exception under 85(3) are void.

In addition, the Commission may require firms to cease and desist other activities found to violate Articles 85 and 86, and may impose daily fines if violators fail to comply. The Commission may also impose large fines for flagrant violations, but criminal sanctions are not available at the EU level. Commission findings and fines may be appealed to the CFI and the European Court of Justice (ECJ).

Individuals may request that the Commission undertake an investigation, but there is no right to private action in EU Courts. Moreover, EU law makes no provision for damages or attorney fees. Articles 85 and 86 have direct effect in member-country courts, and individuals may seek injunctive relief and damages in those courts.

Important deterrents to such private actions include high legal costs in some jurisdictions, the difficulties of gathering evidence if the alleged violations involved actions and/or firms in several member states, the problem of finding a forum if the alleged violations involve non-EU firms or actions outside the EU, and substantial variations in procedures among member states.  

52 Although the Commission has indicated it would


like to see more use of private civil-enforcement actions in member country courts, they are uncommon.\textsuperscript{53}

The European Commission enjoys more control over the requirements of antitrust law and enforcement than do the U.S. Justice Department and the FTC, because private actions are constrained and civil law systems pay less allegiance to past findings. Unlike the U.S. system, if private parties are dissatisfied with the disposition of a complaint by the Commission, they generally do not have adequate recourse in the courts to obtain relief. Regarding the civil law system, Jebsen and Stevens observed: “our analysis of the EU competition jurisprudence will suggest...an ad hoc, unpredictable development of law. The certainty, on which the common law – perhaps somewhat naively – prides itself, is significantly absent.”\textsuperscript{54}

In turn, this gives the Commission greater latitude than U.S. officials enjoy to shape EU antitrust enforcement to the needs of industrial policy.

\textbf{Extraterritorial Application}

EU member states vary considerably in the application of their antitrust statutes, and the European Union has been moving towards an analog of the U.S. effects test regarding the application of Articles 85 and 86, and in merger review.

The United Kingdom does not apply its Restrictive Trade Practices Act (1976) to foreign cartels unless both the actions and the effects take place within the UK market, whereas German competition law is extensively applied to activities outside of Germany that may affect German markets. For example, a merger between a German firm and a

\textsuperscript{53}Bermann, et.  al., Cases and Materials on European Community Law, p. 286.  
\textsuperscript{54}Jebsen and Stevens, "Assumptions, Goals and the Dominant Undertaking," pp. 460.
foreign firm can be stopped even if the foreign firm does not produce or sell in Germany.  

UK blocking legislation is quite aggressive in seeking to frustrate the efforts of foreign (notably U.S.) competition authorities from asserting jurisdiction over activities in the United Kingdom that have their effects in foreign markets. That posture ignores the quite substantial drift of the European Commission and courts towards extraterritorial application, which has the effect of protecting UK producers and consumers from restrictive business practices beyond the sovereign frontiers of EU member states.  

In particular, the Commission and ECJ have applied Article 85 to non-EU companies for activities outside the European Union. In the 1988 Wood Pulp price-fixing case, the Court upheld the Commission's assertion of jurisdiction over firms in the United States, Canada, Sweden, and Finland, even though none had a substantial presence in the European Union and all exported to independent distributors. Although the Court has not articulated in full an analog to the U.S. effects test, it has permitted the Commission to apply what authorities have characterized as "what amounts to an effects test" and "a thinly veiled European effects test."  

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55 In Germany, the 1958 Law Against Restraints of Competition is "extensively applied to restraints of competition agreed to outside Germany that affect the German market," "whereas a cartel in another country that is exporting to the United Kingdom would not be subject to the legislation [the Restrictive Trade Practices Act] unless both the action and the effects were within the UK market." Kuhn, "Germany," p. 143, and Donald Hay, "United Kingdom," in Graham and Richardson, Global Competition Policy, p. 213.  


The European Union has essentially imported this approach into merger review. Specifically, by requiring review of mergers entailing sales of 5 billion ECU globally and only 250 million ECU in the European Union, the Commission is applying the same standards to EU and non-EU firms without regard to the location of ownership, management or production.
Chapter 4: Industrial Policy and Competition Policy in Japan

Since the Meiji Restoration (1868), the Japanese government has sought to manage the pattern and pace of economic development. Competition policy has been a principal tool, as Japanese governments have sought to manage the potentially destabilizing effects of competition on investment, production and employment.

Prior to World War II, Japan did not have an antitrust law. At various times, Japanese governments had tolerated, encouraged, and used cartels and large industrial holding companies (zaibatsu) to achieve specific policy objectives. After World War II, the U.S. occupation government (1945-1952) put in place a western-style antitrust law with several provisions that were stricter than U.S. law. However, when the U.S. occupation ended, antitrust enforcement was quickly subordinated to Japanese industrial policy and, in many ways, Japanese competition policy returned to prewar patterns.

Since the late 1970s, Japanese antitrust enforcement has been resurgent, and in the 1990s this trend was strengthened by implementation of the SII Report, which resulted from bilateral talks with the United States. However, in most areas of enforcement, Japanese authorities are inactive or less active than their U.S. and EU counterparts. In areas where Japanese authorities are active, Japanese policy, like EU policy, is more regulatory in its approach than is U.S. policy.

This chapter discusses the role of competition policy – in particular, the role of cartels and large industrial syndicates in Japanese industrial policy over the last century – and Japanese thinking on the efficacy of private restraints of trade. Chapter 5 describes current Japanese antitrust law and enforcement, and Chapter 6 offers some observations about differences in U.S., European and Japanese law, as well as the implications of those differences for negotiating a CPA.
Pre-World War II Policy\textsuperscript{59}

Beginning with the Meiji Restoration (1868), Japanese governments sought to transform a feudal, agricultural society into a modern industrial economy. As Japanese government officials and jurists articulated a modern civil law system and crafted industrialization strategies, they were much more impressed by German modes of capitalism than by British and American reliance on competition. Japanese industrial policymakers believed monopolies possessed competitive advantages in modern economies, and they feared that open competition would permit foreign companies to destroy their infant industries.

In contrast to late 19th century U.S. common law, therefore, the Japanese concept of freedom of contract permitted cartels, monopolies, and agreements in restraint of trade. The idea of maximizing efficiency through competition had no champion when the Japanese government was encouraging the formation of large enterprises. As professors Seita and Tamura observe:

Japan lacked both laws and social attitudes that supported the antitrust mentality... in American law. Whereas American legal thought accepted the competitive market paradigm and its ideals of vigorous competition and the increase of consumer welfare... the Japanese government disliked excessive competition and ignored consumer welfare.\textsuperscript{60}

Japanese industrial policy encouraged the growth of heavy industry and supported infrastructure through subsidies and tariffs. Large state-owned enterprises were established in industries such as railroads,

\textsuperscript{59}Generally, see Alex Y. Seita and Jiro Tamuro, "The Historical Background of Japan’s Antimonopoly Law," \textit{University of Illinois Law Review} (1994), pp. 115-185.

\textsuperscript{60}Seita and Tamura, "The Historical Background of Japan's Antimonopoly Law," p. 138.
mining, steel, textiles, and shipbuilding, and these were later privatized, contributing to the formation of the zaibatsu.

Zaibatsu were multitiered industrial syndicates, each having a large holding company at its apex. The holding companies controlled major manufacturers, banks, trading companies and transportation companies, which, in turn, controlled smaller subsidiaries. The holding companies were owned by a single family or small group of families, and the families and holding companies controlled their vast networks of subsidiaries through stockholding, interlocking directorates, personnel appointments, centralized buying, and credit.

At the end of World War II, the total paid-in-capital of the four largest holding companies – Mitsui, Mitsubishi, Sumitomo, and Yasuda – accounted for about twenty-five percent of the paid-in-capital of all Japanese corporations. In heavy manufacturing, this statistic was thirty-two percent, and in commercial banking, trust banking and insurance, it was 48, 85 and 51 percent respectively. In many markets, one or several zaibatsu enjoyed substantial monopoly power.  

The Japanese government also tolerated, later encouraged, and finally required, participation in cartels. Privately organized, these appeared as early as 1880, as business responses to recessions. Around 1900, cartels existed in industries such as petroleum refining, chemical fertilizer, sugar, coal, paper, flour, and marine transportation.

In 1907, the Osaka High Court ruled in the case of the Retailers Association of White Sand that restrictions on members’ business territories had the “merit of preventing unfair competition among retailers...” In addition, it ruled that restrictions on retail prices had “merits to prevent unreasonable below-cost sales, to promote business

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\(^{61}\) Seita and Tamura, "The Historical Background of Japan’s Antimonopoly Law," pp. 138-145.

ethics in commerce, and further to strengthen credibility of fellow business men.”

In decisions from 1910 through the 1930s, Japan’s Supreme Court repeatedly found price agreements among competitors to be valid under Japanese law.63

During the recessions of the 1920s and 1930s, the Japanese government began to encourage cartels actively. In 1931, the Significant Industries Control Law gave statutory legitimization to cartels by authorizing the enforcement of agreements to fix prices and restrict output, and by the end of 1932, all major industrial sectors had cartels.

A 1933 amendment to the Control Law required companies to report their investment plans and other activities to the Ministry of Commerce and Industry, thus facilitating the development of administrative guidance as an instrument of industrial policy. As Japan pursued World War II, its government established about 20,000 industry associations for the purposes of controlling business activity.64

The U.S. Occupation of Japan

The U.S. occupation of Japan began on September 2, 1945 and ended April 28, 1952. The occupation government sought to establish necessary institutions for a lasting democracy in Japan. To support that objective, the occupation government undertook land reform, instituted laws protecting labor unions, and sought to deconcentrate industrial power.

The Holding Company Liquidation Commission effectively dissolved the significant zaibatsu holdings by selling off the assets of forty-two companies and not permitting their controlling families and designated companies to acquire stock.


Further, the Deconcentration Law (1947) authorized the Commission to address excessive concentration of economic power by breaking up companies with productive assets. Although the Commission originally targeted 325 companies, only eighteen were ultimately reorganized under the deconcentration law, and another sixty of the original 325 were reorganized under the Corporate Rebuilding Law (1946).

Most zaibatsu family members and corporate officials were purged from their positions in corporations and prohibited from returning to similar jobs until the Purge Law (1948) was ended in 1951. The Trade Association Law (1948) ended the legal right of these groups to enforce association agreements, prohibited cartel practices, and imposed quite stringent regulations on association activities.65

The Antimonopoly Law (AML) of 1947 was a central instrument in the overall U.S. effort to transplant the American culture of competition to Japan. It addressed monopolization, private restraints of trade, and unfair methods of competition in ways similar to U.S. law. For example, Section 4 made hard-core cartel activities per se violations.

In several respects, however, the 1947 AML requirements were more stringent than U.S. law. For example:

Section 6 required prior approval of international contracts. U.S. law has no parallel.

Sections 15 and 16 required prior approval of mergers and acquisitions. U.S. law only requires prior notification, and this only began with the Hart-Scott-Rodino Antitrust Improvements Act in 1976.

Section 10 prohibited intercorporate stockholding by nonfinancial corporations. U.S. law only prohibits cross-shareholding where it results in monopolization or another abusive practice.

Section 13 prohibited interlocking directorates. U.S. law only prohibits interlocking directorates among competing corporations.

Section 8 placed restrictions on undue or substantial disparities in economic power that could not be justified on technological grounds. This provision attacked bigness per se, whereas U.S. law only attacks abuse of dominance.

Section 9 prohibited holding companies. U.S. law has no parallel.

In 1949, the above-mentioned provisions of Sections 6, 15 and 16 were amended to require only prior notification of international contracts, mergers and acquisitions.\textsuperscript{66} Also in 1949, Section 10 was amended to permit cross-shareholding as long as it does not substantially restrain competition, and Section 13 was amended to permit interlocking directorates among companies not in a competitive relationship. In 1953, the Section 8 prohibition on undue concentrations of economic power was repealed.

Together, those changes, along with the continued prohibition on holding companies (Section 9), did much to permit the emergence of the modern \textit{keiretsu} as the replacement for the \textit{zaibatsu} holding company structure. For example, horizontal (bank) \textit{keiretsu} are not characterized by a large holding company at the apex. Rather, the principal firms hold shares in one another's companies, exchange directors and discuss plans through presidents' club meetings. Their stake in one another's success encourages fierce loyalty in their purchasing patterns and results in private barriers to imports.

\textsuperscript{66}Prior approval for international contracts was repealed in 1997.
Equally important, the Section 4 per se prohibition on cartel activities was repealed in 1953 and replaced by prohibitions on inter-firm agreements that substantially restrained competition. As discussed below, this rule-of-reason test has been, and remains, controversial. Also, provisions were added for the Japanese Fair Trade Commission (JFTC) to review and approve rationalization and depression cartels (discussed below).

Further, numerous bypass statutes were enacted to exempt specific industries from the cartel provisions of the AML. Finally, the Trade Association Law was repealed, and the regulation of those associations’ activities was addressed by new provisions in the AML and placed under the supervision of the JFTC.

Consequently, the legal pathways were established for replacing the zaibatsu with the modern keiretsu and resurrecting industry cartels. The former create a bias against imports, while the latter require private or public restrictions on imports in order to be effective.

**Postwar Industrial Policy**

Among these laws were the Law Concerning Liquor Associations (1953), the Law Concerning the Salt Industry (1953), the Export Fisheries Industry Promotion Act (1954), the Ammonium Sulfate Rationalization Temporary Measures Act (1954), the Coal Mining Industry Rationalization Temporary Measures Act (1955), the Warehousing Law (1956), the Textile Industry Facilities Temporary Measures Act (1956), the Machinery Industry Promotion Temporary Measures Act (1956), the Paper Industry Promotion Temporary Measures Act (1957), the Small and Medium-sized Marine Transportation Trade Associations Law (1957), the Law Concerning Environment Hygiene Related Businesses (1957), the Electronics Industry Promotion Temporary Measures Act (1957), and the Law Relating to Cooperative Associations for Small and Medium-sized Enterprises (1957).

Iyori and Uesugi, The Antimonopoly Laws and Policies of Japan, pp. 16-34.
Postwar Japanese industrial policy was orchestrated by the Ministry of International Trade and Industry (MITI). Within the bureaucracy, MITI enjoyed higher status than the JFTC, and superior political influence. Therefore, when conflicts emerged between MITI and JFTC objectives, antitrust policy was conformed to meet the needs of Japan's industrial policy.

