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118. Id.
120. Id.
121. Id., at 12.
124. Id.
125. Id.
129. Supra, note 127, 1-2.
130. Id.
131. Id.

COMPARATIVE ASPECTS OF ANTITRUST LAW BETWEEN JAPAN AND THE UNITED STATES

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Antitrust law in the United States and in Japan are fundamentally similar. There are, however, significant and minor differences. Both aspects will be explored in this paper. We will first summarize examine the nature of antitrust law in the United States and then compare its common and dissimilar characteristics with that of Japan.

There are three basic statutes which together with their amendments define antitrust prohibitions and sanctions in the United States. They are: the Sherman Antitrust Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act of 1914.

The Sherman Antitrust Act of 1890

The act as amended states:

Section 1 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be guilty of a felony..."

Section 2 "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony..."

Jurisdiction The constitutional basis for Congressional intervention in antitrust activities is

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its power under Article I, Section 8 to regulate interstate commerce. Although the U.S. Supreme Court initially interpreted the commerce clause as excluding manufacturing as well as service industries, the Court found activity to be in interstate commerce if it actually involves multi-state transactions or affects persons in other states in little more than a minimal way. In addition to interstate commerce, the prohibitions also affect foreign commerce. Activities by persons in other states to violate the statute even though such persons are affiliated with a subsidiary company.

Conspiracies The Sherman Act, Section 1, prohibits agreements or conspiracies to restrain trade. As in the entire field of antitrust litigations, the wording of the statute, though simple in appearance, is enormously complex. This section is concerned with "horizontal" restraints. The activity must involve more than one legal person. Generally, a corporation cannot "conspire" or contract with its officers, directors or employees to restrain trade. Any arrangement by competitors on the same distributive level which explicitly or implicitly divides territories is unlawful. Even indirect divisions of ranges which affect interstate or foreign commerce is prohibited. Agreements between competitors which prohibit them from dealing with certain other competitors or trades are per se illegal.

Resale price maintenance It is useful for a seller to dictate the price at which a buyer of the goods may resell them. Once a seller has disposed of the goods, they may be resold at whatever price the distributor or retailer desires.

"Rule of reason" Not all restraints are automatically invalid under Sherman (1). In most cases the "Rule of reason" applies, i.e., only unreasonable restraints are prohibited. Examples include:

1. Agreement to exchange data such as price information. Tendency to stabilize prices rather than allow market forces to determine the price structure.
2. Self-regulation by associations.
3. Joint ventures in themselves are legal, i.e., two or more companies banding together to perform a particular project (e.g., the construction of a dam, building of a pipeline, etc.). The problem arises when two or more competitors join together for unlawful ends.

Monopolies. Section 2 of the Sherman Act forbids monopolizing or attempts to monopolize. It does not forbid monopolies in and of themselves. There are two elements necessary to establish an offense: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident." II

Monopoly power is the power to control prices or exclude competition. Crucial to an understanding of monopolizing is the determination of the relevant geographic or product market. Product market refers to possible substitutes or reasonable interchangeability of products.

Geographic market is the area in which a particular company and its competition operate. The area may be nationwide, regional or local. Whether or not a company appears to be monopolistic often depends upon
the geographical area which the court determines to be the relevant market.

Wilful act. In addition to possessing power which alone is not sufficient to be violative of the statute, a company must commit an act to acquire or enhance its monopoly power. If a company becomes a monopoly simply because others fail to enter the market or because of an exclusive product, there is no violation of Sherman.

Attempts and conspiracies to monopolize are also prohibited by Sherman (1). Attempt relates to the effort made by a party to accomplish the goal of monopolizing, intending to and committing an overt act in so doing. The conduct required is similar to the conduct described above for monopolizing.

Conspiracy to monopolize is the attempt to monopolize in unison with at least another person with intent to monopolize.

Sanctions for violations. The Sherman Act is the only statute of the three major antitrust laws which imposes criminal as well as civil penalties. Individuals who violate the Sherman Act can be imprisoned up to three years and fined a fine up to $500,000. Corporations can be fined up to $1,000,000.00. Corporate officers acting on behalf of the company can be fined up to $50,000.00 and/or one year in prison. It is more likely, however, that the federal government will utilize the equitable powers of the court, i.e., the prosecution will generally ask the Court to issue an injunction to prevent and restrain the offending conduct, divide the assets of a company, compel a divestiture of subsidiaries of a company, grant licenses to competitors, cancel contracts and other court-fashioned remedies.

