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Antimonopoly Law of Japan—Relating to International Business Transactions

Mitsuo Matsushita
and
James L. Hildebrand

THE ANTIMONOPOLY LAW of Japan\(^1\) was enacted during the Allied Occupation in an effort to prevent the reversion to the prewar oligopolistic structure of Japanese industry in which cartels (zaibatsu—holding companies) regulated almost every major field of activity.\(^2\) Originally based on certain provisions of the Sherman Act,\(^3\) the Clayton Act,\(^4\) and the Federal Trade Commission Act,\(^5\) and on the judicial interpretation of these acts by American courts,\(^6\) the Antimonopoly Law of Japan categorically prohibited the use of cartels for the restriction of production, the fixing of prices, and the allocation of markets and customers and also placed stringent restrictions on mergers, stockholdings, and holding of multiple directorships and officerships.

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\(^1\) Law Concerning the Prohibition of Private Monopoly and the Maintenance of Fair Trade of 1947, Law No. 54, translated in 2 EHS LAW BULLETIN SERIES, No. 2270, KA-KI (F. Nakane ed. 1968) [hereinafter cited as Antimonopoly Law]. See also 3 OECD, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1969).

The Antimonopoly Law has been amended numerous times, and during the last 24 years the general trend has been to create exceptions to the Law. During the 1960's its enforcement was anemic. However, there is growing evidence that the text of the statute and the decisions implementing it in the past are being revitalized and that the Antimonopoly Law is becoming one of the important legal instruments to cope with various domestic as well as international economic problems facing Japan today. It appears that the Antimonopoly Law may become one of a few remaining legal devices of regulation to be stringently imposed by the Japanese Government on international business transactions.

The purpose of this article is to provide a general introduction to the Antimonopoly Law of Japan, to describe its general structure and the enforcement agencies related thereto, and to clarify certain aspects of the Antimonopoly Law which are relevant to Japan-United States business transactions, including the licensing of pat-

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1 Antimonopoly Policy, 1947-1967, 2 STUDIES IN LAW AND ECONOMIC DEVELOPMENT 1 (May 1967).
5 See generally M. Handler, Cases on Trade Regulation 84-185 (3d ed. 1960).

7 Law No. 91 of 1947; Law No. 195 of 1947; Law No. 207 of 1948; Law No. 268 of 1948; Law No. 103 of 1949; Law No. 134 of 1949; Law No. 214 of 1949; Law No. 192 of 1951; Law No. 211 of 1951; Cabinet Order No. 261 of 1951; Law No. 257 of 1952; Law No. 268 of 1952; Law No. 259 of 1953; Law No. 127 of 1954; Law No. 120 of 1956; Law No. 134 of 1956; Law No. 142 of 1957; Law No. 187 of 1957; Law No. 129 of 1959; Law No. 111 of 1961; Law No. 134 of 1962; Law No. 140 of 1962; Law No. 152 of 1962; Law No. 161 of 1962; Law No. 53 of 1963; Law No. 12 of 1964; Law No. 152 of 1964; Law No. 143 of 1965; Law No. 25 of 1966; Law No. 111 of 1966; Law No. 31 of 1967; Law No. 33 of 1969.

8 In the area of international business transactions, it can be foreseen that the Anti-monopoly Law will play an increasingly important role especially due to the fact that other regulatory devices (e.g., currency and investment controls) are gradually being relaxed in line with the Japanese Government's avowed progress in the area of liberalization of trade and investment. See Chase Manhattan Bank, Japan, 18 WORLD BUS, 33, 34 (special ed. 1970). Here it was observed that "[t]he slowly evolving policy of liberalizing foreign direct investment in Japan has spurred mergers in those sectors into which foreign capital will be allowed." Id. at 33. See also N.Y. Times, Mar. 26, 1971, at 1, col. 5.

9 One commentator has observed that: "There are also indications that the Japanese Anti-monopoly Law, which is based largely on the American antitrust laws and which has not been applied particularly strenuously in the past, may be applied with increasing vigor to increase its effectiveness as a device for controlling the activities of foreign investors in Japan." Calhoun & Brumder, Japanese Laws Relating to Foreign Investment in Japan, in PRIVATE INVESTORS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1971, 24-25 (1971).
ents and technology, the acquisition and control of Japanese business enterprises, and the utilization of distribution agreements.

I. THE ANTIMONOPOLY LAW OF JAPAN

A. Major Regulations under the Law

Regulation under the Japanese Antimonopoly Law may be classified into the following three basic categories: (1) prohibition of private monopolization, (2) prohibition of unreasonable restraints of trade, and (3) prohibition of unfair business practices. Supplemental rules regulate other types of more specific activities, such as mergers, acquisition and holding of stocks and assets, activities of trade associations, false advertising, and others. However, the above mentioned three types of regulation are the most basic ones.

The definition of "private monopolization" (shitekidokusen) is given in Article 2(5) of the Law as "such business activities by which any entrepreneur, individually or by combination, conspiracy, or any other manner 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 particular field of trade." Under this provision, monopolization by one entrepreneur is carried out either through the "exclusion" or the "control" of other entrepreneurs. "Exclusion" means such activities by an entrepreneur as price discrimination, dumping, imposition of harsh restrictions upon distributors and dealers (such as unreasonable exclusive dealing arrangements and other restrictive covenants, thereby eliminating competitors or other entrepreneurs from certain markets. "Control of other enterprises" means such activities as acquiring the business, the assets, or the shares of one or more other entrepreneurs, thereby dominating the market and eliminating competition. Such monopolization is prohibited by Article 3 of the Law.

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10 See note 1 supra. The prohibition of monopolization under this Article is roughly equivalent to that set forth under Section 2 of the Sherman Act which provides that: "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 misdemeanor . . . ." As delineated in the cases which have arisen under Section 2, it is "monopolization" and not "monopoly," which has been placed under the ban. See REPORT OF THE UNITED STATES ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY ANTITRUST LAWS 43-64 (1955).