In the 1950s and 1960s, MITI primarily emphasized labor- and capital-intensive industries, such as textiles, steel, aluminum, consumer electronics, and petrochemicals.

Beginning in the 1960s, and then even more so in the 1970s, MITI emphasized a succession of technology-intensive industries, reflecting the changing human resources and technological infrastructure at the disposal of Japanese industrialists. In addition, as the competitiveness of labor- and capital-intensive industries waned, MITI put in place policies to maintain employment, manage investment and production, and ease adjustments.

At various times, the tools of Japanese industrial policy included:

- direct subsidies, and the allocation of inexpensive credit through the Ministry of Finance and the Japanese Development Bank;
- the facilitation of joint research projects among competing firms;
- the requirement that foreign firms transfer technology and form joint ventures as a condition for gaining access to Japanese markets or establishing manufacturing facilities – a requirement achieved by restrictions on, and licensing

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69 The Ministry of Finance had the key function of investing government trust funds, such as postal savings and pension accounts.
of, foreign investment and by JFTC review of all contracts with foreign companies;\(^{70}\)

the establishment of cartels and the implementation of policies generally supportive of a strong *keiretsu* system – e.g., steering credit, government purchases, and other benefits to favored *keiretsu* firms; and

the guarantee of substantial portions of the Japanese markets to domestic producers, by using:

- tariffs, quotas, and other nontariff barriers;
- controls on foreign exchange conversion;
- discrimination against imports in the procurement processes of public corporations, government agencies, and private firms benefiting directly from government assistance;
- cartels, and the purchasing loyalties of the *keiretsu*; and
- policies designed to limit the ability of foreign firms to develop alternative distribution outlets or introduce products through various promotions –

\(^{70}\)For example, Xerox was not permitted to establish independent manufacturing facilities in Japan. It was required to form a joint venture with Fuji, and to make its patents available to all Japanese manufacturers. NTT refused to purchase fiber-optic telephone cable from Corning, who developed the first clemaking process with Bell Labs in the mid-1970s. The American firm was required to license the technology to Furukawa in order to gain market access. See *Xerox and Fuji Xerox*, Harvard Case No. 9-391-156 (Cambridge, MA: Harvard Business School, 1992); and Dan Morgan, "The Glassmakers Standoff," *The Washington Post* (May 3, 1983), p. A15.
e.g., the 1973 Large-Scale Retail Stores Law (Large Stores Law) and the 1962 Act Against Unjustifiable Premiums and Misleading Representations (Premiums Act).  

The use of cartels, and keiretsu loyalties, required the JFTC and the courts to develop sympathetic interpretations of the AML provisions addressing horizontal agreements that restrain trade, and also the vertical agreements among firms along the manufacturing supply chain and in retailing.

Computers

The computer industry offers a prime example of how various industrial policies, including private restraints of trade, were used in concert with other industrial policies to develop and protect a Japanese industry.

Through the 1960s, MITI had sought to promote alternatives to foreign suppliers, such as IBM and Honeywell. In 1971, it encouraged Japanese computer firms to organize into three groups: Fujitsu and Hitachi, to make large IBM mainframes; Mitsubishi Electric Company and Oki Electric Company to make smaller IBM-compatible computers; and NEC and Toshiba, to design their own models. MITI provided each group with subsidies of about $200 million between 1972 and 1976. 

During the development phase, the government further supported the industry with large purchases by public agencies and by the Japan Telegraph and Telephone Company (NTT), a client the industry called the doru bako (dollar box).

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71 These laws are administered by the JFTC – see text at footnotes 86, 128 and 129.


73 NTT was wholly government-owned until 1985.
In the private sector, the loyalties of keiretsu firms to computer-making members were critical, and also quite revealing of the systemic protection such loyalties provide. For example, in the late 1980s, forty-six percent of the machines used by the Sumitomo keiretsu were purchased from group member NEC, while fifty-four percent were imported; and seventy-one percent of the machines used by the Dai-Ichi Kangyo keiretsu were purchased from group members Fujitsu and Hitachi, while twenty-eight percent were of foreign origin.

Significantly, both of those keiretsu purchased products that were either made within their own group or imported, while shunning other domestic suppliers. The Congressional Office of Technology Assessment (OTA) observed:

This pattern, with Japanese firms in each group buying computers either from their own group or from foreign firms, suggests that the firms' in-group purchases were made at least partly because of group loyalty rather than the machines' worth.\textsuperscript{74}

The Japanese government also established a leasing company, the Japan Electronic Computer Corporation (JECC), with low-interest loans from the Japanese Development Bank and participation from seven computer manufacturers. JECC made Japanese-produced computers widely available and rapidly returned the price of computers to their manufacturers for reinvestment. Moreover, according to the OTA, the JECC assured high profits by constraining price competition:

JECC also managed a price cartel for the industry and did not allow any discounting. By limiting price competition, JECC assured firms that profits would not evaporate in cutthroat price wars, and shifted the competition to cost, technology and quality.\textsuperscript{75}


\textsuperscript{75}OTA, Competing Economies, p. 262.
Consumer Electronics and Semiconductors

During the 1970s, the household electronic products industry matured for a time, and the U.S. industry increasingly concentrated on more R&D-intensive industrial and military applications.

Concurrently, a consensus was reached among MITI and major manufacturers that the Japanese industry should concentrate on consumer products, with a few of the major Japanese electronics companies being particularly favored.

MITI facilitated access to below-market loans, as well as limits on imports and foreign investment, while encouraging domestic products and investment and technology transfer from U.S. firms. Those policies were augmented by cartels in industries such as televisions, radios and cameras, which permitted Japanese firms to enjoy high prices and to dump exports.

In the late 1970s, the tie between consumer electronics, semiconductors, and computers became clearer, and MITI launched a $280 million Very Large-Scale Integrated Circuits program, involving the major computer and chip manufacturers – NEC, Hitachi, Fujitsu, Mitsubishi, and Toshiba.

That program was designed, first, to solidify the position of those companies in the consumer electronics market, which had become the largest single user of integrated circuits. Second, it was hoped that the integrated circuit technology developed in the program would improve the competitiveness of the Japanese computer industry. Smaller integrated circuit manufacturers in Japan were not provided access to the program and, thus, were discouraged from further investment.

Also, intercorporate links were established between semiconductor companies and the government, which permitted firms to

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share "knowledge of each other’s plans and behavior that would be considered extraordinary, probably collusive, in the United States."  

During the 1980s, Japanese manufacturers emerged as leaders in the consumer electronics industry. As the chipmaking and miniaturization revolution took place, they were well positioned to exploit new marketing opportunities in areas such as video cassette recorders and video cameras. In part, because consumer electronics is the largest user of computer chips, a handful of Japanese firms were able to establish dominance in the production of dynamic random access memory (DRAMs). Through the intercorporate links noted above, they were able to manipulate the availability and price of DRAMs much like a formal cartel.

That pattern was repeated in other industries. MITI encouraged the development of domestic substitutes for imports, *keiretsu* purchasing loyalties blocked market access for imports, and cartel activities elevated domestic prices to help cover development costs.

### Industrial Policies since the Early 1980s

Beginning in the 1980s, two sets of trends changed the nature of industrial policymaking in Japan and began to change the role of competition policy.

First, as Japanese MNCs became successful in export markets, they were able to generate adequate capital and become more independent of government funding sources. Moreover, Japan's growing prominence among industrialized countries, as well as the requirements of the Tokyo Round and Uruguay Round Agreements, made reliance on the more blatant forms of government-imposed protection less acceptable.

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78 OTA, Competing Economies, p. 12.
79 OTA, Competing Economies, p. 12.
80 Important exceptions included export credits and the considerable benefits conferred by tied foreign aid.
As a consequence, MITI ceded a significant portion of its industrial policy-planning role, such as picking the activities to be encouraged, to the private sector – in particular, to the planning processes of the *keiretsu*.

MITI then assumed the role of supporting the firms that were undertaking dramatic investments considered appropriate for Japan's leadership in high-technology industries. The means continued to include funding for basic research, support for research consortiums, and implicit sanction of the discriminatory purchasing habits of the *keiretsu* and cartels. As a consequence of the latter, the Japanese market continued to remain hostile to even the most innovative American products.\(^1\)

Second, during the 1960s and early 1970s, sentiments were emerging in Japan that the inflationary consequences of cartels and oligopolistic pricing practices required more effective enforcement by the JFTC.\(^2\) Nevertheless, those practices continued to be tolerated by the public as the price for Japan's rapid growth and positive patterns of industrial development.

When the oil crisis occurred in 1973, price-fixing cartels became the focus of sharp public criticism. The JFTC established a task force

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\(^1\)For example, in 1983, Hunt Chemical Corporation, a major producer of photoresists (a major chemical in the production of semiconductors) was forced to form a joint venture with Fuji, because Japanese semiconductor companies were loyal to suppliers within their *keiretsu* and other Japanese companies. Later in the 1980s, Motorola, the U.S. chipmaker, found it necessary to form a joint venture with Toshiba to obtain market access in Japan. In 1992, AT&T announced a joint venture with NEC to expand its sales of computer chips in Japan. See Ann Hughey, "Fuji Photo, Hunt Chemical Plans Venture in Japan to Produce Electronic Coating," *The Wall Street Journal* (July 14, 1983), p. 17; Robert Neff, "Making Deals that Won't Give Away Technology," *Business Week* (April 20, 1987), pp. 62-63; and John L. Keller, "AT&T to Sell Phone Numbers to Last a Lifetime," *The Washington Post* (April 30, 1992), pp. B1 and B8.

whose recommendations included several key amendments to the AML in 1977: an administrative surcharge that could be levied on cartels, authority for the JFTC to regulate the pricing behavior and profits of firms with large market shares, and authority for the JFTC to require reporting of parallel price increases by large firms in concentrated industries.\footnote{Matsushita, \textit{International Trade and Competition Law in Japan}, pp. 82-85, and text at footnote 103.}

During the 1980s and 1990s, the United States brought considerable pressure on Japan to bring under more effective control, through antitrust enforcement, its restrictive business practices that limited market access. The most important initiative was the SII, which resulted in changes to JFTC guidelines for enforcing the AML, and also supported JFTC efforts to obtain more resources and support from the Japanese bureaucracy.

Over the last two decades, the number of formally sanctioned cartels has declined, and the JFTC has become more active in enforcement (see Table 1). Its bureaucratic influence relative to MITI has improved. Nevertheless, MITI continues to encourage private restraints to trade, and cartels remain prevalent,\footnote{See text at footnote 124.} and each of these limits imports. Two interesting illustrations of this are Japanese efforts to erect private barriers to imports of consumer photographic products and the continuing activities of the Japanese steel cartel.

\textbf{Photographic Film}

During the early postwar decades, the Japanese government protected the consumer photographic paper and film industry from efficient foreign competitors through high tariffs and controls on foreign investment. As a consequence of tariff reductions begun at the conclusion of the Kennedy Round (1967), Tokyo Round (1979), and Uruguay Round (1994), as well as liberalization of Japanese investment

\footnote{Matsushita, \textit{International Trade and Competition Law in Japan}, pp. 82-85, and text at footnote 103.}

\footnote{See text at footnote 124.}
Table 1.

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Note: Data is for the end of March each year.

Source: Japan Fair Trade Commission.
regulations, most explicit forms of import protection were gradually eliminated.

In anticipation of competition from imports, therefore, the Japanese government undertook an express effort to replace government-imposed protection with a labyrinth of private barriers to imports. Specifically, the Japanese Cabinet concluded in 1967 that it would be necessary to restrain foreign enterprises coming into Japan after liberalization from disturbing order in domestic industries….

The establishment of these countermeasures for strengthening the capacity of our industry for international competition and for preventing foreign enterprises from disturbing order in our industries and market would be a basic necessity if the liberalization is to be promoted and if our people are to enjoy its economic benefits. 85

In the film industry, three sets of countermeasures were employed: a reorganization and consolidation of the wholesale distribution industry, restrictions on the creation of new retail outlets, and restrictions on the use of various promotional measures that could be employed to introduce foreign products to Japanese consumers.

Retailing of consumer photographic film in Japan is highly fragmented. About half of all film is sold by specialty shops, which depend on wholesalers for timely delivery of virtually all of the products they sell. Consequently, film manufacturers have to reach the shops through those wholesalers.

In the 1960s, the four principal suppliers of film – Fuji, Konica, Kodak and Agfa (German)– enjoyed access to all six major, and several smaller, primary wholesalers. However, as a consequence of guidance

from MITI, the primary wholesale industry was reorganized into two groups – one to handle Fuji and one to handle Konica – and foreign manufacturers were forced to supply retailers directly. Direct distribution of film, when not coupled with other products, is much more costly. This combination of the dependence of smaller stores on wholesalers and the higher costs place imports at decided disadvantage.

Another third of film sales are through general merchandise stores, including supermarkets, drug stores and department stores. Those stores are more likely to carry foreign products of all kinds, and they can be more easily reached directly by foreign film manufacturers. However, the growth of those outlets has been severely constrained by the Large Stores Law, which requires the builders and operators of stores in excess of 500 square meters to notify the JFTC of planned expansion and new stores.

If the JFTC determines that the new capacity could adversely affect small- and medium-sized stores in the vicinity, it can require reductions in the new retail space, delay the opening, or reduce the days and hours of operation. This procedure has encouraged informal negotiations between large retailers and their smaller rivals, often resulting in anticompetitive practices – surely a novel outcome for a process that was instigated by a rejuvenated national antitrust authority.

Finally, exercising authority it enjoys under the AML and the Premiums Act, the Japanese government has placed restrictions on the use of discounts, gifts, and other premiums, as well as certain types of advertising, particularly where prices and comparisons are highlighted. These restrictions have the effect of preventing innovative product promotions by firms with small market shares, and during the post-liberalization period, they impeded efforts by Kodak and Agfa to encourage retailers to carry, and consumers to try, their products.

The restrictions were embodied in numerous "designations" and "notifications" issued by the JFTC, which has primary responsibility for enforcing the AML and the Premiums Act. In addition, the Premiums Act

86 The remaining film is sold through tourist kiosks and other small vendors, which, as a practical matter, must be accessed through wholesalers.
has permitted the JFTC to designate industry associations to draft and enforce "fair competition codes," which have had the effect of sanctioning cartel behavior within the photographic products industry.