THE CLAYTON ACT OF 1914

After a decade of antitrust experience, many of the abuses which previously existed continued to prevail in a variety of forms. They were due in part to experienced corporation counsel who devised a multitude of techniques to avoid Sherman Act restraints. Congress attempted to close these loopholes in 1914 by the enactment of two major statutes, namely, the Clayton Act and the Federal Trade Commission Act. These statutes, as amended, cover a variety of abuses of which corporate and other business persons should be aware.

Price Discrimination. Section 2 of the Clayton Act as substantially modified by and known as the "Sherman-Patman Act of 1936, "provides in subsection (a) that it is unlawful to engage in price discrimination "between different purchasers of commodities of like grade and quality...where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce..." The statute thus requires a number of prerequisites before a violation will be found, namely:

(a) The persons involved must be engaged in interstate commerce;
(b) There must be at least two sales between different purchasers at a discriminatory price. There must be two distinct sales, not merely a lease, license, consignment or other like arrangement;
(c) The sales must be fairly contemporaneous.
(d) Sales of commodities of like goods and quality must be involved. Only tangible rather than intangible products are within the statute.
(e) There must be a "discrimination in price." "Price" is not merely the charge for the goods but includes terms of sale such as credit and preferential allowances. Allowing some buyers preferential credit treatment may violate the statute.

Defenses. A person charged with a Robinson-Patman price discrimination offense may defend against liability by interposing a number of defenses specifically authorized by the Act. These defenses include:

(a) Cost differential. Section 2(a) says that the statute does not "prevent differentials which make only due allowance for differences in the cost to manufacture, sale or deliver, resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered..." A seller can classify an average customer into various groups provided they are relatively homogeneous.
(b) Changing conditions. Another defense which a person may interpose is proof that price variations took place in response to a change in conditions such as "actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the good concerned." The most common example is the lowering of prices for outdated or seasonal items.

(c) Meeting competition. Section 2(b) states that a seller can justify price differentiation by "showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of
a competitor, or the services or facilities furnished by a competitor.  

**Indirect price discrimination-broker allowances** Section 2(c) makes it unlawful "to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered..."

**Compensation for services and promotions** Section 2(d) makes it unlawful for a seller to pay for services or facilities rendered or furnished by a buyer unless such compensation is available on a proportionate basis to all other customers of competing products. Section 2(e) forbids a seller from furnishing services or facilities to buyers unless they are rendered to all buyers on a proportionate basis.

**Tying arrangements** Section 3 of the Clayton Act forbids a seller or lessor of a commodity from conditioning or tying its sale or lease to the purchase or lease of another product. There must be at least two separate products: the tying and the tied product. A second requirement is that the seller or lessor has substantial market power so as to be able to lessen competition substantially.

**Mergers** The first paragraph of Section 7 of the Clayton Act, amended in 1950 and 1980, sets forth the merger provision:

"No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce where in any line of commerce or in any activity affecting commerce, in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The merger involves the combining of previously separate firms into one having a common ownership and control. Originally, the Clayton Act forbade the acquisition of stock in another corporation which tended to lessen competition. The Cellar-Kefauver Act of 1950 amended Section 7 to include asset acquisitions as well as stock mergers.

**Remedies** The Clayton Act provides only for civil remedies as distinguished from criminal penalties. The United States Government acts through the Justice Department and the Federal Trade Commission in its administrative hearings. Private parties have broad remedies for statutory violations directly affecting them. Equitable remedies allowable to the government include actions to: (1) enjoin or stop the defendant from committing the offending act; (2) cause a divestiture or severing of relationship if an action such as a completed merger has taken place; (3) preliminarily enjoin a present activity pending determination of the outcome; (4) compel a company to license or give permission to others to use its patents, trademarks or copyrights; and (5) divide the assets of a company. In addition, the parties may be induced to enter into consent decrees whereby the parties settle under certain terms and conditions. Approximately 85 percent of all cases are resolved in this manner.

The most potent private remedy is an action for treble damages. A private party is able to collect three times its provable damages plus a reasonable attorney's fee for loss of profits, added costs attributable to the forbidden activity and decrease in value, if any, of the injured party's investment. The litigant, however, must establish a causal relationship between its damages and the action of the offending party.