11 These activities are also subject to regulation with regard to the acquisition of stocks, mergers, etc., as discussed later in this article. See text accompanying notes
"Unreasonable restraint of trade or cartel" (futona toribiki-seigen) is defined in Article 2(6) of the Law as such business activities by which any entrepreneur, by contract, agreement, or any other form, in conjunction with other entrepreneurs, mutually restricts their business activities to fix, maintain, or enhance prices, or to limit production, technology, products, facilities, another party to trade, etc., or executes such activities, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

Such unreasonable restraint of trade is prohibited by Article 3 of the Law.

Prohibition of unreasonable restraint of trade is comparable to the prohibition of conspiracies, combinations, and other restraints of trade under Section 1 of the Sherman Act. However, there is an important difference between the Sherman Act and the Japanese Antimonopoly Law in that "unreasonable restraint of trade" under the Japanese Law includes only horizontal agreements among competitors which suppress competition among themselves (such as price-fixing, territorial divisions, etc.) and does not encompass agreements which establish vertical restraints on trade, such as the imposition of resale price structures upon distributors and retailers or the granting of exclusive sales territories to them. This interpretation is derived from the fact that Article 2(6) of the Law bans only "mutual restriction" (sogo-kosoku) and therefore only those agreements are restricted by which each participant is placed under a similar obligation as the other participants. Boycotts are also not included since such activity does not amount to the suppressing of competition among participants; such activities are considered to fall under the category of unfair business practices.

It should also be noted that certain types of cartels are exempted from the application of the Antimonopoly Law by certain provisions of the Law itself (such as depression cartels and rationalization cartels) and by the provisions of certain other laws (such as shipping conferences, airlines conventions, and others).
Article 2(7) of the Law defines "unfair business practices" (fukoseina torihiki-boho). These include such items as (1) unreasonable discrimination against other entrepreneurs, (2) charging unreasonably high or low prices, (3) unreasonably inducing or coercing customers or competitors to deal with oneself, (4) imposing unreasonably restrictive conditions upon another party to a transaction, (5) abusing one's predominant bargaining power, and (6) unjust interference with a transaction between other entrepreneurs. The Fair Trade Commission (FTC) is empowered and directed to designate as unfair business practices specific acts coming under any of the above categories and tending to impede fair competition. The FTC has issued the so-called General Designation of Unfair Business Practices in which twelve kinds of activities have been designated. This General Designation applies to all industries. In

not apply to such legitimate acts of an entrepreneur or a trade association conducted under the provisions of a special law or an order to be issued thereunder in the event that such special law has been established for the special enterprise."

16 Fair Trade Commission Notification No. II (1953). In accordance with the provisions of Article 2(7) of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947), unfair business practices, other than specific business practices in a particular field of trade to be designated in accordance with the procedure as provided for in Article 71 of said Law, shall be designated as follows:

Unfair Business Practices

(1) Unduly refusing or limiting deliveries from certain entrepreneurs or to supply to certain other entrepreneurs, commodities, funds, or other kinds of economic benefit.

(2) Affording, without good reason, substantially favorable or unfavorable treatment to certain entrepreneurs in regard to the terms or execution of transactions.

(3) Excluding certain entrepreneurs from concerted activities or from a trade association, or unduly discriminating against specific entrepreneurs in the concerted activities of the trade association, thereby causing to such entrepreneurs undue disadvantage with respect to their business activities.

(4) Supplying or receiving without good cause, commodities, funds, or other kinds of economic benefit at prices which discriminate between customers in different places or between customers.

(5) Supplying commodities, funds, or other kinds of economic benefit at unreasonably low prices or receiving them at unreasonably high prices.

(6) Inducing or coercing, directly or indirectly, customers of a competitor to deal with oneself by offering undue advantages or threatening undue disadvantages in the light of normal business practices.

(7) Dealing with customers on the condition that they shall, without good cause, not supply commodities, funds, or other kinds of economic benefit from a competitor of oneself.

(8) Dealing with customers on conditions which, without good reason, restrict any transaction between the said customers and the supplier of commodities, funds, or other kinds of economic benefit to them or between the said customers and any person receiving those from them, or any relationship between the said customer and their competitors.

(9) Dealing with a company on the condition, without good reason, that the appointment of officers of that company, meaning those as defined by
addition the FTC has made certain specific designations in which certain kinds of activities in particular industries are denominated as unfair business practices (such as certain activities within the shipping industry). "Unfair business practices" are prohibited by Article 19 of the Law.

B. The Enforcement Agencies and the Forms of Actions

(1) The Enforcement Agencies—The Antimonopoly Law is enforced by the FTC and the courts. The FTC is an independent administrative and quasi-judicial regulatory commission composed of a chairman and four other commissioners appointed by the Prime Minister with the consent of the Diet, in much the same way that the members of the Federal Trade Commission are appointed in the United States. Indeed, the Japanese FTC is modeled after the American Federal Trade Commission. However, unlike the American practice where the Department of Justice and the Federal Trade Commission both retain certain powers in their respective fields, the power to initiate action under the Japanese Antimonopoly Law is concentrated in the hands of their FTC with the exception of damage claims brought by private individuals. In Japan the FTC is the only agency conferred with the power to bring administrative action against Antimonopoly Law violators.

(2) Forms of Actions under the Law—The FTC may initiate administrative action against persons or companies violating the Antimonopoly Law. If an activity is believed to be in violation of the Law, the FTC investigates the case and, if the result of such investigation indicates that a violation has occurred and the FTC determines that initiating action will serve the public interest, then it

subsection (3) or Article 2 of the Law Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade, shall be subject to prior direction or approval by oneself.

(10) Trading with customers on conditions which are unduly unfavorable in the light of normal business practices by making use of one's predominant position over the said customers.

(11) Unjustly interfering with a transaction between other entrepreneurs who compete in Japan with oneself or with the company of which oneself is a stockholder or an officer and their party to such transaction by preventing the execution of a contract, or by inducing breach of contract, or by any other means whatsoever.