In 1995, the United States brought a complaint in the WTO alleging that the Japanese government, through its reorganization of the photographic film and paper distribution system, the Large Stores Law, and restrictions on promotions, had "nullified and impaired" market access benefits the U.S. had anticipated from tariff reductions. However, the WTO found no violation, because it concluded that the United States could have "reasonably anticipated most of the measures since they were in place at the time the relevant tariff concessions were made."

**The Steel Cartel**

Five integrated companies produce most of the steel consumed and exported from Japan. Prices charged domestic consumers are consistently higher than prices charged foreign customers and on the U.S. west coast (appropriately adjusted for transportation and other costs).

For example, the big-buyer price in Japan for hot-rolled coil was 67 to 105 percent above the comparable U.S. price from February 1993 to September 1998. To maintain such price differentials, Japanese steelmakers must establish mechanisms for setting prices or limiting production, and must also keep imports from undercutting domestic prices.

As for setting prices, a Japanese steel executive who once worked for several years in the United States said, “In the United States you have

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88 Big-buyer contracts are estimated to account for about sixty percent of domestic sales, while the comparable figure for spot sales is about forty percent. Spot prices are lower but were still consistently higher than U.S. west-coast prices.

free competition. Here it's like we're violating the Antimonopoly Law everyday. The steel companies get together and talk about what the price ought to be." \(^{90}\)

With regard to limiting production, the market shares of the five steelmakers have been very stable since 1973, because MITI helps coordinate the process. According to the same executive, “Once a quarter, MITI asks each steel company to submit a projection of production. If a company wants to expand production, it must give MITI a reason… MITI provides administrative guidance as to how much steel should be produced.” \(^{91}\)

He explains further that the steelmakers seek MITI's involvement, in part, to avoid trouble from the JFTC: “One of the principles of Japanese government is that one agency can't get involved in another agency's affairs. What the Steel Association does is get MITI involved so that it can avoid an investigation by the JFTC.” \(^{92}\) Japanese steelmakers have what they call an "unseen cartel" (meizaru karuteru).

Meanwhile, the consuming industries, such as automobiles and shipbuilding, support the cartel by not purchasing from minimills and foreign companies. Because their principal competitors face the same high costs, they are willing not to look elsewhere.

More importantly, a steel customer that purchases commodity steel from offshore or from a minimill may be denied access to specialty products not available from other sources, and they fear retaliation in other areas of business from steelmakers' keiretsu partners. According to one shipbuilder, “If we increase purchases from one steel company to try to get lower prices, then the steel company whose purchases were cut won't have its shipping company buy ships from our firm.” \(^{93}\)

The artificially elevated domestic prices permit Japanese steelmakers to subsidize exports with the profits from their domestic sales, and those subsidies are an important cause of persistent U.S. industry problems with dumped Japanese steel.
Chapter 5: Japanese Antitrust Law

The 1947 AML establishes the substantive structure of modern Japanese antitrust law, although its impact on the conditions of competition in Japanese markets has been significantly constrained by other legislation and by court rulings supporting administrative guidance. The competition policy that has emerged is consistent with Japanese business culture – namely, a business culture that values stability and allows some legitimate role for collaboration among competitors.

This is not to say that postwar Japan has had no antitrust enforcement to protect consumers. The JFTC has pursued some notable cases to ensure that business collaboration does not excessively disadvantage consumers, and firms with monopoly power have been somewhat regulated in their pricing since 1977. However, the goal of protecting consumers has remained subordinate to the goals of ensuring that businesses are not harmed and jobs are not threatened by what Japanese economic policymakers view as excessive competition.

Statutes

The Antimonopoly Act (AML, 1947) provides the essential framework for antitrust enforcement in Japan. It is supplemented by the Subcontract Act (1956) and the Premiums Act, each of which have been variously amended and abridged by numerous bypass and exempting

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statutes. Because these laws are written in the civil law tradition, they spell out prohibited practices and exemptions more explicitly than either U.S. statutes or Articles 85 and 86 of the Treaty of Rome. However, as in both the United States and the European Union, the JFTC and the courts have had to interpret the meaning of important terms in the law.

Section 3 of the AML states that “No entrepreneur shall effect private monopolization or unreasonable restraint of trade.” Section 19 states that “No entrepreneur shall employ unfair trade practices.” Section 2 defines private monopolization and unreasonable restraint of trade as follows:

2(5) "private monopolization"... shall mean such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs... excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any field of trade.

2(6) "unreasonable restraint of trade"... shall mean such business activities, by which any entrepreneur, by contract, agreement or concerted action, irrespective of its 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 causing, contrary to the public interest, a substantial restraint of competition in any particular field of commerce.

Section 2(9) provides a general definition of unfair trade practices, and the JFTC notification on *Unfair Trade Practices* (June

95AML Section 2(1) states "entrepreneur... shall mean a person, who carries on a commercial, industrial, financial or any other business."

96Section 2(9) reads: "unfair trade practices"... shall mean any act coming under one of the following paragraphs, which tends to impede fair competition and which is designated by the Fair Trade Commission as such:
18, 1982) lists practices that meet the requirements of that definition, among which are:

- refusals to deal
- discriminatory pricing (including terms of transactions)
- discrimination by trade associations (exclusion of an entrepreneur from membership or its activities)
- unjustly low price sales (below-cost pricing and pricing that creates difficulties for other entrepreneurs)
- unjust purchasing of a commodity or service at a high price, thereby creating difficulties for other entrepreneurs
- deceptive customer inducements (deceptive sales practices)
- inducing customer purchases by unjust benefits in light of normal business practices

(...continued)

(i) unjustly discriminating against other entrepreneurs;
(ii) dealing at unjust prices;
(iii) unjustly inducing or coercing customers of a competitor to deal with oneself;
(iv) dealing with another party on such terms as will restrict unjustly the business activities of said party;
(v) dealing with another party by unjust use of one's bargaining position;
(vi) unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself... or in the case where the entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interest of such company.
tie-in sales

exclusive dealing

resale price maintenance (including terms)

abuse of dominant position

interference with a competitor’s transactions

interference with internal operations of a competing company

In turn, many of these guidelines are further elucidated in the Antimonopoly Act Guidelines Concerning Distribution System and Business Practices (DSBP Guidelines), which were issued in July 1991 as a consequence of the SII Report. 97

Section 6(1) of the AML prohibited entrepreneurs from entering into an international agreement or international contract "which contains such matters as constitute unreasonable restraints of trade or unfair trade practices." Section 6(2) required entrepreneurs to submit international contracts for review. Enforcement of Section 6(2) was relaxed in 1992, 98 and the section was deleted from the law in 1997. 99 These changes permitted the JFTC to enforce Japanese industrial policies regarding the licensing and transfer of technology by foreign firms to Japanese firms on favorable terms.


Section 8(1) prohibits trade associations from restraining trade, limiting the present or future number of entrepreneurs in a particular field of business, unjustly restricting the functions or activities of their members, and causing their members to engage in unfair trade practices. It also requires trade associations to register with the JFTC and comply with Section 6(1).

Section 15 provides for the prior notification and JFTC review of mergers:

15(1) No company shall effect a merger coming under any one of the follow paragraphs:

(i) Where the effect of a merger may be substantially to restrain competition in any particular field of trade;

(ii) Where unfair trade practices have been employed in the course of the merger. 100

15(2) Every company in Japan, which is desirous of becoming party to a merger shall, in accordance with the provisions of the Rules of the Fair Trade Commission, file a report with the Commission.

As with U.S. and EU law, areas of Japanese enforcement may be divided into four categories: monopolization and abuse of dominance, horizontal restraints, vertical restraints, and mergers.

Monopolization and Abuse of Dominance

Much like U.S. law, AML Sections 3 and 2(5) prohibit efforts to acquire or maintain a monopoly through unfair trade practices. For a single firm, the AML establishes a fifty percent market share as a threshold for establishing monopoly power, which is lower than the U.S.

100Section 10 imposes similar conditions on the acquisition of stocks by one company of another.
As in U.S. law, a monopoly obtained or maintained through superior business skills or technological innovation is not illegal.

Those provisions have only been lightly enforced. One reason is that most conduct to exclude or control other enterprises also falls under the Section 19 prohibition of unfair trade practices, and unlike Section 3 violations, Section 19 violations are not potentially criminal offenses.

In 1977, Section 2(7) was added to the AML. Unlike U.S. law, it would appear to require the JFTC to impose a remedy on a lawfully acquired monopoly when the market share of an individual entrepreneur exceeds fifty percent or two entrepreneurs exceed seventy-five percent, when new entry is difficult, and when prices and profits become excessive.

Section 8(4) empowers the JFTC to remedy a "monopolistic situation" by ordering an entrepreneur "to transfer part of his business or to take any other measure necessary to restore competition..."

Those are extreme measures. Instead of enforcing them, the JFTC has chosen a preemptive strategy. It names firms that have reached the market-share thresholds, and that serves as a warning to be careful about pricing. In this regard, Japanese policy appears similar to EU policy, with both being more regulatory than U.S. policy.

The Notification on Unfair Trade Practices prohibits predatory pricing, price discrimination and abuse of dominant position. Regarding these provisions, Japanese policy is also more like EU policy than U.S. policy. It places greater emphasis on protecting smaller firms who compete or deal with larger firms, and in the process, it may dampen competition and subvert consumer benefits.


The JFTC Notification on Unfair Trade Practices defines unjust low price sales as, “without proper justification, supplying a commodity or service continuously at a price which is excessively below cost…or otherwise supplying a commodity or service at a low price, thereby tending to cause difficulties to the business activities of other entrepreneurs.”

In Maruetsu and Haromato (1982), two Tokyo super markets engaged in a price war, selling milk for ¥100 per liter carton when their acquisition cost was more than ¥155. This hurt home delivery retailers, and the JFTC found that the practice violated the above guidelines.

In 1984, in response to mounting criticism about loss-leader selling by large retailers, the JFTC issued its Guidelines on Unjust Low Price Sales, which applies to retailers. It prohibits persistent sales below invoice price that causes difficulties, or is likely to cause difficulties, for competitors.\textsuperscript{104}

In addition, those Guidelines prohibit unjust customer inducements. Prior to the Premiums Act, the prohibition was used to discourage unusual premiums and prizes, but under the Premiums Act, the JFTC regulates product giveaways and premiums used in sales promotions. Under its provisions, entrepreneurs in "fair trade associations" may establish "fair competition codes" that regulate premiums, advertising and labeling if they file their plan with the JFTC. If approved by the JFTC, their actions become exempt from the AML.

Overall, those practices can deter new market entrants, who might otherwise aggressively employ giveaways and premiums to encourage consumers to try their products and services.\textsuperscript{105} This can be especially problematic for foreign firms seeking to penetrate Japanese markets.


\textsuperscript{105} USTR, 1999 National Trade Estimate Report on Foreign Trade Barriers, pp. 247-248.
previously closed by tariffs, quotas, cartels, or various forms of administrative protection now regulated by international agreements.

The Notification on Unfair Trade Practices defines discriminatory pricing as "unjustly supplying or accepting a commodity or service at prices which discriminate between regions or between the other parties." That definition does not apply merely to dominant firms. Therefore, this requirement may function more like a small-business protection law than a competition policy.\textsuperscript{106}

JFTC rules regarding abuse of dominance are designed to protect businesses in their transactions with other businesses enjoying a dominant position in the transaction. They were applied, for example, in the 1957 Mitsubishi Bank Case, regarding loan terms to a silk manufacturer, and in the 1982 Mitsukoski Case, regarding reciprocal purchases imposed on suppliers by Japan's most prestigious and second-largest department store.\textsuperscript{107}

**Horizontal Restraints**

Section 3 of the AML prohibits agreements among entrepreneurs that effect "an unreasonable restraint of trade." Section 8(1) prohibits trade associations from engaging in activities that substantially restrain competition. As in U.S. law, agreements need not be express, but the JFTC must show some kind of liaison of wills among entrepreneurs to prove a violation.\textsuperscript{108}

Unlike U.S. law, cartels, while not explicitly sanctioned by Japanese law, are not declared per se illegal. Section 2(6) states they must be "contrary to the public interest." The interpretation of that phrase


provides a useful window into the different views held by U.S. and Japanese antitrust officials, business communities, and courts regarding business collaboration.

In the view of the JFTC, for example, any substantial competitive restraint not sanctioned by law is contrary to the public interest. It expressed this view in the 1949 Yuasa Lumber Company Case:

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 suffered any loss or not, all these considerations should not furnish any basis for deciding whether the activities in question are contrary to the public interest or not.\(^{109}\)

If applied, that would be a de facto, per se rule, which is consistent with the thinking of the U.S. Justice Department, FTC and courts.

On the other hand, the Japanese business community, as represented by Keidanren (Federation of Economic Organizations), does not view “contrary to the public interest” as synonymous with restraint of competition. It maintains that consideration should be given to other factors, such as the stability of the economy, growth, and the interest of consumers.\(^{110}\)

In the 1984 Oil Cartel Price Fixing Case, Japan’s Supreme Court chose a position between the JFTC and the business community. It determined that the term "public interest" means free competition, but that, in exceptional situations, substantial restraints of trade could be tolerated to meet a valid public objective.\(^{111}\) That ruling leaves some


limited room for cartels not sanctioned by law to plead legality on the basis of public interest.\footnote{112} That defense has not been much used,\footnote{113} which may reflect the broad use, at least until recently, of legal cartels and administrative guidance.

Until 1999,\footnote{114} the AML permitted the JFTC to exempt depression and rationalization cartels. Section 23-3(1) defined the preconditions for a depression cartel as "an extreme disequilibrium of supply and demand for a particular commodity." Section 23-4(1) defined the valid purposes for a rationalization cartel to include "effecting an advancement of technology, an improvement in the quality of goods, a reduction in costs, an increase in efficiency, or any other rationalization." Cartels operated under those provisions from 1957 to 1989, with as many as thirty enjoying JFTC sanction at any one time.\footnote{115}

Numerous bypass statutes have legalized industry, export and import cartels. Many were enacted at the urging of MITI, which viewed the AML as an impediment to the administration of industrial policy. In some cases, MITI negotiated the terms of cartel behavior with the JFTC. Between 1984 and 1988, such negotiations established cartels for aluminum, petrochemicals, steel and wood pulp under the Specific Industries Structure Improvements Law.\footnote{116} In 1996, the number of

\footnote{112}The Supreme Court did not elaborate on the meaning of public interest. One noted Japanese antitrust authority believes examples of acceptable cartel activities could include private agreements to control the use of polluting substances, or to maintain good order and public morale (e.g., agreements not to publish obscene materials). See Matsushita, "Antimonopoly Law of Japan," pp. 171-173.