**Exceptions** Exempted from the prohibitions of the Clayton Act include labor unions and business concerns controlled by other governmental agencies, such as banks, railroads, airlines and stock exchanges.

**THE FEDERAL TRADE COMMISSION ACT OF 1914**

The third major piece of legislation governing antitrust activities is the Federal Trade Commission Act enacted at the same time as the Clayton Act. The Act created the Federal Trade Commission. Section 5(a)(1) grants antitrust jurisdiction to the FTC by providing: "Uniform methods of competition in commerce, and unfair or deceptive acts or practices in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." Section 5(a)(6) provides: "The Commission is hereby empowered and directed to prevent persons, partnerships or corporations...from using
unfair methods of competition in commerce and unfair or deceptive acts or practices on commerce."

The FTC is solely empowered to enforce Section 5(a)(1) above and to enforce, together with the Attorney General, the Sherman and Clayton Acts. Section 5(a)(1) is so broad that virtually all conduct prohibited by the Sherman and Clayton Acts comes within its purview. For example, conspiracy or attempts to monopolize, price fixing, vertical and horizontal restraints are "unfair methods of competition." The provision is broader than the Sherman and Clayton prohibitions. Thus, certain conduct not forbidden under these laws may be proscribed under the Act.

The FTC is empowered to protect the consumer against deceptive and unfair acts or practices such as false and misleading advertising, deceptive claims, nondisclosure of hazardous products and deceptive warranty representations. It has the power to conduct broad investigations of possible antitrust violations, including the issuance of subpoenas. It may issue guidelines, advisory opinions and enter into consent decrees with persons who may be violating the laws within FTC jurisdiction. It may sue in Federal Courts for the issuance of an injunction and can issue cease and desist orders directly. Violations of its orders can result in civil penalties of up to $10,000.00 per day.

We will now review the manner in which Japan promulgates and enforces its antitrust laws.

Japanese Antitrust Law

The historical development of Japan's policy with respect to cartels may be divided into three major eras, namely, the Tokugawa Shogunate Era (1603-1868); the post-Meiji Restoration of 1868 and the post-World War II Era. Prior to 1868, the Tokugawa governments were essentially feudalistic in nature with emphasis upon the concept of "wa" or social harmony which mandated that commercial disputes be resolved without litigation. Individual rights were subsumed to that of society.17

The Tokugawa government was overthrown in 1868 and replaced by a government under the Emperor known as the Meiji Restoration of 1868. The Restoration brought about a transition of the feudal based society into the modern world with a reformed monetary, educational and industrial system. Government worked closely with private industry to create a unique form of Japanese capitalism. As in the U.S., various cartels formed known as the Zaibatsu combines, led by a number of families. Unlike the U.S. which passed the several antitrust laws referred to in this paper, the government virtually fostered cartels and monopolies which it found easier to control than a more pluralistic industrial complex.18 The four major Zaibatsu families of Mitsubishi, Sumitomo, Yasuda controlled 544 companies which constituted almost half of the financial sector and a third of heavy industry.

The allied victory over Japan led to a dissolution of the Zaibatsu groups. President Harry S. Truman's directive of September 6, 1945 to General Douglas MacArthur mandated the development of democratic organizations in labor, industry and agriculture, directed to peaceful ends. It stated:

"To this end it shall be the policy of the Supreme Commander
(a) to prohibit the retention in or selection of places of importance in the economic field of individuals who do not direct future Japanese economic effort solely toward peaceful ends; and
(b) To favor a program for the dissolution of the large industrial and banking combinations which have exercised control for a great part of Japan's trade and industry.

MacArthur issued a Directive calling for the dissolution of the Zaibatsu and other combinations of enterprise, the abolition of private monopolization and the establishment of a competitive system.19 Ultimately, the statute, which was an enactment of these goals, was passed and made effective on July 20, 1947 and was known as the "Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade."20 The Act was modeled upon the three major U.S. antitrust enforcements, namely the Sherman Act, the Clayton Act and the Federal Trade Commission Act.