(12) Unjustly inducing, abetting, or coercing a stockholder or an officer of a company which competes in Japan with oneself or a company of which oneself is a stockholder or an officer, to act against the interest of such company by the exercise of voting rights, transfer of stock, divulgence of secrets, or any other means whatsoever.

opens an administrative proceeding against the violator pursuant to Article 49 of the Law. In this administrative trial, the investigator makes a formal charge and the respondent is given an opportunity to defend himself in much the same way that he would in the courts. After this administrative trial, a decision is handed down by the FTC.

There are three types of decisions under the Law. The first one is a regular decision which is handed down after an administrative trial. The second is a recommendation decision which is issued pursuant to Article 48 of the Law. In the case of a recommendation decision, the FTC recommends that a violator cease and desist from specific activities which the FTC deems to be in violation of the provisions of the Law. The decision is handed down without an administrative trial if the violator accepts the recommendation. A majority of the cases are resolved by this procedure. Where the violator rejects the recommendation, the usual procedure is the initiation of an administrative trial. The third type of decision is a consent decision which is issued pursuant to Article 53—3 of the Law. If, after the administrative trial has been initiated, the respondent proposes to the FTC that he will take some measures to eliminate the violation and the FTC accepts such proposal, the administrative trial is stopped at that point and a consent decision is made.

There is no difference with regard to the legal effect between the above described kinds of decisions. If a person does not observe the terms of the decision, under Articles 90, 95 and 97, he may be punished by a fine or penal servitude.

An appeal can be taken from the decision of the FTC to the Tokyo High Court and then to the Supreme Court except in the cases of recommendation decisions and consent decisions. In these latter cases, an appeal is barred by the rule of estoppel. With regard to those legal cases resulting from the decisions of the FTC, the Tokyo High Court has exclusive jurisdiction pursuant to Article 85 of the Law.

Whenever damage to property was caused by a violation of the Antimonopoly Law, the persons who sustained such damage may institute a claim for recovery in the Tokyo High Court. Under Article 25 of the Law, a violation of the Antimonopoly Law is regarded as a tort and therefore a tort claim is permitted. However, in order to bring a tort claim under Article 25, a decision must have been issued by the FTC (it does not matter what kind of decision)
with regard to the case in question. In other words, the injured party must wait until the decision of the FTC has become final and conclusive before instituting a tort action.\(^\text{18}\) When a decision has been rendered by the FTC with regard to a particular case, this decision may serve as conclusive evidence of illegality in a subsequent tort claim action against the respondent. Tort claims on the basis of antimonopoly violations have not been very common in Japan in the past. However, there is an apparent trend toward an increase of such actions.

Private monopolization and unreasonable restraint of trade are criminal offenses and are punished by a fine or imprisonment or both, pursuant to Article 89 of the Law. In criminal proceedings in which the Tokyo High Court has exclusive jurisdiction, the FTC has the exclusive power to accuse the violator before the Procurator-General and under Article 96, the Procurator-General may initiate a criminal action only after such accusation has been made. Such criminal actions have rarely been brought in Japan.

C. Jurisdiction of the Antimonopoly Law with Regard to International Transactions

(1) The General Principle—There is no definition in the Japanese Antimonopoly Law with regard to jurisdiction over international transactions. However, it would seem that the jurisdiction of the Antimonopoly Law is based on the principle of territorial jurisdiction even though it is not easy to establish concrete jurisdictional tests. It could be argued that the Law applies only to business activities carried out either in whole or in part within the territory of Japan. The principle of territorial jurisdiction is derived from the following factors: (1) Generally speaking, Japanese domestic laws which are designed to be applied to activities conducted outside the territory of Japan have provisions explicitly stating that they shall have an extraterritorial effect.\(^\text{19}\) There is no such provision in the

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\(^{18}\) However, the injured party may institute a tort claim against the violator under Article 709 of the Civil Code of 1896, Law No. 89, as amended, which permits recovery for damages caused by tortious acts. In such a case, however, the litigation is more difficult since the plaintiff must prove the illegality of the conduct of the defendant.

\(^{19}\) For example, Section 2 of the Criminal Code of 1907, Law No. 45, as amended, applies to any person who has committed certain enumerated crimes (such as counterfeiting currency, etc.) "outside of Japan." Similarly, Section 36 of the Foreign Exchange and Foreign Trade Control Law of 1949, Law No. 228, as amended, states that a resident of Japan cannot acquire any real estate or any right thereto "in a foreign country," unless expressly permitted by the Minister of Finance. Section 37 of this Law also prohibits disposing of any real estate or any right thereto in a foreign country by a resident of Japan.
Antimonopoly Law and it may be inferred from the absence of such a provision that the Law is not intended to have extraterritorial effect. (2) Under its Constitution, Japan is obligated to respect and observe general principles of international law, and the rule of international law with regard to jurisdiction of national (domestic) law is that such law is basically territorial in effect. From the principle of territorial jurisdiction, it follows that the regulation of the Japanese Antimonopoly Law can be applied only when an activity constituting a violation, or at least a portion of it, is carried out in Japan. Perhaps Article 6 of the Law, which is explained below, is the exception to this general interpretation of territorial jurisdiction and represents a shift toward an objective territorial approach.

(2) Article 6 of the Antimonopoly Law—Article 6 of the Law, which is specifically designed for the regulation of international agreements and contracts, provides: "No entrepreneur shall enter into an international agreement or an international contract which contains therein such matters as coming under the purview of unreasonable restraint of trade or unfair business practices."

So far as the prohibitions concerning unfair business practices are concerned, Article 6(1) of the Law covers a wider area than does Article 19 which is the general provision for the prohibition of unfair business practices and which provides categorically that "no entrepreneur shall engage in unfair business practices." Article 6(1) prohibits the "entering into" of an international contract which includes elements constituting unfair business practices. Therefore, practically speaking this prohibition applies not only to the malefactor, that is, the one who may actually commit the unfair business practice, but also to the victim of such practice as long as

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20 JAPAN CONST. art. 98 (2) (1946).