\footnote{113}Iyori and Uesugi, The Antimonopoly Laws and Policies of Japan, pp. 76.

\footnote{114}See footnote 120.


-- 82 --
exempted cartels peaked at 1079. When the SII report was issued in 1991, 248 cartels were exempt under thirty-seven bypass statutes.\textsuperscript{117}

Just as important, MITI and other ministries issued administrative guidance (\textit{gyosei shido}) encouraging firms to set prices, restrict production (\textit{kankoku sotan}), and engage in other cartel behaviors.\textsuperscript{118} The principal vehicles for the coordination of those activities were the trade associations.

Beginning in the 1950s, the JFTC held that administrative guidance could not trump the AML, and it issued several decisions finding cartels initiated by administrative guidance to be illegal.

In the 1984 Oil Cartel Price Fixing Case, the Supreme Court found:

\begin{quote}
the most important objective of the Antimonopoly Act is to guarantee that price is determined freely in a market, and it is clear from the aim or purpose of the Act that an administrative agency should not intervene in free price formation.
\end{quote}

However, the Court also stated:

\begin{quote}
Even an administrative guidance, which tries to affect price and does not have a clear basis in the Petroleum Act, should not be held illegal, if done from the standpoint of \textit{smooth administration to cope with changing circumstances}…
\end{quote}

Even when an understanding on price among entrepreneurs seemed to violate the letter of the act, the

\textsuperscript{117}See Table 1 and Iyori and Uesugi, \textit{The Antimonopoly Laws and Policies of Japan}, pp. 357.

illegality of such understanding is removed if it is done in accordance with and in cooperation with lawful administrative guidance.\textsuperscript{119}

Since the 1991 SII report, the Japanese government has undertaken a systematic review of cartel exemption laws, abolished most cartels sanctioned under bypass statutes (see Table 1), and repealed much of the legislation permitting them.\textsuperscript{120} The JFTC has taken a more assertive posture toward MITI regarding administrative guidance, MITI has shifted policy away from explicit reliance on cartels, and the JFTC has stepped up prosecution against bid-rigging and price cartels.

In 1994, the JFTC issued new guidelines regarding administrative guidance, which state that actions taken by enterprises and trade associations in response to administrative guidance are illegal if they violate the requirements of the AML. However, it remains to be seen how the courts would respond should MITI or other ministries again seek explicitly to manage prices, capacity, or production, in order to deal with disruptions in specific markets.\textsuperscript{121}

Moreover, the cartel activities of formal trade associations (\textit{kyokai}) and informal networks of firms within the industries (\textit{gyokai}) apparently remain pervasive.\textsuperscript{122} The principal effect of the SII may be to make practices like bid-rigging, production allocation, and price-fixing

\textsuperscript{119}Iyori and Uesugi, \textit{The Antimonopoly Laws and Policies of Japan}, p. 82 – emphasis added.

\textsuperscript{120}On June 15, 1999, the Diet passed legislation repealing Sections 24-3 and 24-4, and reducing the number of exemption systems from 89, under thirty individual laws, to 25, under sixteen laws. These changes became effective on July 23, 1999.


less transparent. In some ways, cartel problems in Japan and Germany are becoming more similar, but they are probably more acute in Japan.\footnote{Mark Tilton, "Implications of Competition Policy for International Trade: How Different is Japan from Germany and Does It Matter?" (Washington, DC: Japan Information Access Project, October 1998).}


The cartel problem in Japan may be likened to speeding by American drivers. Most Americans reveal through their behavior that they believe speed limits are too restrictive and that some speeding is acceptable. When the highway patrol cracks down, they become more careful but continue the practice as they can. Without a patrolman beside each driver, speeding continues.

Japanese businesses reveal through their behavior that they view the AML and JFTC guidelines as too strict and collaboration too important to social stability and business success. Since the JFTC has stepped up enforcement, they may be less inclined to collude openly. However, the JFTC has many fewer regulators than Japan has formal and informal trade associations.

\textbf{Vertical Restraints}
Similar to U.S. and EU approaches, the Japanese courts have generally held retail price maintenance agreements to be illegal. Such agreements may be express, or they may be established through a supplier's statement of suggested prices, enforced by actual or threatened coercion. Section 24(4) of the AML expressly exempts copyrighted books, newspapers, and recordings. Section 24(2) permits the JFTC to exempt particular classes of goods, and until 1997, pharmaceuticals and cosmetics were exempt.

Tying agreements are illegal if the purchasers' freedom of choice is unreasonably restricted. The JFTC has pursued few tie-in cases.125

As in the United States, a rule of reason applies to other nonprice vertical restraints. Manufacturers may assign dealers geographic territories, but they may not restrict sales beyond those territories if that would have the effect of impeding interbrand and price competition. Exclusive dealing arrangements are illegal if they have similar effects, including impeding the ability of new entrants to secure a distribution channel.126 The JFTC has not aggressively enforced these provisions.

Keiretsu and Vertical Restraints

Closely related to vertical restraints are the trade tensions created by the keiretsu.

Keiretsu relationships take three basic forms: horizontal, production, and distribution. Six horizontal keiretsu are composed of leading firms from industrial sectors, a major city bank and related financial institutions, and a general trading company. These firms are connected by cross-shareholding and by exchange of directors and supply relationships, and the core firms participate in presidents' club meetings.

their networks of distributors. These horizontal and vertical structures overlap and divide the Japanese economy into competing industrial syndicates.

Keiretsu firms generally exhibit strong loyalty toward fellow members. Whenever possible, they purchase material, components, goods, and services from within their groups while shunning outside suppliers. In terms of the sale of final products to consumers, Japan enjoys intense intraindustry competition, but this system tends to exclude foreign producers, who lack membership in these groups and access to their procurement and distribution channels.\(^{127}\)

The resulting barriers to market access are exacerbated by several government laws and policies. The Large Stores Law, which is designed to protect owners of small shops, limits the expansion of large retailers who are much more likely to sell imported goods to consumers.\(^{128}\) Similarly, the Premiums Act, discussed above, makes the introduction of imported goods through nonexclusive distribution channels more difficult. Both laws tend to maintain and reinforce the protection afforded Japanese

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manufacturers by *keiretsu* distribution practices. The DSBP Guidelines were intended to improve market access for foreign firms by clarifying AML rules regarding vertical restraints.

Matsushita has offered two reasons why he thinks there are limits to the potential for more rigorous antitrust to affect *keiretsu* behavior. First, exclusive distribution arrangements, such as those enjoyed by Japanese automakers, are generally lawful if interbrand competition is intense. He asserts that this is true if one accepts rules announced in the DSBP Guidelines. Second, *keiretsu* distribution arrangements often do not involve formal contracts, but are the product of loyalty.

Regarding Matsushita’s first point, other prominent Japanese antitrust scholars offer a different interpretation of the consequences of the DSBP Guidelines:

The DSBP Guidelines made it clear that a restriction on the handling of competing products by an influential manufacturer in a market, that may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, was illegal...

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129 On May 28, 1998, the Japanese Diet passed legislation to abolish the Large-Scale Retail Stores Law and replace it with the Large-Scale Retail Location Law, effective June 1, 2000. Under the new law, the licensing of large stores will no longer be based on supply and demand considerations, but rather, on their impact on the local environment – particularly traffic, noise, parking, and garbage removal.

The U.S. government welcomed the repeal of the old law but has expressed reservations about proposed regulations for implementing the new law. It remains to be seen whether this new law will usher in a genuine change of policy or merely make existing policy less transparent. See USTR, *1999 National Trade Estimate Report on Foreign Trade Barriers*, pp. 216; and *Submission of Comments by the Government of the United States on the Government of Japan's Guidelines Under the Large-Scale Retail Store Location Law* (May 20, 1999).

The difficulty in securing alternative distribution channels may depend on other manufacturers’ behavior in a market, therefore, other manufacturers’ behavior needs to be considered. For example, if other manufacturers independently and simultaneously restrict the handling of competing products, it is more likely to produce the anticompetitive effects stated above...\textsuperscript{131}

Regarding Matsushita’s second point, it begs the question of whether practices such as cross-stockholding, exchange of directors and other personnel, financial assistance from large companies to suppliers and distributors, and meetings among presidents and other top executives imply agreements, especially when the conditions just cited are present.

The JFTC enjoys extensive interpretative latitude regarding antitrust rules, and owing to the limitations on private action (discussed below), it also has the primary responsibility for bringing complaints against vertical restraints that may block imports. Yet, it has failed to assume this responsibility adequately. According to Professor Jiro Tamura, “One of the most important points of the antimonopoly regulation of Japan’s distribution system is to prevent barriers to market entry. In the present state of enforcement, the JFTC falls short of achieving this goal.”\textsuperscript{132}

Furthermore, \textit{keiretsu} vertical structures may aid the maintenance of horizontal cartels. When producers in an industry – for example, the glass industry – agree to standardize prices, they can only maintain their discipline if purchasers are willing to accept the cartel price and do not to resort to imports. Purchasing industries – for example, the glazier industry – will be more willing to do so when they are confident that their competitors will also accept cartel prices and operate under the same cost disadvantage.


Keiretsu loyalties to suppliers, therefore, tend to help purchasing industries feel assured about their competitors.\textsuperscript{133} Moreover, firms in cartel relationships may be able to rely on their keiretsu partners to help them discipline purchasers who turn to imports, by refusing to purchase their products.\textsuperscript{134}

**Mergers**

The JFTC requires prior notification of a merger between a company with assets exceeding ¥10 billion and another company with assets exceeding one billion yen. In addition, the JFTC requires prior notification for mergers among foreign companies when one of the parties has sales in Japan exceeding one billion yen.\textsuperscript{135}

In evaluating whether a merger will, or is likely to, limit competition substantially, the JFTC considers the market shares of the merged companies (company group). Generally, JFTC merger guidelines indicate that mergers will not substantially restrain competition if one of the following conditions is met:

\begin{itemize}
  \item the market share of the company group is ten percent or less;
  \item entry, including importation, is easy, and the particular field of trade is not oligopolistic, the market share of the company group is twenty-five percent or less, and the company group ranks second or lower; or
  \item the M&A brings no change to the position of the company group and number of competitors (vertical
\end{itemize}

\textsuperscript{133}Tilton found keiretsu relationships to be useful in maintaining cartel prices in the glass industry. See *Restrained Trade in Japan's Basic Materials Industries*, p. 195.

\textsuperscript{134}For example, steel – see text at footnote 93.

\textsuperscript{135}Outline of the Partial Amendment of the Antimonopoly Act Concerning Enterprise Combination (May 22, 1998).

-- 90 --
M&A and acquisitions or conglomerate M&A), and the problem of foreclosure or exclusiveness of a market and overall business capabilities do not arise.\textsuperscript{136}

On their face, JFTC requirements appear no more lenient than U.S. or EU regulations. However, they afford considerable latitude to regulators. The JFTC has not much applied its authority to regulate mergers,\textsuperscript{137} and it has not pursued the kind of aggressive oversight of potential changes in market structure that characterize U.S. and EU review.

Joint ventures to facilitate other cooperative activities, such as joint R&D, have been encouraged in Japan. The JFTC Antimonopoly Law Guidelines Concerning Joint R&D, published in 1993, appear to continue that approach, subject to safeguards against anticompetitive effects.\textsuperscript{138} The requirements they establish are somewhat similar to the EU system of block exemptions.\textsuperscript{139}

**Enforcement and Remedies**

As in the European Union, enforcement is more administrative and less judicial than in the United States, and this has permitted greater intrusion by political and industrial policy concerns in the shaping of policy.

\textsuperscript{136}JFTC, Guidelines for Interpretation on the Stipulation that "The Effect May Be Substantially to Restrain Competition in a Particular Field of Commerce" (December 21, 1998).


The AML affords the JFTC authority to investigate violations of the AML, levy administrative surcharges, order entrepreneurs to eliminate offending practices, and review mergers and acquisitions. It also enjoys authority to define the meaning of "unfair trade practices," which it has exercised through various published guidelines and case decisions. Overall, the JFTC combines many, but not all, of the roles of the U.S. Justice Department and FTC. Regarding criminal prosecution, it forwards its findings to the Ministry of Justice for prosecution.

By Section 89, violations of Section 3 (monopolization and unreasonable restraints of trade by entrepreneurs) and Section 8.1 (substantial restraints of trade by trade association) are criminal offenses. Section 19 violations (unfair trade practices) are not criminal offenses.

As a practical matter, the Japanese record of criminal prosecution has been very limited. The JFTC has more limited criminal investigative powers than other Japanese criminal investigative agencies, and the Ministry of Justice has imposed an extraordinary procedural rule on JFTC referrals that is not present in any other area of Japanese law. However, it should be noted that, since the SII report, criminal prosecutions of cartel-related activities, such as bid-rigging, have increased.

The JFTC undertakes investigations on its own initiative or at the request of other government agencies and private persons. It has the authority to obtain business records and other materials pertinent to its investigations; however, its investigatory authority is not as strong as that of other Japanese administrative bodies (e.g., the National Tax Agency), criminal prosecutors, or U.S. antitrust agencies. Regarding the latter, the

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140 Unfair methods of competition in the U.S. FTC Act.
JFTC lacks the FTC’s extensive power of discovery and is more dependent on evidence obtained through surprise on-site inspections.¹⁴³

When the JFTC finds a violation, it may issue an elimination measure. This may require an entrepreneur to "file reports, or to cease and desist...to transfer part of his business, or to take any other measures necessary to eliminate such acts in violation."¹⁴⁴

When the JFTC finds that an entrepreneur "effects an unreasonable restraint of trade," it may order it to pay an administrative "surcharge." The amount is an estimate of extra profit obtained over the duration of the unreasonable restraint, but that period may not exceed three years. Unlike the EU administrative fines, those surcharges do not contain a penalty component, and they have not proven to be an effective deterrent.

Entrepreneurs and trade associations cited by the JFTC for AML violations are entitled to an administrative hearing, and JFTC decisions may be appealed to the Tokyo High Court and the Tokyo Supreme Court. As in the European Union and the United States, the Courts have elucidated the meaning of terms such as "contrary to the public interest."