The Japanese Antimonopoly Act of 194721

The purpose of the Act is set forth in Section 1:

"This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of
economic power and by eliminating unreasonable restraint of production, sale, price, technology, and the like and all other undue restoration of business activities through combination agreements and otherwise, aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of trade or enterprises, to heighten the level of employment and people's real income and thereby to prevent the domestic and wholesome development of the national economy as well as to assure the interest of consumers in general."

The purpose clause is reflective of the goods of the U.S. statutes outlined above. The substantive requirements are set forth in Section 3 of Chapter II which states that "no entrepreneurs shall effect private monopolization of any unreasonable restraint of trade." The section is a summary of the two substantive sections of the Sherman Anti-Trust Act. Section 19 reflects Section 5 of the Federal Trade Commission Act by forbidding an entrepreneur from employing unfair business practices. The Federal Trade Commission Act created the Federal Trade Commission to enforce the provisions of the Act. Enforcement of the Japanese Antimonopoly statute is by the Fair Trade Commission. The similarity in nomenclature is not coincidental.

Section 2 of the Antimonopoly Act defines each of the key words of Section 3. "Entrepreneur" is any person who carries on a commercial, industrial, financial or other business including officers, employers, or agents thereof. "Private monopolization" refers to business activities by any person acting alone or an entrepreneur or conspiracy with other entrepreneurs (almost identical to Sherman Act, Section 2. "Every person who shall monopolize...or combine or conspire with any other person") which excludes or controls business activities of other entrepreneurs causing a substantial restraint of competition in any particular field or trade (Sherman: "Every contract combination...or conspiracy, in restraint of trade...or commerce among the several States, or with foreign nations is declared to be illegal.") "Unreasonable restraint of trade" is defined as business activities by contract or concerted activities which mutually restrict their business practice so as to fix, maintain, or enhance prices, or to limit production, technology, products, facilities or customers or suppliers causing a substantial restraint of competition (Section 2(6)) This definition is very similar to Section 2 of the Robinson-Patman Act.

Fair Business Practices The prohibition against monopolization extends to international agreements or contracts containing subject matter which constitutes unreasonable restraint of trade or unfair business practices (Section 6(1)). Unfair business practices refers to any act which tends to impede fair competition and which: (1) unduly discriminates against other entrepreneurs; (2) deals at undue prices; (3) unreasonably induces or coerces customers of a competition to deal with oneself; (4) trading with another party so as to unjustly restrict the business activities of the latter; (5) abusing one's bargaining position; or (6) unjustly interfering with a transaction between a competitor and its customer or causing an officer or shareholder to act against the interest of his/her company. The definition is reflective of U.S. law with respect to price discrimination and predatory pricing practices (2,3) as well as Clayton's prohibition of tying and boycott (Section 3). The last aspect of the definition is similar to U.S. common law injunction against interference with contracts. (Pennsoil litigation).

The Fair Trade Commission further elaborated upon the meaning of "unfair business practices" in its notifications of 1953 and 1982. Among the specific prohibitions were:

- Unduly refusing to deal with a certain entrepreneur or restricting the quality or a substance of a commodity or causing another to so refuse service [U.S. - boycott provision of Clayton];
- Price discrimination (Compare Robinson-Patman);
- Affording favorable or unfavorable treatment of and entrepreneur (Robinson-Patman 2(d));
- Unjustly excluding an entrepreneur from a trade association or unjust discrimination against it; without proper justification, supplying a commodity or service excessively below cost or at a low cost on a continuous basis so as to cause difficulties to other entrepreneurs;
- Unjustly purchasing a commodity or service at a high price as to cause difficulties to other entrepreneurs;
- Wrongful inducement to customers of a competitor to
deal with oneself by alleged unsubstantial claims that one's commodity or service is better than competitor or by offering unjust benefits in the light of normal business practices;

Unjustly causing a purchaser to purchase a commodity or service by tying it with another purchase or otherwise coercing the party to deal with oneself;

Unjustly dealing with a party on condition that it does not deal with a competitor;

Imposing resale price restriction without proper justification upon the purchaser of one's commodities;

Abusing one's dominant bargaining position by unfairly compelling the other party to purchase a commodity or service not involved in the transaction or causing it to provide money, service or other economic benefit not warranted under the circumstances, setting or changing terms of the transaction in a disadvantageous way to the other party or otherwise imposing a disadvantage upon the other party regarding execution of the agreement;

Interfering with the formation of a contract or inducing a breach of contract by a competitor;

Interfering with the internal operation of a competitor by wrongful inducement of a shareholder in its exercise of voting rights divulgence of secrets or by any other means.