21 For example, Belgium's Trade Regulation Law of May 27, 1960, only applies to the exercise of conduct "within the territory of the kingdom." It is also well established that "the penal laws of a country have no extraterritorial force." 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 236 (1960). See also American Banana Co. v. United States, 213 U.S. 347 (1909), where the court stated that all United States legislation is prima facie territorial. Id. at 357.

22 The Court in Strassheim v. Daily, 221 U.S. 280, 285 (1911), explained this principle as follows: "Acts done outside a jurisdiction, but intended to produce detrimental effects within it, justify a State in punishing the cause of the harm as if [the actor] had been present at the time of the detrimental effect, if the state should succeed in getting him within its powers." This view has been followed in subsequent American antitrust cases. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). See also RESTATEMENT (SECOND) OF UNITED STATES FOREIGN RELATIONS LAW § 18 (2d ed. 1965); Blakeny, Legal Aspects of Private Investments in Japan, in 3 INSTITUTE ON PRIVATE INVESTMENTS ABROAD 289 (1961).
he is a party to the international contract containing provisions deemed to constitute unfair business practices.

There are some types of unfair business practices in which the malefactor and the victim are the parties to a contract constituting unreasonable practices, such as exclusive dealing contracts, tie-in agreements, or contracts between a powerful enterprise and a subcontractor by which the former imposes unreasonable conditions upon the latter or misuses its dominant bargaining power. Even if such malefactor is a foreign enterprise and stays outside the territorial jurisdiction of Japan, Article 6 can be applied to the transaction if the other party to the contract resides in Japan. Article 6 applies to the Japanese parties in most cases since the prohibition extends to “entering into” an international contract containing such provisions so as to constitute unfair business practices. The domestic enterprise which directly suffers from unreasonable restrictions in an international contract with such provisions is usually a party to the agreement. This is a rather unusual way of applying the Antimonopoly Law since theoretically it catches the injured party instead of the injuring party and holds the former as a violator. However, this provision of the Law can be utilized to eliminate unreasonable restrictions imposed on domestic enterprises by international contracts when the foreign parties imposing such restrictions are outside the territorial jurisdiction of Japan. In this way the Japanese Government can use the Antimonopoly Law to protect domestic enterprises. Furthermore, it would seem that this provision effectively extends the regulation of the Japanese Antimonopoly Law to foreign enterprises residing outside the territorial jurisdiction of Japan who enter into contracts with domestic parties, since the Law can be interpreted as prohibiting domestic parties from entering into any contract containing provisions which constitute unfair business practices.23

The present wording of Article 6 was incorporated into the Antimonopoly Law in a 1953 amendment.24 There had been no decision under amended Article 6 until the recent case of FTC v. Amano Seiyaku Kabushiki Kaisha,25 which is discussed below. Most probably the reason for the dearth of case law is that international contracts involving foreign investment in Japan — especially the

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23 See Matsushita, supra note 2, at 9-10.
24 Law No. 259 (1953).
licensing of patents and technology — have, until recently, been examined by the Foreign Investment Council of the Japanese Govern-
ment under the Foreign Investment Law.\textsuperscript{20} Prior to the notification to the FTC, when some objectionable restrictions were involved, elimination or revision usually occurred at that preliminary stage. However, the avowed goal of the Japanese Government is increased liberalization of capital transactions, and therefore the trend today appears to be toward a relaxation of governmental controls which were previously exercised under the Foreign Investment Act. Under these circumstances, it is foreseeable that Article 6 may be applied more and more to regulate the contents of international contracts.

(3) Notification—Under Article 6, an entrepreneur who has entered into an international contract must report that contract to the FTC. In this regard, Article 6(2) provides: "In the event that an international agreement or an international contract is concluded, every entrepreneur shall file a report of said effect, together with a copy of the said agreement or contract (in the case of a verbal agreement or contract, a statement demonstrating the contents thereof), with the Fair Trade Commission within thirty days as from the day of its conclusion pursuant to the provisions of its Regulation."

Pursuant to Article 6(3) of the Law, this reporting duty does not apply to an agreement or contract with respect to a single trans-
action (except in the case of transactions such as those in which the delivery of goods extends over a period of one year), or to an agree-
ment or contract merely creating an agency in business matters (with
the exception of agreements or contracts containing conditions that restrict the business activities of the other party or parties).

As is shown in Table 1 (printed at the end of this article), during the first half of 1971 a total of 1,542 international contracts were reported to the FTC, which represents a 78.3 percent increase over the comparable period of the previous year. During the last five years the total number of contracts reported to the FTC each year has been as follows: for 1966 a total of 663 cases, for 1967 a total of 917 cases, for 1968 a total of 1,868 cases, for 1969 a total of 1,648 cases, and for 1970 a total of 1,739 cases. A marked increase in reported cases is apparent. Of the 1,542 cases reported during the first half of 1971, 48.2 percent or 741 cases involved United

\textsuperscript{20} Law Concerning Foreign Investment of 1950, Law No. 163, as amended.
States companies and 140 cases involved British and West German companies. Although the number of cases involving investments in developing countries is small, companies in almost all countries of the world were parties to one contract or another during the first half of 1971.