Sections 25 and 26 permit private plaintiffs to bring suit in the Tokyo High Court for damages resulting from AML violations. However, private plaintiffs may only bring suit under the AML after the JFTC has investigated and found a violation. Therefore, a private person believing he has been harmed must depend on the JFTC to act on its complaint first.

Also, private persons may bring a torts claim under the Civil Code for violations of the AML, regardless of whether the JFTC has acted. However, private parties may only obtain compensation for damages and cannot obtain injunctive relief. Moreover, standards of proof for establishing the causality between violations and damages are


¹⁴⁴ AML Section 7(1).
quite stringent and difficult for plaintiffs to satisfy.\textsuperscript{145} Plaintiffs enjoy only limited powers of discovery.\textsuperscript{146}

Overall, the unavailability of injunctive relief, the absence of treble damages, and tough standards of proof discourage private suits. From 1947 to 1998, only eleven private actions were brought.\textsuperscript{147}

**Extraterritorial Application**

The AML applies to conduct undertaken within Japan by foreign entities. Whether targets of enforcement reside in Japan is irrelevant. However, the Japanese courts have yet to develop an effects test similar to those in U.S. and EU law.\textsuperscript{148}

This said, the JFTC has aggressively regulated foreign firms through its review of international contracts under AML Section 6. Section 6.1 prohibits Japanese firms from entering into agreements and contracts "which contain such matters as constitute unreasonable restraint of trade or unfair trade practices." Section 6.2 required prior notification of international contracts and agreements to the JFTC.

In conducting its reviews, the JFTC assumed that foreign firms enjoyed a superior bargaining position, and thus, it took an aggressive stance in regulating the contents of agreements and contracts. Although


\textsuperscript{147}USTR, 1999 National Trade Estimate Report on Foreign Trade Barriers, p. 214.

Section 6.2 was removed from the AML in 1997, Section 6.1 still provides a legal basis for JFTC jurisdiction over the activities of foreign firms when they conduct business with a Japanese firm.

In 1999, Japan implemented regulations for notification and review of mergers among foreign companies when sales in Japan of one party exceed ¥10 billion and of another party exceed one billion yen.\textsuperscript{149} With that action, Japan joins the European Union in essentially importing an effects doctrine into merger review. It remains to be seen how aggressively, or to what purpose, the JFTC will apply this jurisdiction over foreign entities.

\textsuperscript{149}JFTC, Notification System Concerning M&As by Companies Outside Japan (January 1, 1999).
Chapter 6:  
Implications for a Competition Policy Agreement

As described above, antitrust statutes in the United States, the European Union and Japan prohibit similar practices, but the rules for business behavior that have emerged from the interpretation and application of those statutes differ greatly. The differences have roots in the historical origins and motivations of antitrust legislation, national economic ideologies, and constitutional structures. These differences have important implications for how an effective CPA could be structured.

Some Observations about U.S., EU and Japanese Law

U.S. law has strong populist origins, emerging from the perceived abuses by large trusts in the late 19th century and from a body of common law in the several states that was becoming increasingly hostile to private contracts in restraint of trade.

In contrast, EU law was not motivated by concerns about big-business abuses or by legal cultures growing more antagonistic toward collaboration among competitors; rather, it was motivated by the political impulse behind the common market and by concerns that private business arrangements could frustrate the purposes of removing tariffs and other government-imposed barriers to trade among member states.

Post-World War II Japanese law was intended to combat bigness (i.e., dismantle the zaibatsu) and to prohibit private restraints of trade (the cartel activities of industry associations). However, it was imposed by a foreign occupation government, and once the Americans left, it was quickly transformed to reflect traditional Japanese values – order, stability and cooperation – and to serve Japanese industrial policy objectives.
U.S. policy strongly reflects the ideas that robust competition best promotes consumer welfare, economic efficiency, innovation and growth, and markets best allocate capital and labor. Consequently, U.S. policy is most concerned about maintaining the conditions for competition. It seeks to maintain competitive markets by ensuring that incumbent and prospective competitors are not thwarted or discouraged by unfair, dominant-firm behavior, and that competitors do not collaborate to determine the supplies or prices of goods.

In contrast, European and Japanese policies reflect considerable concern about the perceived negative consequences of unbridled competition, as well as greater confidence in the efficacy of government action to improve the allocation of capital and labor among rival uses. Policy in those jurisdictions is more inclined to regulate large-firm behavior directly than to rely on the contestability of markets, and more inclined to tolerate collaboration among competitors.

In the United States, the common law system and the independent judiciary have permitted private actions and the courts to play substantial roles in enforcement and policymaking. Private individuals, firms, the several states, and foreign governments with legitimate interests in U.S. enforcement, are not dependent on the actions of federal agencies. Specifically, if the Justice Department or the FTC will not respond to their grievances, they can go directly to court. The precedents of the courts then bind, or at least substantially constrain, Justice Department and FTC behavior.

Moreover, the Justice Department, the FTC and U.S. courts have been insulated from statutory requirements and political pressures to pursue industrial or trade policy considerations in the formation of antitrust policy. Exceptions may be cited, notably the treatment of export cartels, R&D consortia and agricultural cooperatives. However, as much as in any jurisdiction, antitrust law has focused on maximizing consumer welfare and economic efficiency, and competition has been the industrial policy of the United States.

In the European Union, the Commission enjoys more control over the requirements of important aspects of antitrust law and enforcement.
than do the FTC and the Justice Department, because private actions are confined to national courts, and the civil law system pays less allegiance to past court decisions. Also, as a consequence of EU efforts to decentralize enforcement and rely on national competition authorities, restrictive business practices can go unnoticed when member governments lack interest in seeking them out.

EU policymakers are required by statute to consider industrial policy goals in shaping important aspects of antitrust policy, and the more administrative nature of EU enforcement creates opportunities for political and industrial policy considerations to infiltrate enforcement.

In Japan, the bureaucracy also enjoys considerable discretion, because private actions are severely limited, it has a civil law system, and its national courts seem disinclined to challenge executive branch actions that violate domestic antitrust law or international agreements having direct effect in Japanese law.\(^{150}\)

\(^{150}\)Consider the courts’ findings with regard to cartels and administrative guidance, discussed at footnotes 118 and 119, and also the Kyoto necktie decision.

In the necktie case, Japanese tie producers argued that the Silk Price Stabilization Law violated Articles 2(4) and 17 of the GATT. The Japanese constitution requires that treaties prevail over domestic law. Therefore, the Japanese court should have decided whether the Silk Price Stabilization Law violated Articles 2(4) and 17. Instead, the Kyoto District Court found that it did not need to find the law invalid, because the GATT Article 23 provides relief for violations.

This was an absurd finding, because private parties (in this case the tie manufacturers) cannot bring complaints of violations to the GATT. Only their governments may do so on behalf of private parties. If the silk tie manufacturers were to pursue the path to remedy implied by the court, they would have had to persuade the Japanese government to file a GATT complaint under Article 23 against a Japanese law. In essence, the tie manufacturers would have had to persuade the Japanese government to bring suit against itself in the GATT. See Matsushita, *International Trade and Competition Law*, pp. 31-40.
Furthermore, the requirements of nonantitrust laws – notably the bypass statutes, Premiums Act, and Large Stores Law – as well as administrative guidance, have enabled industrial policy to trump antitrust enforcement. For example, other ministries, notably MITI and Finance, have effectively overruled the JFTC on occasion; and in the case of some bypass statutes, the Premiums Act and the Large Stores Law, the JFTC itself has been the ready accomplice of businesses contracting in restraint of trade.

All of the above has given rise to remarkable differences in the requirements of antitrust laws and the rigors of enforcement. For example, regarding monopolization and the abuse of dominance, U.S. law requires larger market shares to find monopoly power and is more inclined to permit large firms to engage in pricing to meet the competition.

In contrast, when they are enforced, EU and Japanese laws are more likely to find monopoly power and more inclined to limit the ability of large firms to price below, or just above, cost, in order to meet the competition or drive out less-efficient competitors.

Moreover, whereas U.S. policy is inclined to rely on contestability, EU and Japanese policy is inclined to regulate. In the European Union and Japan, therefore, smaller and less-effective firms may obtain protection from superior competitors through antitrust enforcement in ways that American firms cannot.

Enforcement authorities in all three jurisdictions agree that cartels pose dangers to consumer welfare and economic efficiency, though exceptions and exemptions may be necessary. However, the Justice Department does more than the EU Commission to discover, root out and punish collusive behavior, and EU law offers room for discretionary (crisis) cartels that U.S. law does not.

Meanwhile, in postwar Japan, the finding of exemptions and exceptions, and the organizing of industry associations to divide markets, establish production quotas and set prices, became as large a tool of national economic policymaking as did the manipulation of the tax code in the United States. Although published Japanese policy has become less friendly to cartels, it remains to be seen whether a strengthened JFTC can
root out cartels and alter the culture of collaboration and cooperation in Japan.

Regarding vertical restraints, American law in general is fairly lenient, EU law is tougher, and Japanese law is a paper tiger – it sounds tough on paper, but it’s even tougher to detect in enforcement.

Foreign sovereigns have long complained about the extraterritorial application of U.S. law, but the European Union and Japan are importing similar long-reach doctrines into their laws. Extraterritorial application combined with the exemptions that all three authorities offer to export cartels creates peculiar contradictions in policy.

**Implications for a CPA**

Restrictive business practices in any jurisdiction may impede or deny market access to foreign products and firms, and also impose significant costs on foreign consumers, when those practices are not addressed by an effective enforcement authority. To cope with those restrictive practices, noted antitrust scholars, 151 including the Munich Group, 152 have advocated an international antitrust agreement supported either by an international antitrust authority or some apparatus in the WTO.

For its part, the European Union advocates negotiating a CPA in the WTO. Observers have pointed to the European Union’s success in

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fostering a common continental policy from the varied historical, philosophical and constitutional traditions of its members. They also suggest that a precedent has been established by the Uruguay Round TRIPS agreement. Accordingly, several advocates of a CPA suggest establishing minimum standards for national antitrust regimes – the way TRIPS does for intellectual property law – and then pursuing gradual, but sustained, harmonization of national laws.

Regarding the relevancy of the EU experience, members of the WTO lack the goals and the driving will of the early participants in the European Union, who were motivated to establish a common market in order to avert renewal of devastating continental animus. Moreover, important WTO members, including the United States, would be unwilling to grant the WTO or a similar institution the same kind of broad constitutional authority enjoyed by the European Commission and courts (i.e., rule making, investigatory and judicial authority) to shape the requirements for private business practices affecting cross-broader trade from general phrases like those found in the Sherman and Clayton Acts, the Treaty of Rome Articles 85 and 86, or even the Japanese AML.

Regarding the use of TRIPS as a precedent, a CPA could not achieve the same level of precision or scope of convergence that TRIPS achieved. In TRIPS, WTO members agreed to rather precise requirements for national laws regarding the scope of intellectual property rights, administrative and judicial procedures for enforcing them, and remedies to be made available to intellectual property owners (e.g., rights to private action).

Specifically, the TRIPS agreement lays out detailed, rigorous requirements for laws protecting copyrights, trademarks, geographic indicators (marks of origin), product and process patents, topographies of integrated circuits, and other types of intellectual property. It lays down specific requirements for civil and administrative procedures and the remedies to be made available to individuals claiming infringement of their intellectual property. The remedies include access to civil judicial procedures, access to evidence (discovery\[153\]), injunctive relief, and the

\[153\] TRIPS Article 43 states:
right of plaintiffs to recover damages and attorney fees. TRIPS requires members to provide for criminal procedures against willful counterfeiting and copyright piracy on a commercial scale.

For important aspects of antitrust law, a CPA could not achieve that same level of precision or scope of convergence. For one thing, key antitrust concepts such as monopolization and abuse of dominance do not lend themselves to clear tests as readily as copyright infringement or patent piracy. For another, the application of common standards across jurisdictions could prove counterproductive, given the differing geographic and institutional contexts in which antitrust officials must operate. For example, the application of U.S. vertical-restraint rules in the European Union, coupled with the natural protection engendered by geography (language, culture and national frontiers), could contribute to a refragmentation of European markets; while applying EU rules to U.S. conditions would be unnecessarily regulatory and could stifle healthy interbrand competition.

Even in those areas of law where differences in objective geographic conditions do not impel great differences in policy, differences in national economic ideologies would pose significant obstacles to common standards and harmonization. For example, the Europeans and Japanese are not likely to accept the less-regulatory U.S. approach to large-firm behavior, aggressive American-style cartel enforcement, and the capacious rights that U.S. plaintiffs enjoy in private actions to redress harm imposed by dominant firms and cartels (in particular, triple damages). Nor is the United States likely to accept a CPA that would

(. .continued)

(1) The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced...

(2) In cases in which a party... without good reason refuses access to, or otherwise does not provide necessary information... a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them...
make legitimate the general intrusion of industrial policy values into the application of antitrust law.

In light of the above, a CPA premised on minimum standards and harmonization would likely result in one of the following scenarios: (1) greater U.S. reliance on the regulation of large-firm behavior, along with reduced reliance on competition; or (2) the European Union and Japan embracing a culture of competition and substantially changing their laws and policies to conform more closely with U.S. practice (for example, by relaxing their regulatory approaches to dominant-firm behavior, substantially strengthening cartel law and enforcement, strengthening the right of private action, and withdrawing significantly from industrial policy); or (3) limited progress.

The first outcome would seem to serve U.S. interests poorly, given the relative successes of U.S. industrial policy ("competition") and the malaise imposed on their economies by Japanese and European industrial policies ("regulated competition" and "dirigism"). The second outcome would prove much tougher to achieve than were the compromises necessary to negotiate TRIPS. And the third outcome would serve only to bolster skepticism about the WTO in the United States.

That said, real improvements in international market access do not require a one-size-fits-all approach to antitrust enforcement. The EU path need not be our inspiration, and TRIPS need not be our model. The formulation of an effective CPA that avoids the undesirable scenarios above will be the focus in Part II of this study.
PART TWO

Antitrust as an International Commercial Issue
Chapter 7: 
International Agreements

The 1948 Charter of the International Trade Organization (ITO) included provisions to address the harm that may be imposed on international competition by restrictive business practices. However, those provisions were not among those imported into the GATT. When the ITO failed to be ratified, attempts were made to bring antitrust policy within the GATT framework, but as discussed below, those provisions have only limited scope and effect.