Filing Section 6(2) of the Act mandated that any entrepreneur entering into an international transaction shall file a report within 30 days with the FTC together with a copy of the contract or agreement or a memorandum of the substance of an oral agreement. Forms are provided by the FTC in accordance with the nature of the agreement. Failure to file such a report would subject the entrepreneur to a fine of up to 2 million yen and further subjects the offending officer, agents or employees committing the violation to a similar fine. No such comparable statute or regulation exists in the U.S.

Trade Association The act specifically addresses activities of trade association. Section 8(1) states:

"No trade association shall engage in any one of the following acts:

i) Substantially restricting competition in any particular field of trade;

ii) Entering into an international agreement or an international contract as provided for in Section 6(1) [Contracts which unreasonably restrain trade or unfair business practices;

iii) Limiting the present or future number of entrepreneurs in any particular field of business;

iv) Unduly restricting the functions or activities of the constituent entrepreneurs [meaning an entrepreneur who is a member of the trade association; hereinafter the same];

v) Causing entrepreneurs to do acts as constitutes unfair business practices."

The reason why trade associations are specifically addressed is because historically these associations were meeting grounds for the formation of cartels. Every trade association is given 30 days to file a report with the FTC of its formation (Sec. 8(2)) as well as for any changes or termination thereof (Sec. 8(4)(4)).

The FTC guideline formulated in August, 1979 elaborated upon the statutory prohibition. Generally they prohibit price fixing of every nature, enforcement of resale price maintenance, restriction of output, restriction of governing sales territory, and competition, restriction concerning development or use of technology, defamation of non-members and other restrictions.

The remedy provided is similar to the remedy set forth above but in addition thereto. The FTC is empowered to issue a dissolution of the trade association and take any measure to carry out the statute.

Monopolistic Situations If the FTC determines that a monopolistic situation exists, it may order the entrepreneur to transform a part of its business or take any other measures necessary to restore competitiveness with respect to such goods and services. The statute
does place some limitations upon the FTC by foregoing statutory injunction if such action by the FTC reduces the business of the entrepreneurs to such an extent that the cash required for the sale of goods or services will rise sharply, undermines the financial of the entrepreneur or makes it difficult for it to maintain its international competitiveness.26

The FTC in making its determination is to consider the entrepreneur's (1) assets, means of expenditures; (2) officers and employees; (3) location of factories, workyords and offices; (4) business facilities and equipment; (5) the substance of intellectual property rights; (6) capacity of production and sales and for obtaining funds and materials and (7) aspects of supply and distribution of supply and distribution of goods or services.27

A "monopolistic situation" is defined at length in the Act in terms of market structure and market performance such the situation occurs whenever such structure or performance exists in an area of business where the total amount of prices of goods of the same description and those of other goods essentially similar thereto are supplied in Japan or the total amount of prices of service supplied in Japan is in excess of 56 billion yen for a one year period and: (a) the market share of one entrepreneur exceeds 50% or the combined share of entrepreneurs exceeds 75%; or (b) conditions exist which make new entrants very unlikely; or (c) where the increase in price for the goods or service or the decrease therein is slight considering the charges in the market place; and where the entrepreneur has earned for excessive profit rate or is paying for cost and administrative expenses far in excess of the norms.28

In such event the FTC shall notify the appropriate governmental ministry of the monopolistic situation who shall render his view regarding the existence or non-existence of such a monopolistic situation as well as his recommendation as to which measures should be taken if such situation does exist.29 A public hearing is then held by the FTC to obtain the public's view.30 The FTC will then issue a complaint but only after it consults with such minister. The complaint must be in writing outlining the case. After the hearing in which all parties present their position, the commission renders its decision which may include the remedians heretofore stated.31

STOCKHOLDING, INTERLOCKING DIRECTORATES,

MERGER AND TRANSFER OF BUSINESS

The Act addresses the prohibitions addressed by President Truman to General MacArthur. To eliminate the pre-war Zaibatsu combines, the Act specifically prohibits the formation of a holding company. A "holding company" is defined as: "a company whose principal business is to control the business activities of a company or companies in Japan by means of holding of stock (including shares of partnership..."32 It applies only to Japan and not to holding companies possessing the shares of a foreign company.