The present system is a post notification system, that is, notification is given after entering into the contract or agreement. However, the view has been expressed that this post notification system should be changed to a prior notification system in order to avoid the legal insecurity which results from the possibility that an international contract or agreement, after having been entered into, may be held in violation of the Antimonopoly Law when it is later reported to the FTC.27

(4) Application of Article 6—In FTC v. Amano Seiyaku Kabushiki Kaisha,28 Article 6 of the Antimonopoly Law, as amended, was applied for the first time to restrictive clauses in an international agreement. The facts of the case are as follows: Amano Seiyaku Kabushiki Kaisha (hereinafter referred to as “Amano”) was a Japanese enterprise engaged in the production and sale of pharmaceutical products including enzymes. In June 1966, Amano entered into an international contract with a Danish company, Novo Industri A/S (hereinafter referred to as “Novo”), in which it was agreed that Novo would give the right to Amano to distribute its product “Alcalaise,” an alkaline bacterial proteinase (an ingredient of a cleaning agent), in certain areas. Specifically, Amano was given an exclusive distributorship of this product in Japan and Okinawa, and a nonexclusive distributorship in Korea and Taiwan. In this distribution agreement, the following restrictions were included: (1) Amano could not manufacture and sell competing products for three years after the termination of the contracts; (2) Amano could not sell competing products manufactured by some other enterprise in Japan, Okinawa, Taiwan, or Korea (no definite period being stipulated for the duration of this restriction); and (3) Amano should maintain a certain minimum resale price when it sold the products imported from Novo. In this contract, the applicable law was stipulated to be Danish law, and the Danish Commercial and

Maritime Court was appointed as the court of first instance. This contract was notified to the FTC in 1969, and it was terminated at the end of the same year. However, the first two restrictive clauses were deemed to survive the termination of the agreement.

The FTC, considering that the restrictions contained in this contract violated Article 6 of the Antimonopoly Law, issued a recommendation to Amano on December 16, 1969. The recommendation stated that the restrictive clause in the contract prohibiting Amano from handling products in competition with Novo's products was an unreasonable restrictive dealing clause tantamount to Item No. 7 as set forth in the FTC's General Designation of Unfair Business Practices, that the restrictive clause prohibiting Amano to produce, sell, or handle competing products was an unreasonable restriction imposed on Amano tantamount to Item No. 8 of the said General Designation, and that the clause fixing minimum resale prices also was an unreasonable restriction imposed on Amano tantamount to Item No. 8 of the General Designation. The FTC requested Amano to eliminate these clauses, and Amano accepted this request. Accordingly, the FTC issued a recommendation decision on January 12, 1970 which ordered Amano to cancel these restrictions. However, as regards the clause fixing minimum resale price maintenance, the FTC took no action since the issue had now become moot due to the fact that the resale price maintenance clause had been terminated together with the entire agreement.

As noted before, the Amano case was the first case in which amended Article 6 of the Antimonopoly Law was applied to restrictive clauses contained in an international agreement. In this case, Amano “entered into” an international contract containing restrictive provisions which constituted unfair business practices. Amano was deemed to be a violator of Article 6 of the Antimonopoly Law even though, in substance, it was the injured party. Novo, the injuring party, was not named as a respondent since it had no business establishment in Japan.

After the decision of the FTC was handed down to Amano, Novo initiated an action against the FTC in the Tokyo High Court.

29 See note 16 supra.
30 Novo Industri A/S v. FTC, Tokyo Kosai, Showa 45 Nen (Gyo Ke) Dai 16 Go, Shinketsu Torikesi Seikyu Jiken (Tokyo High Court, Administrative Case No. 16, 1970) (Case Concerning Cancellation of FTC Decision). For a discussion of this case, complete text appended thereto, see Matsushita, Novoshajiken Kosaihanketsu To Somokousaiyoribikihanayo Eaiyoe (The Tokyo High Court Decision and Its Impact on International Transactions), 564 SHOJI HOMU KENKYU (Commercial Law Bulletin) 21 (1971).
alleging that, due to the FTC's recommendation decision, it had been deprived of a fair opportunity to be heard and that this was contrary to the principle of due process of law as stipulated in the Constitution. In seeking to obtain a judgment declaring the FTC decision illegal and void, Novo alleged that the adverse effect of the FTC decision was felt by it most strongly since the distribution policy of Novo in selling the product in Japan would be seriously hampered by the elimination of the restrictive clauses incorporated into the initial agreement with Amano. Thus Novo argued that it should be allowed to sue in the court even though the FTC order had not been addressed to it.

On May 19, 1971, the Tokyo High Court handed down its decision denying Novo the right to an action before the Court on the grounds that the right to sue against the FTC for the cancellation of its order was limited to the party whose legal interest had been injured by the order and that Novo's legal interest had not been injured by said order. The reasoning of the Court was based on the following three points: (1) The order of the FTC was not directed to Novo and, therefore, Novo was under no obligation to obey it; (2) The order of the FTC was an administrative order directing the respondent to eliminate the illegal provisions of the contract to which the respondent was a party, and therefore the order did not necessarily invalidate the private law effect of said contract; and (3) The disadvantage that Novo might incur from the FTC order was considered to be de facto and not a legal disadvantage. This case has been appealed to the Supreme Court and is still pending as of the first of June, 1972.

II. SOME PROBLEM AREAS IN INTERNATIONAL TRANSACTIONS

A. Licensing of Patents and Technology

(1) General Principles—As in most countries, patentable inventions are protected in Japan. A monopoly position enjoyed by the patentee or its exclusive licensee in the particular field covered by the patent is not by itself subject to attack under the Antimonopoly Law. Article 23 of the Law provides for the exemption

31 JAPAN CONST. art. 32 (1946).
32 For a brief discussion concerning the private law effect in Japan of a transaction that violates public law, see Akamatsu, Legal Practices, in DOING BUSINESS IN JAPAN 144-47 (R. Ballon ed. 1968).
33 Section 29 of the Patent Law of 1959, Law No. 121, as amended.
of those activities which amount to the valid exercise of patent and other industrial property rights. This Article states: "The provisions of this Law shall not apply to such acts as recognized to be within the execution of rights under the Copyright Law, the Patent Law, Utility Model Law, the Design Law, and the Trademark Law."