Subsequently, the problems that may be posed by inadequate national laws and enforcement and by conflicts of law and jurisdiction have instigated activities in the United Nations Committee for Trade and Development (UNCTAD) and the OECD regarding national antitrust regimes. In 1996, the WTO initiated a working group on the relationship between trade and competition policy, and considerable scholarly interest has become focused on the potential efficacy of a CPA in the WTO.

WTO Agreements as Public Law

In considering the potential consequences of a CPA, it is important to recognize that WTO agreements create a system of public international law. It is a horizontal legal system establishing contractual obligations among sovereign governments. It does not establish a supranational jurisdiction over the activities of private persons.

Accordingly, WTO members acting collectively through the dispute settlement process may seek to enjoin member governments from taking actions that violate specific WTO obligations (for example, an import quota on automobiles) or other actions that frustrate the

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commercial benefits expected from a WTO obligation (for example, granting a subsidy to automakers who formerly enjoyed tariff protection).  

The WTO has no authority, however, to regulate or discipline private persons engaging in business practices that frustrate the benefits of a WTO obligation (for example, an industry cartel that limits imports in an industry that once enjoyed tariff protection). Also, private persons may not bring a complaint to the WTO when they are harmed by a member government’s violation of a WTO agreement (for example, the failure of a government to enforce laws against software piracy). To obtain a remedy, they must petition their government to bring a complaint in the WTO on their behalf.

Importantly, WTO agreements do seek to regulate several areas of member-government policy that discipline private behavior (for example, the laws and procedures for protecting patents and copyrights and the activities of private standards-setting organizations). In this way, WTO agreements indirectly, through the actions of member states, influence private behavior.

However, member governments often encourage private businesses to discriminate against foreign products through areas of

155 WTO dispute settlement is applicable when a member believes a benefit accruing to it under an agreement has been nullified or impaired, or the attainment of any objective has been impaired as the consequence of:

1) the failure of another member to carry out its obligations under the agreement (a violation complaint);

2) the application by another member of any measure whether or not it conflicts with the provisions of an agreement (a nonviolation complaint); or

3) the existence of any other situation (situation complaints).

Private actions and structures might lend themselves to situation complaints. However, no GATT or WTO panel has ever ruled on one, and new, strengthened WTO dispute settlement rules do not apply to situation complaints. Rather, old GATT rules, which require complete consensus, would apply. See WTO, Annual Report, 1997, pp. 77-78.
government practice falling outside the specific purview of WTO agreements. These include, but are not limited to, most aspects of policy toward inward foreign investment and antitrust.\textsuperscript{156}

A CPA in the WTO would not establish a supranational authority, for example, to police cartels or review mergers. Rather, it would establish standards for the substantive content and enforcement of member governments' antitrust laws, and would provide member states, and perhaps individuals through their governments, with a forum when member governments failed to live up to their obligations.

The debate about the efficacy of a prospective CPA in the WTO is not about establishing a supranational authority with jurisdiction over private persons. Rather, much like the debate about TRIPS in the 1980s, and the prospective Multilateral Agreement on Investment today, it turns on questions such as: Which areas of national government policy should be regulated by WTO agreements? How far should binding WTO agreements reach into national government regulation of private persons?

\section*{Antitrust and the WTO Agreements}

When the ITO Charter was not ratified, attempts were made to bring antitrust policy within the GATT framework. That effort resulted in the 1960 Contracting Parties Decision on Arrangements for Consultations on Restrictive Business Practices, which recognized that business practices that restrict competition in international trade may frustrate the benefits expected from tariff reductions, but it concluded that it would be not be practical for the GATT to control those practices or investigate them. It did recommend that members enter into consultations when requested by other members. The GATS and TRIPS require members to enter into such consultations if requested by another member.\textsuperscript{157}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{156}] For example, governments may require foreign investors to transfer technology facilitating local production of components, or they may organize or ignore cartels that lock out imports.
\item[\textsuperscript{157}] WTO, Annual Report, 1997, p. 77.
\end{itemize}
\end{footnotesize}
Beyond those weak provisions, several WTO agreements do address limited classes of unfair business practices. GATT Article VI addresses dumping, which is a particular form of private anticompetitive practice; however, it authorizes member states whose markets are disrupted by dumped imports to impose duties to offset the effects of dumping, rather than requiring member states where the products originate to curtail the anticompetitive practice.

GATS Article VIII requires members to ensure that government-sanctioned monopolies, such as public utilities and airlines with exclusive routes, do not abuse their market power when they compete directly or indirectly with firms in markets outside their exclusive franchise.\(^{158}\) The Agreements on Technical Barriers to Trade requires member states to take "such reasonable measures as may be available to them" to ensure that subnational governments and nongovernmental (private) standards-setting bodies refrain from imposing unnecessary restrictions on trade and generally adhere to the same disciplines the agreement imposes on national governments.\(^{159}\)

TRIPS Article 40 reserves to members the right to adopt laws and measures to prevent or control abusive licensing practices.\(^{160}\) When a national or domiciliary of one member is accused of violating another member's laws relating to anticompetitive practices, the latter is required to supply the former with relevant, publicly available, nonconfidential information.

On a more general level, GATT Article III requires national treatment (nondiscrimination between domestic and imported goods) in the

\(^{158}\) This obligation is limited to industries covered by the GATS. See Edmond McGovern, *International Trade Regulation* (Exeter: Globefield Press, 1995), pp. 31.14-3 - 31.14-4.

\(^{159}\) McGovern, International Trade Regulation, pp. 7.24-8.

\(^{160}\) Article 40(3) states: ...a Member may adopt, consistently with other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity, and coercive package licensing, in the light of relevant laws and regulations of that Member.
substantive law and enforcement, as does GATS Article VIII for covered services and service suppliers. GATT and GATS most-favored-nation rules require equal treatment for goods and services imported from different member countries. TRIPS Articles 3 and 4 contain similar provisions for the treatment of foreign holders of intellectual property rights. To address restrictive business practices in the WTO by reference to those provisions, the complaining member would have to prove that:

- market access for its goods, services or intellectual property had been impaired by private anticompetitive practices; and

- those private anticompetitive practices resulted from less-than-equal treatment (compared to domestic or other imported products) by statutes or regulations, enforcement authorities or the courts.

Without the cooperation of the respondent government, the first condition would be very difficult to establish to the satisfaction of a WTO dispute settlement panel. Efforts to gather the necessary evidence would be hampered by the same or similar obstacles that thwart the extraterritorial application of U.S. law. Absent express discrimination in statutes or regulations, or incriminating statements in the public records of administrative actions or court decisions, the second condition also would likely be difficult to establish.

Restrictive business practices could be addressed through the nullification and impairment provisions of WTO agreements by bringing a "nonviolation complaint." However, to win a nonviolation case, a complainant must clear three tough hurdles:

- First, the onus of proof is very much on the complaining party to provide a detailed justification of its claim that the "non-violating" measure at issue has had the effect of nullifying or impairing benefits accruing to it under the WTO. Second, it would have to establish that an act of omission, namely a failure to enforce the law, constitutes

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161 See footnote 155.
an "application" of a "measure" by the member concerned. Third, it would have to be demonstrated that the measure could not, at the time the obligation or concession was negotiated, have been reasonably anticipated.\textsuperscript{162}

It appears that only the most blatant and easily documented actions are susceptible to such a complaint, and the failure of national authorities to enforce antitrust laws hardly seems like a good candidate for this tact.

The primary effect of a CPA agreement would be to transform the failure of WTO members to address specific classes of restrictive business practices into violation complaints, much as TRIPS has made the failure to punish copyright piracy a violation complaint.

**UNCTAD and the OECD**

In the absence of a GATT or WTO agreement, UNCTAD and the OECD have made recommendations for national policy and work programs to foster sound antitrust laws and cooperation among national authorities. These establish nonbinding norms for national regimes and codes of behavior for MNCs.

UNCTAD has adopted a set of principles aimed at fostering harmonization among national regimes and cooperation among national enforcement agencies. The document also defines restrictive business, including attempts to achieve and abuse dominance, cartel activities, and several forms of vertical restraints.\textsuperscript{163} In addition, the UNCTAD secretariat publishes commentaries on model competition law and offers technical assistance.

\textsuperscript{162}WTO, Annual Report, 1997, p. 78.

\textsuperscript{163}UNCTAD, The Set of Multilateral Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980).
The OECD has adopted recommendations encouraging cooperation among member states regarding restrictive business practices affecting trade. Members are encouraged to notify other members of their antitrust investigations when the important interests of other members may be affected, coordinate investigatory activities, and respond to requests for assistance (for example, by providing information from investigative files and employing compulsory processes to obtain information from their nationals and domiciliaries).\(^{164}\) In addition, the OECD has sponsored regular meetings and an extensive work program, which has contributed to more consensus about what constitutes a restrictive business practice.

**Bilateral Agreements**

Several countries and the European Union have bilateral cooperation agreements. Some of these provide for intense collaboration in enforcement and/or harmonization of regimes, which has resulted in four major areas, or zones, of enforcement within the OECD:

- the United States and Canada, especially in the area of criminal prosecution;
- the European Union, European Economic Area, and various Central and Eastern European Countries that are linked to the European Union by cooperation agreements based on EU rules;
- Australia and New Zealand – in several areas this cooperation achieves essentially one enforcement zone; and
- Japan.

Other, less-intense bilateral agreements create bridges among those zones. These include U.S. agreements with the European Union, Japan, and others.

\(^{164}\) These recommendations were first adopted in 1967 and have been revised several times. See OECD, Revised Recommendations of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade (1995).
Germany, Australia, and Japan, and an agreement between the European Union and Canada. As an example, the U.S.-Japan agreement provides for:

*Notification of Enforcement Activity* – Each antitrust agency will notify the other when the activities of one national enforcement agency may affect the important interests of the other.

*Consultations and Exchange of Information* – The parties will consult on matters that arise under the agreement and will exchange information subject to applicable confidentiality constraints.

*Conflict Avoidance* – Each antitrust agency will consider the interest of the other in carrying out enforcement activities.

*Positive Comity* – Each party will give careful consideration to a request by the other to take antitrust enforcement action against illegal behavior occurring in its country that injures the other party’s interests.

In addition, the agreement provides that U.S. and Japanese enforcement agencies will consider cooperation in, and coordination of, enforcement activities.

In comparing the cooperation agreements that create bridges among the four major enforcement zones with those agreements that forge links within these groups, the EU Group of Experts observed:

Despite the inclusion of important provisions (such as the "positive comity" provision in the EU-United States agreement or the draft EU-Canada agreement) these agreements are more limited in scope in that they do not
provide for the possibility to exchange confidential information.\textsuperscript{165}

Beyond this, many other issues impede the successful discipline of restrictive business practices that restrict or distort international commerce. These impediments emerge from a lack of adequate international consensus about who should address behavior having cross-border consequences and what private practices should be subject to antitrust enforcement, and also from the primitive state of antitrust law in many developing countries.

\textsuperscript{165} Director General IV - Competition, Competition Policy in the New World Order: Strengthening International Cooperation and Rules, p. 16.
Prior to World War II, national regimes regulating restrictive business practices were largely domestic in their orientation. However, with globalization, consumers and producers have become increasingly vulnerable to harm from restrictive business practices originating beyond their country’s borders. In turn, national governments in Europe, North America and elsewhere have become more concerned about anticompetitive behavior beyond their borders, and national antitrust authorities and courts have become more inclined to assert the extraterritorial jurisdiction of their laws.

When the Justice Department or FTC identifies anticompetitive behavior abroad that damages U.S. consumers and producers, they may seek remedies under U.S. law, or the Justice Department may request action by foreign antitrust enforcement authorities (appeal for positive comity). In addition, U.S. firms and individuals may bring private suits in U.S. courts; or they may seek remedies under foreign laws, either by petitioning foreign antitrust authorities to take action or by bringing private suits in foreign courts.

For several reasons, those approaches offer only limited relief. First, when U.S. enforcement agencies and courts apply U.S. laws against conduct abroad, they often encounter difficulties obtaining evidence in foreign jurisdictions and enforcing judgments if the targets of enforcement have no significant assets in the United States. Even for enforcement actions aimed at the most egregious behavior (e.g., price-fixing and market-dividing cartels), many foreign governments resent U.S. efforts to assert jurisdiction over conduct occurring within their borders but causing harm outside of them, and foreign

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166 The effects test was established in U.S. law in 1945 – see United States v. Aluminum Company of America, 148 F.2d 416 (2nd Cir. 1945) – and as discussed above, the 1948 Charter of the International Trade Organization had extensive provisions regarding restrictive business practices.
governments in several nations have implemented blocking and claw-back statutes.\textsuperscript{167}

Second, Justice Department appeals for positive comity, and private petitions to foreign agencies, will yield satisfactory results only if foreign antitrust law and authorities agree that the alleged anticompetitive conduct warrants action. This can be problematic, because national authorities and courts may be constrained by statutes or by the policies of their governments to consider industrial policy goals in applying antitrust laws.

For example, national regimes differ regarding the conditions under which they will tolerate or encourage cartels in order to stabilize markets. A notable example of this was the uranium case of the late 1970s, which placed the United States at odds with several of its major trading partners.\textsuperscript{168} Similarly, the Japanese and German governments continue to tolerate cartels in industries with excess supply.

In regulated industries such as insurance, foreign law may require or permit U.S. and foreign firms to engage in activities abroad that affect U.S. markets in ways that violate U.S. law. U.S. firms may use the requirements of a foreign law as a defense against U.S. antitrust enforcement if the foreign law requires behavior within its jurisdiction that violates U.S. law. However, U.S. firms may not use the requirements of foreign law as a defense against U.S. enforcement if they can act so as to comply with the requirements of both foreign and U.S. laws.\textsuperscript{169}

\begin{footnotesize}
\begin{enumerate}
\item[167] See footnote 32.
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Third, because national laws and enforcement are most concerned with the welfare of domestic consumers and producers, they can be inward-looking and parochial in their focus. For example, virtually all national antitrust regimes exempt export cartels from enforcement when they cause no harm in domestic markets. Often, this results in hard-core cartel activity that is actionable under the law of the importing country but not at the point of collusion. Such situations are ripe for conflicts regarding the extraterritorial application of law.