Giant Company Giant companies also face restriction in stockholdings. Any stock company, other than one engaged in financial services (banks, insurance, securities), whose capital is larger than 10 billion yen or whose net assets are larger than 30 billion yen is not allowed to acquire stock in Japanese companies in excess of its capital or its net assets whichever is larger. Exceptions include governmental corporations, corporations engaged in development of industries as permitted by a Cabinet Order and companies involved in international business or foreign investments. Companies engaged in financial service have much stricter limitations (limit purchases to 5% of stock of mother company; 10% of insurance companies).33

The Act prohibits the purchase of any stock of a company in Japan where the effect is to substantially restrain competition in any field of trade. Compare Section 7 of the Clayton Act which forbids the acquisition of stock or other share capital of assets of another corporation where the effect is to substantially lessen competition or tends to create a monopoly. The Japanese FTC, like the U.S. FTC has guidelines with respect to mergers.

The FTC will closely examine all stockholdings where the combined market share is 25% or more. The combined market share is one-third and the combined share of the top three companies is 50% or more where there are seven or few competitors; and where the total assets of one corporation is 100 billion yen and the other party is 10 billion yen or more.

Financial Company The Act restricts stockholding by a financial company by forbidding the acquisition of shares by a company engaged in the financial sector from acquiring or holding stock of another company in Japan to the extent of greater than 5 percent or 10 percent if the purchase is of insurance company stock. The FTC is
given the authority to grant exceptions with
consultation with the Minister of Finance if the
acquisition was the result of enforcement of a lien,
pledges, mortgage or payment of an indebtedness or
purchase was of shares in a securities firm or it was
acquisition of stock in the form of trust property or
securities trust.3

Interlocking directorates The Act forbids an officer or
employee of a company from holding a similar position in
another company in Japan where the effect is to
substantially lessen competition in a field or trade. A
company in Japan cannot compel a competing company to
hire one of its officers or employees to act as an
officer in such other company. If an officer or employee
does possess such status and the total assets of either
company exceeds 2 billion yen, s/he must file a report
with the FTC within 30 days of assumption of such
office. Compare Section 8 of Clayton Act which
provides that "No person at the same time shall be a
director in any two or more corporations, any one of
which has capital, surplus, and individual profits
aggregating more than $1,000,000..."

Restriction on purchase of shares by an individual The
Act forbids a person other than a company from acquiring
or holding in a stock of another company which such
acquisition may restrain competition in such acquisition
is accomplished by unfair business practice. If a
purchase of shares in mutual competing companies exceeds
10 percent of the second company, s/he must file a report
with the FTC within 30 days of acquisition.4

Restriction on mergers The Act forbids mergers or
consolidation (a) where the effect may be to
substantially restrain competition in any field or trade or
(b) when unfair business practices have been employed in
the course of such merger or consolidation.5 All
mergers or consolidations must be done by filing a
report with the FTC and must wait for the expiration of
a 30 day waiting period from date of filing. The FTC may
extend the period to 60 days with consent of the
companies or shorten the said period. The FTC must file
its complaint or recommendation within the said waiting
period unless there has been false statements made in
the filing with respect to important matters.6

Restrictions on acquisition of assets De facto mergers
are also subject to the preceding section where a
company acquires the business or fixed assets of a
competing company or leases most of the business of
another company or enters into a joint profit and loss
account arrangement with another company.7

It should be noted that the prohibition of this and
preceding section are applicable only within Japan. It
is not unlawful to merge or acquire assets in competing
companies beyond its borders.

Parallel Price Increases Historically, U.S. courts have
applied the concept of "conscious parallelism" where
direct proof of concerted price fixing or other wrongful
conduct has not been established but where conduct has
occurred and the parties had knowledge, motive and
substantial unanimity with respect to each other's
actions.8 The Antimonopoly Act addressed similar
parallelism with respect to price increases. The FTC may
inquire and compel a report from entrepreneurs
requesting reasons for the in price of goods and
services where the total price of goods or services of
the same type is in excess of 30 billion yen and the
rises by the largest entrepreneur with an aggregate
market share in excess of 50 percent is
almost identical within a 3 month period.9