Generally speaking, the licensing of patents and utility models is exempted from the application of the Antimonopoly Law. Restrictive clauses, such as territorial or customer restrictions, fixing of prices of patented products, period of exercise of the patented products, or exclusive dealing arrangements involved in licensing contracts, are not illegal under the Antimonopoly Law as long as they are regarded as being within the scope of the patent monopoly. However, restrictions extending beyond the scope of the Patent Law do fall within the restrictions of the Antimonopoly Law, and it is often difficult to draw a clear line between those restrictions which are within the scope of patent rights and those which are not. Since most problems which arise concerning the relationship between patents and the Antimonopoly Law are concerned with restrictions in licensing agreements, the discussion which follows will be limited to the problems relating to restrictions incorporated in patent and technology licensing agreements.

It may be helpful at this point to set forth a hypothetical case. Assume an American company A, a British company B and a Japanese company C agree to establish a jointly-owned Japanese company D. The licensing agreement is executed between A, B and C on the one hand and D on the other. A, B and C grant to D the exclusive right to manufacture and sell the product X under the patents owned by them. In this licensing agreement, the following restrictive conditions are incorporated: (1) D is obligated to purchase certain materials needed for the production of product X from company E, another company which is jointly-owned by A, B and C; (2) D is obligated not to export the patented products outside Japan, and especially not to the United States and England; (3) D is obligated to maintain the sales price of product X in Japan; and (4) D is obligated to refrain from selling the patented product in the area south of Osaka, Japan, in which another company, company F, which is jointly-owned by A, B and C, will sell the product X. What are the antimonopoly aspects of this case?

The clause obligating D to purchase the necessary materials (which we assume are unpatented) from E only would seem to be hardly justifiable under the Antimonopoly Law. Also the clause
restricting the sales area of D to Japan is difficult to justify. The clause which fixes the sales price is perhaps justifiable; however, the fixing of resale price is clearly not permissible except for the cases in which the commodities concerned are those fulfilling the requirements for the exemption of the Antimonopoly Law under Article 24—2.\(^{34}\) The clause limiting the business territory of D in Japan to the area north of Osaka is perhaps lawful. Viewed in this way, some of the restrictive clauses appear to be legal, some illegal, and some in the grey area between. What then, are the general principles, if any, regulating these relationships?

As to these problems, the legal rules have not yet been fully developed in Japan. However, it is possible to make some general remarks. As noted before, restrictive clauses incorporated in licensing agreements may escape the application of the Antimonopoly Law as long as they are regarded as valid exercises of the rights established under the Patent Law.\(^{35}\) Any restriction in an international licensing agreement that goes beyond the legitimate scope granted by the Patent Law is liable to attack under the Antimonopoly Law as either an unreasonable restraint of trade or an unfair business practice, depending on the nature of the restriction involved. However, among these, the unfair business practice aspect is the most important for practical purposes, since antimonopoly problems regarding patent licensing arise mostly concerning the imposition of restrictions upon the subsidiaries and licensees by parent companies

\(^{34}\) Article 24-2(1) of the Antimonopoly Law states:

The provisions of this Law shall not apply to justifiable acts to be undertaken by an entrepreneur, who produces or sells a commodity which is designated by the Fair Trade Commission and the identical quality of which can be easily recognized, for the purpose of fixing and maintaining with the entrepreneur of the other party selling the said commodity the resale price thereof (Such shall mean the price of the commodity to be sold by the entrepreneur of the other party, or to be sold by an entrepreneur who purchased it from the entrepreneur of the other party offering to sell; hereinafter the same.); Provided, further, That nothing herein contained shall be lawful in the event that the said act may be unduly to injure the interest of the general consumer, or may be contrary to the will of the entrepreneur producing the commodity in the case of the entrepreneur offering to sell.

It is interesting to note that most of the Japanese commentaries on this problem rely heavily on the cases and legal commentary concerning patents and the Sherman Act in the United States.

\(^{35}\) Article 77(1) & (2) of the Patent Law of 1959, Law No. 121, as amended, states: "(1) Any patentee may establish an exclusive license in respect of his patent right. (2) Any exclusive licensee shall have the exclusive right to undertake as his business the working of such patented invention within the limit as prescribed by the act of creation." Translated in 6 EHS LAW BULLETIN SERIES No. 6850, SA-A (F. Nakane ed. 1960).
and licensors. Such unilateral imposition of restrictions has been held to fall within the category of unfair business practices.

The FTC has published guidelines with regard to the enforcement of the Antimonopoly Law against various types of restrictions involved in international licensing agreements. The rules given in these guidelines may provide some useful information as to what kinds of restrictive covenants in international licensing agreements are allowed and which are viewed with disfavor by the FTC.

(2) Antimonopoly Law Guidelines—The "Antimonopoly Law Guidelines for International Licensing Agreements" were issued by the FTC on May 24, 1968, immediately prior to the second round of liberalization. In a preface to the Guidelines, the FTC briefly summarized the background which led to such publication and the reasons thereof as follows. The Antimonopoly Law provides for post notification of international agreements and measures for elimination of illegal agreements. However, there have been very few instances in which such agreements were filed with the FTC and once filed were held violative of the Law. The reason for this dearth of violations under Article 6 of the Law is due to the fact that unreasonable restrictions contained in international licensing agreements had so far been modified or removed in the process of screening under the Foreign Investment Act. However, as the liberalization of capital transactions progressed, it was intended that the advance screening process would no longer be undertaken. Therefore, such restrictions would come increasingly under the post scrutiny pursuant to amended Article 6 of the Antimonopoly Law. The FTC decided to issue the Guidelines to afford the opportunity for the contracting parties of international licensing agreements to take the attitude of the FTC into consideration in advance and thereby, hopefully, to avoid illegal restrictive clauses from being included in such licensing agreements.

Item I of the Guidelines enumerates the restrictions found in international licensing agreements concerning patent rights or utility model rights which are most liable to fall within the general category of unfair business practices. However, since this Item enumerates only certain outstanding restrictions, any other restrictions not enumerated should not be considered as necessarily falling outside

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36 The entire text of the Guidelines is set forth in Appendix A at the end of this article. For a discussion of these Guidelines, see GIJUTSUDONYU KEIYAKU NITRIKI-JUN NO KAISETSU (Commentary on Antimonopoly Law Guidelines for International Licensing Agreements) (1968), which was edited by the Section Chief of the International Section of the FTC.
the scope of the Antimonopoly Law. Item II of the Guidelines indicates that restrictions in international know-how licensing agreements will be treated in the same manner as those in international licensing agreements concerning patent rights or utility model rights. Item III of the Guidelines enumerates certain restrictive practices which will be regarded as the valid exercise of patent rights.