Also, national authorities may choose not to enforce laws when restrictive business practices benefit domestic firms at the expense of foreign competitors. For example, cartel arrangements in Japan often require private controls on imports to restrict supply and maintain targeted prices, and they sometimes result in dumped exports. Furthermore, keiretsu arrangements appear to pose few barriers to robust competition among established Japanese firms, but they may pose substantial barriers to new competitors, and in particular, to foreign firms. Much the same may be said about the Premiums Act and the Large Stores Law. Seeing no harm to their domestic economy, Japan only reluctantly addresses the barriers to foreign competitors created by those arrangements.

Fourth, U.S. and foreign enforcement regimes, applying similar statutes, may develop quite different standards for firm behavior and different approaches for assuring the benefits of competition. For example, consider the differences in U.S., EU and Japanese thresholds for finding monopoly power, criteria for establishing abuse of dominance (e.g., predatory pricing), and preferred methods for inoculating markets against the dangers of abuse. Also, consider the differences in U.S., EU and Japanese policies toward vertical restraints.

Diversity in standards for firm behavior may have neutral consequences for the ability of foreign and domestic firms to contest markets. For example, the different U.S. and EU approaches to vertical restraints require U.S. and EU firms to compete by different rules in U.S. and EU markets but generally accord U.S. and EU firms equal footing in those markets. Alternatively, however, diversity can result in practices that assure robust competition among domestic firms but effectively
exclude foreign competitors. An example is the disinclination of the JFTC to address *keiretsu* vertical restraints.

One result of such diversity may be that behavior viewed as innocuous in the United States could be regulated or prohibited abroad. Coupled with the inclination of some authorities to apply industrial policy objectives in formulating antitrust remedies, that could result in U.S. firms being subject to conditions that harm their competitiveness.

For example, both the Justice Department and the European Commission investigated various IBM marketing practices during the early 1980s. The European Union challenged the IBM practice of bundling software and peripherals (disk drives and memory) with its System 370 mainframe computers, and not releasing interface specifications for peripherals to competitors until it began shipping newly modified versions of them. The Justice Department found no fault with IBM, whereas the Commission, over the strong objections of the U.S. government, obtained an undertaking from IBM to refrain from bundling memory and to release interface information for new products earlier.  

Both the FTC and the European Commission evaluated the 1997 Boeing-McDonnell Douglas merger. Because the newly combined company largely competed with Airbus and other firms in global markets, both agencies were evaluating the merger in the same competitive context. The European Union objected to the merger because of the market share of the newly combined company, and extracted conditions from Boeing not required by the FTC. In particular, for a period of ten years, Boeing agreed to operate the commercial portion of McDonnell Douglas as a separate entity and not to enforce exclusive purchase agreements it had negotiated with several U.S.-based airlines.

In addition, Boeing agreed to license to competitors patents obtained through government-funded R&D and to submit annual reports

to the European Commission on nonclassified aeronautics projects.\footnote{Bureau of National Affairs, \textit{International Trade Reporter} (July 30, 1997), pp. 1313-1315; and EU, \textit{XXVIIth Report on Competition Policy} (1997), pp. 170-172.} That remedy imposed a new competitive burden on Boeing: as payment for its continued access to EU markets, it was forced to surrender to its principal European competitors intellectual property that had been developed in the United States incidental to servicing government customers. The remedy clearly constituted an extension of the EU industrial policy of aiding the growth of Airbus and the companies that participate in the Airbus consortium.

Fifth, to firms and individuals bringing suits in U.S. courts, U.S. law affords wide access to investigative tools and remedies – e.g., discovery, injunctive relief, treble damages, and costs and attorney fees for prevailing plaintiffs. Many of those tools are much less available, or simply nonexistent, in other jurisdictions. In the European Union and Japan, where access to private actions are severely constrained, U.S. nationals seeking relief are largely limited to petitioning the European Commission and the JFTC to investigate alleged transgressions, and appealing to the Justice Department to petition for positive comity.

Better access to remedies through private actions would be particularly valuable in situations where enforcement authorities are disinclined to prosecute conduct that imposes its primary harm on foreigners and grants its primary benefits to domestic firms, even though violating domestic law. Better access to remedies could be useful in situations where statutes and regulations have been modified and case law is underdeveloped – for example, in Japan, where DSBP Guidelines have been modified to address vertical restraints better but have not been adequately applied.\footnote{See discussion at footnotes 131 and 132.}

Sixth, national governments, when they manage the production of natural resources, often engage in cartel behavior (e.g., the Organization of Petroleum Exporting Countries and other international commodities cartels.) Commercial public enterprises – e.g., publicly owned


\footnote{See discussion at footnotes 131 and 132.}
telecommunications firms – can fall within the reach of foreign antitrust enforcement when their actions harm foreign consumers and the integrity of competition in foreign markets.\(^{173}\)

However, price fixing and production management of natural resources and agricultural commodities by governments are generally overlooked by antitrust regimes in importing countries.\(^{174}\) Often fig-leafed by claims that they serve conservation purposes and other legitimate functions of government, such practices are generally intended to raise prices, extract rent from foreigners, and transfer wealth from resource-consuming states to resource-producing states. Sovereign immunity for such perverse commercial activities distorts trade and reduces economic efficiency in the global economy, and provides political coverage for industrialized countries to maintain antitrust exemptions for export cartels of every stripe.

\(^{173}\) See discussion of Foreign Sovereign Immunities Act at footnote 27.

\(^{174}\) For example, when the International Association of Machinists brought suit against OPEC for price fixing in California in 1979, the district court found that managing resource extraction was essentially a sovereign, rather than a commercial, act. The Ninth Circuit was uncomfortable with this analysis but affirmed the lower court decision on the basis of the Act of State Doctrine.

Although the Circuit Court's finding is generally viewed as correct, Hovenkamp concludes:

the Act of State analysis falls short in important respects. First, the OPEC cartel, where governments themselves are sellers, seemed to be "commercial" under generally accepted definitions. Second, the prices that were fixed applied extraterritorially to sales made elsewhere, and the Act of State doctrine is generally limited to Acts committed on the soil of the sovereign whose act is called into question.

Significantly, the U.S. government did not intervene, either formally or as amicus, to express an opinion in the OPEC case. See Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice, pp. 704-705 and 706-707; and Handler, et. al., Trade Regulation, pp. 1214 and 1216-1217.
Seventh, in most developing countries, antitrust law is underdeveloped. "Many do not have competition laws; those that do, have limited implementation ability." In such circumstances, opportunities are very limited to appeal effectively for positive comity, private petitions for official enforcement, and private enforcement suits.

To address those issues, an effective CPA should require member governments to make illegal, and to take action against, those restrictive business practices within their territories that harm other members’ consumers and producers. The agreement should specify the classes of business behavior to which their commitments apply – e.g., abuse of dominance and cartels – and the commitments should apply to the commercial activities of governments as well as private firms and individuals.

Also, a CPA should afford members’ consumers and producers national treatment in the application of antitrust, and should require that, in formulating antitrust remedies, members should not advance industrial policy objectives in ways that disadvantage foreign firms.

Further, a CPA should require member governments to afford other members’ consumers and producers adequate access to private actions and judicial appeal of the decisions of antitrust enforcement authorities. Should any member believe another member is failing to comply with the agreement, either in a particular case or as a general practice (e.g., noncomplying statutes or regulations), the agreement should provide for dispute settlement in the WTO by a panel well qualified in antitrust law.

Chapter 9:
Structuring A Competition Policy Agreement

Should WTO member governments agree to move forward with a CPA, negotiators should address five sets of issues: overall objectives, standards of enforcement, standards of performance, dispute settlement, and membership.

Objectives

The principal objectives of a CPA should be to ensure that restrictive business practices within the territory of any signatory state do not deny or impede market access by products and firms\(^\text{176}\) of other signatory states, or impose substantial harm on consumers or producers in other signatory states.

Translating those objectives into tangible obligations for national law and enforcement is complicated by the substantial diversity in the means and the goals of policy among national antitrust regimes. For example, enforcement in the European Union and Japan is more regulatory than in the United States, and EU and Japanese policy afford greater consideration to industrial policy than does U.S. policy. How should a CPA cope with such differences?

Regarding means, WTO agreements regulating other aspects of government policy recognize that national business and legal institutions differ. Generally, agreements do not require governments to harmonize practices but only to conform them to the extent necessary to meet the market access obligations of the agreements.\(^\text{177}\)

\(^{176}\)Here the term “firms” is used to include individuals and organizations engaged in commerce.

\(^{177}\)For example, members establish product standards in different ways to meet varying objectives. What is required by WTO agreements is that these standards be nondiscriminatory and do not raise unjustifiable barriers to imports.
Regarding goals, the general orientation of WTO rules is to give top priority to enhanced market access. Those rules countenance the industrial policies of individual members to the extent that they do not compromise the market access benefits other members expect from their agreements.\textsuperscript{178} This approach reflects the principal WTO goals of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income" through the "substantial reduction of tariffs and other barriers to trade" and "the elimination of discriminatory treatment in international trade relations."\textsuperscript{179}

Consistency would require that improving and ensuring market access – improving the contestability of markets by foreign products and firms – should be the primary objective of a CPA. National regimes could be permitted to pursue other, industrial- and social-policy objectives through antitrust enforcement, but only to the extent that these do not harm consumers and producers domiciled in other signatory states.

It is important to remember that WTO agreements are contracts among sovereigns signatories who agree to exchange market access benefits and to accept adjustments. When a government signs an agreement, it accepts constraints on its freedom to implement future industrial policies. Before signing an agreement, therefore, governments, through their political processes, weigh the economic tradeoff (better market access versus freedom to undertake future industrial policies). After an agreement is in force, the WTO has no competent political process to recalibrate these contracts.

\textsuperscript{178}For example, the Agreement on Subsidies and Countervailing Measures recognizes that many kinds of subsidies may be important to industrial and regional policy. However, signatories may countervail subsidies if they injure one of their industries in their home market or may seek relief if they impose harm on one of their industries outside their home market.

\textsuperscript{179}Agreement Establishing the World Trade Organization, preamble.
Standards of Enforcement

An effective CPA should contain substantive obligations regarding nondiscrimination, market access, export-related activities, the commercial activities of governments, industrial policy and administrative guidance, powers of national antitrust enforcement authorities, private actions, the standing of signatory governments in other signatories' courts, and the status of CPA obligations in domestic law.

Nondiscrimination

Regarding antitrust law and enforcement, and regarding all other laws and government policies and practices regulating or affecting the contestability of markets, signatories should be obligated to afford national treatment and most-favored-nation treatment to other signatories' products, firms and nationals. The CPA should state that this obligation applies to statutes and regulations; the actions of administrative agencies; the formal, informal, and implied advice and (administrative) guidance offered by governments to private firms or public commercial enterprises; agents of governments; and the application of law by courts.

Market Access

Signatories should be obligated to make illegal, and to take action against, restrictive business practices that deny or impede opportunities for other signatories' products and firms to contest markets on terms no less favorable than those enjoyed by domestic and other foreign products and firms. Activities that could so impede international commerce would include:

- abuses of dominance, explicit or implicit agreements among firms, and other anticompetitive practices; and

- practices that limit or deny the access of importers and foreign firms to suppliers, distribution channels, advertising, and all other goods and services necessary or helpful for marketing their goods and services.
An effective CPA should recognize that structures of industrial organization (for example, relationships among competitors and firms along the supply chain, whether established through explicit or implied agreements; ownership or cross-ownership of stocks, debt, or other financing relationships; exchange of directors or employees; or the formal or informal associations of firms within and across industries), although not necessarily illegal, may give rise to anticompetitive business practices that violate the agreement.

Signatories should be obligated not to implement laws and regulations – or similarly, not to act through, or ignore, the actions of private associations – that limit the ability of importers and foreign firms to price, to contest markets and defend market shares, or to offer discounts and premiums, to advertise, or to undertake other forms of nonprice competition.

Signatories should be obligated, in the application of antitrust law (including merger review), not to impose on foreign firms criteria or standards of behavior different from those imposed on domestic firms in comparable situations. Similarly, signatories should be obligated not to impose conditions that have the purpose of advantaging domestic firms over foreign firms. Such provisions could strengthen the hand of foreign firms in negotiations with antitrust authorities, and in judicial hearings and appeals, if they believe their foreign status caused treatment less-than-equal with that afforded to domestic firms.

The general provisions above should be supplemented by a nonexhaustive, illustrative list of restrictive business practices that may violate the agreement. For example, the list could include certain forms of predatory pricing and other abuses of dominant position; hard-core cartel activities, such as agreements fixing prices, allocating production quotas, assigning customers, dividing market, and bid-rigging; and conditions that prejudice exports or imports in exclusive distribution agreements.

Export-Related Activities

Signatories should be obligated to take action against restrictive business practices that harm other signatories' consumers and producers.
Signatories should also be obligated to respond to requests for positive comity in this regard.

**Commercial Activities of Governments**

The obligations of the agreement should apply to the behavior of public commercial enterprises (including public monopolies), government agencies, and agents of governments engaging in commercial activity. When these entities engage in, manage, or coordinate decisions regarding the production, distribution or sale of goods or services that move through channels of international commerce, they should be viewed as engaging in a commercial activity.

**Industrial Policy and Administrative Guidance**

The obligations of the agreement should apply to the behavior of private firms and individuals, public commercial enterprises, government agencies, and agents of governments engaged in commerce, without regard to whether their behavior is required, permitted, or suggested by law, government policy or action, or by government advice or administrative guidance.

**National Antitrust Enforcement Authority**

Each signatory should be required to establish a national antitrust enforcement authority (national authority)\(^\text{180}\) and to provide the authority with adequate investigative powers and the remedial power to take action against all practices that violate the CPA. In particular:

- The national authority should have the power to require individuals, firms and government agencies within its jurisdiction to accept an investigation, to make statements, and to submit records and other evidence relevant to investigations. It should have the means to

\(^{180}\) For the United States, the FTC and the Antitrust Division of the Justice Department would share this status. In the EU, both the Commission and EU member-states enforcement agencies would enjoy this status.
impose sanctions on individuals and firms that fail to comply or that provide false evidence.

The national authority should be vested with the power, either directly or through domestic courts, to impose conditions of behavior, restructuring remedies, fines, and other remedies on those firms or entities undertaking practices that violate the CPA.

National law should guarantee the political independence of the national authority and require signatory governments to provide the national authority with adequate financial resources to meet all obligations under the CPA – in particular, adequate resources to respond effectively to the petitions of other signatory governments and private parties.

National authorities should be required to investigate complaints brought by private parties and other signatory governments concerning violations of the substantive obligations of the CPA. The national authorities should be obligated to respond in writing to those petitions.