Exemptions The U.S. exempts certain entities from the
antitrust laws. They include air carriers, agricultural
organizations, motor, rail and interstate water
carriers, export trade associations, stock exchanges and
labor union. Similarly, exemptions are granted under the
Antimonopoly laws to persons engaged in a rail way,
electricity, gas and other enterprises which by nature
are monopolies. Other exemptions include those permitted
by law, monopolies arising under intellectual property
right enactments (patents, copyright, trademark), acts
of cooperative and statutory exception for agriculture,
consumer coops, labor unions, forestry cooperative and
public service mutual aid association.10

Enforcement of the Antimonopoly Law Violations of the
Antimonopoly laws are enforced against in four ways: (1)
administrative guidance; (2) formal action by the FTC;
(3) criminal procedure initiated by the FTC; and (4)
private litigation.11 The FTC is given broad powers
under the Antimonopoly laws to initiate both civil and
criminal proceedings. Any person is allowed to file a
complaint with the FTC which may undertake an
investigation. The FTC then determines what action if
any, to undertake. A report of its investigation is
given to the complainant. If action is mandated, the FTC
then initiates the appropriate procedure which varies
depending upon the nature of the violation.12

In its investigation, the FTC may order persons
affect or witnesses to appear for interrogation. It may further order experts to appear and give expert testimony, order submission of accounting books and records and enter upon any place of business being investigated to inspect conditions of its operations as well as its books and records.49 A record of its investigation must be maintained.

The FTC upon a finding of a violation of monopolization of unreasonable restraint of trade, trade association violation and other violations, may recommend that the persons affected take appropriate measure to cure the violations. If the person accepts the recommendation, a decision is rendered without a formal hearing. If the FTC finds a violation of Section 7 of the Act (private monopolization or restraint of trade), it may order the entrepreneur to pay the Japanese Treasury a surcharge. If the person objects timely, a hearing procedure will be commenced.50

A formal hearing is initiated by the issuance by the FTC of a complaint which is in writing and which outlines the case. The respondent submits an answer. Generally a hearing examiner then conducts the proceeding in which both sides submit their evidence. The hearing is public unless it is necessary to protect trade secrets. The commission then makes a determination, based upon the hearing, whether a violation has taken place. A certified copy of the written decision is served upon the respondent. The respondent may bring on a lawsuit in court to grant a decision of the FTC; however, the findings of fact by the FTC shall, if supported by substantial evidence, be binding upon the court. The court may grant the decision if the decision is not supported by substantial evidence or is inconsistent with the constitution or other laws or orders.51

General Considerations American companies wishing to do business in Japan must be attentive to the above stated statutory prohibitions. A U.S. company must be careful no to become designated as a holding company, i.e., where its principal business is to control business activities of other companies. The exception are: (1) where the holding company is engaged in the same line of business and (2) a foreign holding corporation and its related companies may control one Japanese corporation even if it is not in the same line of business.

Like the U.S., the Antimonopoly Law has extraterritorial reach. In order to be affected by the statute, a presence is necessary either by way of a U.S. corporation's acquisition of a Japanese corporation or its assets or at least "close contracts" with Japan. Service of process however, must be accomplished by service upon a place of business or office in Japan.52

CONCLUSIONS

The Antitrust laws of Japan and the U.S. have a great deal of similarity. It appears initially that the Japanese legislation may be stricter than the U.S. but enforcement trends to be relatively lax. Nevertheless, companies doing business in Japan must conform to the statutory requirements to avoid conflict with local authorities.

FOOTNOTES

1.15 USC sections 1-7.
3. United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945).
12.15 USC sections 12-27.


20. No. 54 of April, 1947.


23. Sections 92-2(i) and 95.

24. The Hart-Scott Improvements Act does impose a pre-merger notification requirement but only with respect to large mergers and acquisitions.

25. Section 8-4(1).

26. *Ibid*

27. Sect. 8-4(2)(l-viii).

28. Section 2(7)

29. Section 45-2(1)(2).

30. Section 22-2.

31. Section 49.

32. Section 54.

33. Section 9.

34. Section 9-2.

35. Section 11.

36. Section 10(1).


38. Section 11.


40. Section 14.


42. Section 15(2)(3)(4)

43. Section 16.


45. Section 18-2.

46. Section 21-24.


48. Section 45.

49. Section 46.

50. Section 48-2.