Item I of the Guidelines lists nine types of restrictions as falling under the ban. They are (1) the prohibition or limitation of export areas of the products covered by a licensed patent, (2) the fixing of the licensee's export prices or export quantities and the limitation of licensee's channels of export distribution, (3) the prohibition or limitation of handling competing products (technology), (4) the tie-in clause whereby the licensee is obligated to purchase certain materials from a fixed supplier, (5) the compulsory selling of goods through the licensor or his designee, (6) the fixing of resale prices in Japan, (7) the grant-back clause whereby the licensee is obligated to grant back improvement patents and other technology to the licensor, (8) the collection of royalties on unpatented products, and (9) the restrictions imposed on quality of raw materials or parts, etc. Any such restrictions, if found in an international licensing agreement, will make the Japanese licensee vulnerable to a violation of Article 19 of the Antimonopoly Law. In the cases of (1), (2), (3), (7) and (9), some saving clauses are attached exonerating the enumerated restrictive clauses in certain situations. In the other cases, no such saving statements are attached, and, therefore, it seems that the types of restrictions enumerated in (4), (5), (6), (8) are not justifiable under any circumstance.

Limitation of sales territory and fixing of prices of the patented products imposed by a foreign licensor on a Japanese licensee is usually considered to be within the scope of the patent monopoly when such restrictions relate to the Japanese domestic market. However, the prohibition of export or the fixing of export prices and other restrictions related to exports are generally considered to be outside the patent monopoly since the Japanese Patent Law covers only the territory of Japan. Since a large portion of all Japanese manufacturing is in someway involved with foreign technology, it is not surprising that the Japanese Government takes an increasingly hard line on export territory restrictions.37

37 One commentator has noted: "There is of course no way of knowing how limiting the technological agreements involved may be on Japan's export capability, but it is reasonable to assume that it is a substantial and growing handicap as Japan's exports swing toward more sophisticated products. It may be concluded therefore, that recourse
With regard to restrictions such as tie-in clauses, limitation of channels of distribution, fixing of resale prices, and collecting royalties on unpatented products, it should be observed that these types of restrictions have nothing to do with the exercise of licensed patents and, therefore, they may be regarded as "naked restrictions." Probably this is the reason why they are prohibited without any further qualification. On the other hand, the restrictions such as the prohibition or the limitation of handling competing products imposed upon a licensee, even though strictly speaking not within the scope of the patent monopoly, may be ancillary to the main transaction — that is, the licensing of the patents or technology to the Japanese company. Therefore, such restrictions are not subject to per se prohibition. Restrictions imposed on the quality of raw materials or parts may be regarded as the exercise of the patent monopoly in certain situations. For example, it may be necessary to impose such restrictions in order to maintain the efficiency of the technology licensed. For this reason, this type of restriction is also not treated as illegal per se.

When some of the restrictions involved in an international patent or technology licensing agreement are found to be illegal by the FTC, it then issues a cease-and-desist order to the respondent stating that such restrictions must be eliminated from the license agreements to which the respondent is a party. It should be emphasized here that both the licensor who imposes such restrictions, and the licensee, upon whom such restrictions are imposed, may be held to have violated Article 6 of the Antimonopoly Law which prohibits a domestic party from entering into an international agreement whose content constitutes an unfair business practice. In actuality most of the objectionable restrictions are stricken out of the agreements pursuant to the "administrative guidance" (Gyosei shido) of the FTC before formal proceedings are initiated.

(3) Status of Administrative Guidance—International contracts reported to the FTC are screened on the basis of the standards discussed above. As a result of the screening of the 1,542 cases reported during the first half of 1971, 51 cases (62 cases for the comparative period of the previous year) as shown in Table 2 (printed at the end of this article) were subjected to informal "administrative guidance" of the FTC because of possible Antimonopoly
Law violations. Ordinarily the number of cases for which guidance is required increases in proportion to an increase in the number of cases reported. However, as is obvious from the following figures, the number of such cases for the first half of 1971 is half that of the comparative period of the previous year:

<table>
<thead>
<tr>
<th></th>
<th>Number of cases reported</th>
<th>Number of cases guided</th>
<th>Percentage of occurrence</th>
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</thead>
<tbody>
<tr>
<td>First half of 1970</td>
<td>865</td>
<td>62</td>
<td>7.2%</td>
</tr>
<tr>
<td>Second half of 1970</td>
<td>774</td>
<td>38</td>
<td>4.9%</td>
</tr>
<tr>
<td>First half of 1971</td>
<td>1,542</td>
<td>51</td>
<td>3.3%</td>
</tr>
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This trend may indicate the effectiveness of the FTC's Guidelines. Of the 51 cases which required guidance during the first half of 1971, a United States company was party to the contract in 22 cases (43.1 percent), West Germany in nine cases (17.6 percent) and England and Sweden in 5 cases (9.8 percent).