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181 The Munich Group suggested political independence in its draft agreement (see footnote 152). Obviously, political independence can never be absolute. It cast this idea in terms of affording the national authority exclusive competence in application of the requirements of the agreement. Article 17, Section 1(b) of its draft agreement reads:

Political independence of the national antitrust authority shall be guaranteed by the domestic law of the Party to the Agreement especially embracing, as far as this Agreement does not provide otherwise, exclusive competence of the national antitrust authority within the scope of application of this Agreement and autonomy of the national antitrust authority in all decisions relating to its staff.

Commenting on these provisions the Munich Group stated:

The authority shall have exclusive jurisdiction in the application of the Agreement, especially excluding political antitrust decisions of the national government... exceptions to the general rule of exclusive jurisdiction should only be permitted as far as they are provided for by the Agreement...

Private Actions

Signatories should be obligated to provide private persons with the right to bring civil suits, access to adequate discovery, and effective remedies, including injunctive relief, damage awards, and costs and attorney fees. Such standing would be afforded to the domiciliaries of other signatories even if they do not have a commercial or physical presence in the jurisdiction where they bring action.

Further, signatories should be obligated to provide private persons with the right to bring suits in national courts to challenge:

- decisions, by national authorities and other agencies, that violate obligations of the agreement; and
- laws, government regulations, directives, advice, administrative guidance, actions, or failures to act, that violate the obligations of the agreement.

Standing for Signatory Governments

Signatories should permit other signatories to bring civil suit for remedies, as *paren patriae*, for injuries sustained by their domiciliaries in a designated national or EU court. In the United States, this could be any federal district court; in Japan, it could be designated district courts or the Tokyo High Court; and in the EU, it should be the CFI. Those courts should be required to provide access to adequate discovery, either through laws for private actions enacted to comply with the requirements of the agreement, or by directing national authorities, under the supervision of the court, to exercise power to gather evidence. This requirement would help compensate for the difficulties foreign persons encounter in seeking remedies through private actions for violations of EU law in member-state courts.

In cases brought by or against their domiciliaries, signatories should be permitted to appeal court decisions (provided domiciliaries have not already availed themselves of the same level of appeal) before
appropriate appellate courts or before a WTO dispute settlement panel (discussed below).

Further, signatories should be permitted to bring suits in national or EU courts to challenge:

decisions, by national authorities and other agencies, that violate substantive obligations of the agreement; and

laws, government regulations, directives, advice, administrative guidance, actions, or failures to act, that violate the obligations of the CPA.

Signatories should be permitted to appeal judgments and remedies rendered either before appellate courts or before a WTO panel. In the case of the European Commission, this would provide other signatories the right to appeal before the CFI, and regarding the finding of EU member courts or the CFI, to appeal before the ECJ. Alternatively, they should be permitted to appeal directly to the WTO dispute settlement panel.

**Status in Domestic Law**

Signatories should be obligated to ensure that their laws, regulations, and administrative procedures conform with their obligations under the agreement. In particular, national laws should be altered to ensure that administrative agencies and national courts are required to adhere to the obligations of the agreement as domestic law.

**Standards of Performance**

TRIPS defines, in considerable detail, the procedural requirements for civil and criminal enforcement. Articles 42 through 49 lay out requirements for procedures that are typical of those found in developed countries. For example, they specify minimum requirements regarding notice, representation, evidence, and protection of
confidentiality. When parties to a dispute fail to comply with an order to produce evidence, the other party may accord judicial authorities the authority to make judgments on the basis of available evidence. Decisions must be written, reasoned and based on the facts in a case. Administrative findings must be subject to judicial appeal.

Similar requirements should also be written into a CPA. Failure to comply with those standards in a particular case, or as a general practice, should be grounds for a finding of noncompliance by a WTO dispute settlement panel.

The WTO secretariat currently undertakes periodic reviews of member-state trade policies, and with the advent of a CPA, those reviews should be extended to include antitrust enforcement and restrictive business practices. Nonconfidential information gathered in the preparation of those reviews should be made available to complainants and respondents in WTO disputes.

**Dispute Settlement**

The WTO has an elaborate process for enforcing rules. Briefly, when a complaint is filed, the first stage is consultation, an effort to reach a compromise acceptable to both parties. If that fails, a dispute settlement panel consisting of three (sometimes five) trade experts is established. Normally, those experts are senior trade officials from governments not involved in the dispute. Their findings are reported to the WTO Council, which adopts them unless there is a consensus not to do so.

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183 The four largest members – the United States, Japan, the EU, and Canada – are reviewed every two years, the next sixteen every four years, and others every six years. Regarding the latter, longer periods between reviews may be extended to the least developed countries.

184 Prior to their report to the WTO Council, their findings may be appealed before another panel composed of members of the Appellate Body.
There are four sets of reasons why that procedure should be altered for a CPA. First, no matter how carefully a CPA is drafted, panel decisions will clarify the meaning of its provisions and have important consequences for how effectively the CPA regulates national antitrust regimes.

Consequently, it is essential that members have confidence in the fairness and thoroughness of the panels, and confidence that the CPA will be consistently applied. In this regard, WTO panels have sometimes fallen short.  

A CPA may not achieve perfect justice, but it can strive for fair, understandable and consistently applied rules to guide governments and private businesses. All of this argues for a permanent panel having a reliable, yet evolving, personality.

Second, U.S. resistance to a CPA emanates, in part, from concerns that antitrust policy and decisions would be made and reviewed by trade policymakers instead of antitrust enforcement officials and national courts. It makes sense to address this concern by ensuring that panelists for disputes falling under the purview of the CPA are selected from among sitting and former antitrust officials, economists and lawyers expert in the field, and judges.

Third, when a respondent government fails to act on a WTO dispute panel’s finding of violation, the only penalty it currently faces is the withdrawal of compensating benefits, accomplished through higher tariffs imposed by complainants. Unhappily, those tariffs often hurt innocent parties and impose costs on consumers in the complaining country. A more effective remedy would be to require that governments failing to comply with dispute settlement panel findings pay monetary compensation.

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186 The bilateral investment agreements the United States has in place with more than thirty countries, and the North American Free Trade Agreement, provide for payments of damages when foreign investors are harmed.
Fourth, WTO members currently may violate an agreement willfully and face no penalties until many months after their actions become the focus of a dispute settlement panel. If they are found to violate an agreement, they merely have to remove the offending practices, and all is forgiven. Moreover, after a dispute settlement panel finds a violation, offending members may avoid or substantially delay compliance by taking cosmetic action. 187

For these reasons, dispute settlement panels should be able to require that violating governments pay compensation when they impose costs on foreign firms and consumers by failing to comply with the requirements of the CPA.

**CPA Council of Ministers**

A Council should be established to oversee the implementation of the CPA, similar to the Councils for Trade in Goods, Trade in Services, and the Trade-Related Aspects of Intellectual Property. Each signatory should be represented on the CPA Council by the head of its national authority, minister of justice, or their appointed representative.

**Permanent Dispute Settlement Panel**

A permanent WTO panel should be established whose membership includes sitting and retired antitrust enforcement officials, antitrust practitioners, and judges. These panelists should be instructed not to represent their governments but rather to apply the CPA as international jurists.

187 In the recent U.S.-EU disputes concerning bananas and hormone-treated beef, the EU pursued its nonconforming practices for years and avoided penalties for fifteen months after the dispute settlement panel found a violation. See Morici, *Setting U.S. Goals for WTO Negotiations*, p. 10-11.
A selection and ratification process should be established that helps ensure the objectivity of the panelists. This could be achieved, for example, by selecting one panelist from each of the four enforcement zones enumerated in Chapter 7\textsuperscript{188} and selecting one panelist from a fifth zone comprised of developing countries. Within each zone, Council members would select their nominee by consensus. To be confirmed, each nominee would require approval by a majority of Council members in three of the remaining four enforcement zones.\textsuperscript{189}

The obligations that result from a panel finding of violation should depend on the nature of the dispute:

When a signatory is found to have a nonconforming law, regulation or practice, it should be required to correct the situation to the satisfaction of the panel. If the offending signatory failed to propose a satisfactory plan of action\textsuperscript{190} within thirty days, it should be required to pay the complaining signatory monetary damages, the amount and frequency of which would be determined by the panel in order to compensate for the harm imposed (compensatory damages).

When a signatory is found to have imposed costs on a complainant's consumers or firms, either through action or inaction, it should be required to correct the offense and to pay to the complainant compensatory damages, the amount and frequency of which would be determined by the panel. The complainant, at its own discretion, could

\textsuperscript{188} The United States and Canada, Europe, Australia and New Zealand, and Japan.

\textsuperscript{189} For example, the United States and Canada would nominate a panelist; each of the other four enforcement zones would vote on the nomination, and the panelist would have to be approved by three of the four other zones.

\textsuperscript{190} Such a plan need not specify a precise and immediate remedy but rather a commitment by the respondent to achieve legislative or regulatory changes within a period of time determined satisfactory by the panel. Subsequently, if the respondent failed to act as it represented, the panel would then authorize payment of compensatory damages.
transfer those payments to the harmed consumers and firms.

When a signatory appeals the decision of another signatory's national authority or court, the decision should be remanded to the authority or court whose finding violated the CPA. If the national authority or court repeatedly failed to act on the instructions of the dispute settlement panel, its government should be required to pay compensatory damages to the complainant. If the actions of the national authority or court harmed a complainants' consumers or firms, its government should be required to pay compensatory damages, the amount and frequency of which would be determined by the panel. The complainant, at its own discretion, could transfer those payments to the harmed firms and consumers.

**Membership and Accession of New Members**

The EU Group of Experts advocated that a CPA should be a pluralateral agreement. Initial participants should include:

- the countries in the four enforcement zones listed in Chapter 7 - essentially, the OECD countries, the emerging economies of Eastern Europe that have signed cooperation agreements with the EU, and
- other newly industrializing and developing countries, such as Hong Kong, Singapore and Taiwan, and several other

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191 Director General IV - Competition, Competition Policy in the New World Order: Strengthening International Cooperation and Rules p. 16-17.
developing countries fully prepared to meet the obligations of a rigorous CPA.

Many developing countries lack the reliable legal systems necessary to implement effective antitrust regimes. Neither their signatures on a CPA nor penalties imposed by the WTO Dispute Settlement Panel for noncompliance are likely to bring about the systemic changes necessary to alter those deficiencies. Yet, for developing countries, eventual membership in the CPA would offer important benefits – for example, those benefits flowing from the regulation of cartels and vertical restraints.

Accordingly, the CPA should contain an accession clause outlining standards for antitrust law and enforcement, the judicial institutions necessary to support them, and procedures for reviewing and approving applications.

Comments

The market access, export, and government commercial activities provisions would require signatory governments to make illegal, and to take action against, restrictive business practices within their territories that deny or impede market access to, or impose harm on, other signatories' producers and consumers. Those provisions would establish classes of business practices to which enforcement obligations apply.

The provisions regarding the investigative and remedial powers, political independence, and financial resources of national authorities should better ensure that those authorities have the tools, the will, and the means to act against practices that violate the CPA.

Taken together, these provisions would give U.S. consumers and producers – or the Justice Department acting on their behalf – better prospects for success when petitioning the JFTC, the European Commission, and other national authorities to investigate cartels, practices that deny access to distribution channels, and other anticompetitive practices. By requiring national authorities to act against behaviors that cause substantial harm beyond their borders, these provisions should
make appeals for positive comity more effective and reduce the frequency of conflicts over the extraterritorial application of national laws.

Should the JFTC, the European Commission, or some other national authority be reticent or disinclined to remedy harm done to U.S. producers and consumers, the private actions provisions would better equip U.S. consumers and producers to seek relief through the courts. It should provide them access to remedies abroad more comparable to those available to foreign persons in U.S. courts.

The *paren patriae* provisions would permit the U.S. government to bring suit in other signatories' courts on behalf of U.S. consumers and producers who may be ill-equipped to avail themselves of remedies – owing, for example, to the high cost of bringing a suit, or owing to the multinational incidence of anticompetitive conduct. The standing for signatories to appeal administrative and court decisions involving their domiciliaries, and to challenge laws, regulations, directives, and advice that violate the CPA, is proposed for similar reasons.

Should national courts be reticent or disinclined to find illegal those restrictive business practices that are harming foreign interests, or to act against or embarrass their national authority or incumbent government, the national-treatment and status-in-domestic-law provisions should clarify their obligations.

Should national courts nevertheless fail to act in accordance with the requirements of the CPA, the dispute settlement provisions would permit signatory governments to seek review and remand of both administrative and court decisions through WTO dispute settlement, and ultimately to obtain monetary damages, the amount, frequency and duration of which would compensate for harm imposed on their consumers and producers.

The industrial policy and administrative guidance provisions would require that antitrust considerations prevail in the event of conflicts between antitrust law and other laws, government policies, and administrative guidance. These provisions, along with the national treatment and market access provisions, would give foreign firms and
their governments the standing to challenge, in national courts and in the WTO, those decisions (e.g., in merger review) that impose conditions not imposed on domestic firms in similar circumstances, or that arbitrarily advantage domestic competitors at their expense.

Although a CPA with the provisions outlined above would require important changes in national laws and enforcement, and would bring some national regimes into closer alignment, it would not require the strict harmonization of national regimes. Rather, the CPA would require that restrictive business practices in one signatory state will not be permitted to harm producers or consumers in other signatory states as a consequence of inadequate laws and regulations, selective enforcement, the trumping of antitrust enforcement by industrial policy, or simple prejudice against imports and foreigners.

For example, U.S., EU and Japanese enforcement authorities could continue to apply different standards for establishing dominant-firm position and the abuse of dominance, and for remedying problems. However, they would be obliged to treat foreign and domestic firms on equal terms, and to address the abuse of dominance by their own firms when other signatories’ consumers and producers are harmed.

U.S. authorities could continue to apply more lenient approaches to vertical restraints than does the European Commission, with each continuing policies appropriate to their geographic and historical circumstances.

However, to the extent that keiretsu practices deny U.S. and EU firms access to Japanese markets, those firms and their governments would have much better access to remedies in Japanese courts and, ultimately, through WTO dispute settlement.

In turn, Japanese compliance with the CPA could take many forms. For example, it could rely on administrative guidance (effective, proactive industry programs to open procurement and distribution to foreign firms), or the JFTC could address keiretsu relationships in ways that are more similar to EU policies toward vertical restraints.