(4) Recent Cases—There have been few FTC or court decisions regarding illegal restrictions in international patent or technology licensing agreements. However, there have been several recent exemplary instances in which the FTC, through the process of informal "administrative guidance," has advised the enterprises concerned to modify the contents of their particular licensing agreements in order to avoid the danger of an antitrust attack.\(^{38}\)

One such case involved a contract between a Japanese enterprise and a Swiss enterprise in which it was agreed that the Swiss enterprise (the licensor of the patent) would have the right to file for the patent rights to the improvements of the technology made by the Japanese enterprise (licensee) in any country that the Swiss company desired. However, as the result of the advice of the FTC, the contract was amended to the effect that the Japanese company would have the primary right of filing for the patent rights for such technological improvements and that only when the Japanese com-

\(^{38}\) The first four cases which follow have been reported by the International Section of the FTC in 101 KAIGAI SHOJI HOMU KENKYU (International Business Law Bulletin) Nov. 1970, at 36. The fifth case has been reported in Nomoto, Kokusai Keiyaku Shinsu Gyomon no Jitsujyo (Present Status of Screening Activities in Connection with International Contracts), Zaisei Keizai Koho (Information on Finance and Economy) Dec. 6-13, 1971, at 4. All five of these "cases" were resolved pursuant to informal administrative guidance from the FTC and therefore no formal administrative proceeding occurred. For other examples see Iyori, Showayonjugonenbochuno Kokusai Keiya Kuno Shimsajo Kyo (International contracts filed and examined by the FTC between April 1969 and March 1970), 97 KAIGAI SHOJI HOMU (International Business Law Bulletin) 4 (1970).
pany did not wish to file such claims, would the Swiss company have the right to file for the patent rights.

In a second case, which involved a joint venture between a Japanese company A and an American company B, the original draft of the licensing contract stipulated that A would be prohibited from manufacturing or handling the products in competition with the products of the Japanese joint venture subsidiary company as long as either A or B was a stockholder of this subsidiary company or for three years after either party to the licensing contract disposed of its stocks in the joint venture company. Also A was prohibited from handling competing products forever after withdrawal from the joint venture as long as B remained a stockholder in the joint venture. The FTC advised the parties to modify the contract to read "as long as B is the owner of the stock of the joint venture company, or until two years have elapsed after A disposed of all the stock of the joint venture company, whichever is shorter."

A third case involved a contract between two Japanese companies, A and B, and a Swedish company C. According to their licensing agreement, C licensed technology to A and A sublicensed it to B; A would then sell the products in Japan manufactured by B. In the original draft of the contract, B was bound not to manufacture any constituent part of the products or purchase same from any one other than C unless the production cost or purchase price was lower than or equal to the constituent part that C was to supply. Pursuant to the advice of the FTC, this restrictive clause was stricken out of the licensing agreement.

A fourth case involved a contract between two Japanese companies, A and B, a British company C, a German company D, and a Swiss company E for the establishment of a "patent pool." This contract was aimed at exchanging present and future technology with regard to certain machines between A and B on one hand, and C, D and E on the other. There were, however, the following restrictions involved in this agreement: (1) the two Japanese companies would not sell the machines in England, West Germany or Switzerland and the three European companies would not sell the machines in Japan (a mutual restriction of the sales territories), and (2) whenever one of the parties wished to grant a license of the patent involved in this patent pool to a third party, it must first obtain the consent of all the parties to the licensing agreement. The FTC held that this agreement unduly restrained competition in the marketing of this machine since these five companies were quite
powerful in this field and therefore the restrictions involved in this licensing agreement could not be considered to be a valid exercise of patent rights. At the last report, a negotiation was proceeding between these parties and the FTC for the elimination of both restrictions.

A fifth case involved a contract between companies A and C for import of technology. It was concluded following establishment in Japan by company B of its wholly-owned subsidiary, company C. Company C desired to acquire from company A, a major British cosmetic manufacturer, know-how relating to the manufacture of cosmetics and an exclusive trademark license. The following problems were found with respect to said contract: (1) Article 5 of the licensing agreement provided: "Licensee (C) shall be responsible for sale in accordance with Licensor's (A) marketing policy." This provision placed C in subordination to A in terms of business policy. The term "marketing policy" has extensive implications which can be interpreted to include factors other than basic sales policy, such as price, quantity, sales method, etc. of individual goods, and accordingly, the term could be interpreted as restricting sales methods, quantity, price, etc. The FTC suspected this provision of falling under Item No. 10 of the FTC's General Designation of Unfair Business Practices (discussed above) on the ground of A's abuse of its technological superiority. Consequently the parties concerned were advised either to delete said provision or to revise the same to read: "A shall provide appropriate advice on sales method, etc. when it deems it necessary." (2) Article 8 of the licensing agreement read: "The retail price shall not be lower than that of a similar product in the United States." This provision obviously was designed to restrict the resale price, and it was suspected of falling under Item I, Paragraph 6 of the FTC's Guidelines. Also specific figures restricting resale price were given, including the words "shall not be sold for a price lower than . . . ." In this case even if specific figures had not been given, the words "shall not be lower than" would have constituted an unfair restriction. Accordingly, the FTC advised the parties to delete said provision. (3) Article 11 of the licensing agreement provided: "Licensee and B shall not handle any product which is competitive with the Product in terms of price and quality without the written consent of Licensor." Issues arising from such a restrictive provision must be separated into those with respect to C, Licensee, and those with respect to B, C's parent company, because of the different status of B and C. It was established
that because C was granted an exclusive license to manufacture and sell the cosmetics concerned within Japan (including Okinawa) and thus need not fear intrusion of the market by other competitors, C was obligated to use its efforts solely for the sale of said cosmetics. Consequently, when an exclusive license is thus granted, the FTC considers some restriction of the handling of competitive goods as inevitable even under the Antimonopoly Law. Item I, Paragraph 3 of the FTC's Guidelines prohibits the imposition of restrictions on the handling of competitive products or the use of competitive technology except in the case of a grant of an exclusive license which imposes no restriction on the products or technology handled or exercised by a licensee prior to the granting of the exclusive license. This means that restrictions may be imposed on the handling of competitive products only when the license granted is exclusive and there is no infringement on a licensee's vested rights. No restrictions may be imposed in any other cases. The FTC saw no ground under the Antimonopoly Law for the imposition of restrictions by A on B in connection with the handling of competitive products. A might have imposed such restrictions on both B and C on the basis of the interpretation that B and C are one entity because of their relationship as a parent company and a wholly-owned subsidiary with the same representative director serving both companies simultaneously. On the basis of the assumption, however, that the imposition of the foregoing restrictions on C is allowed only under certain terms and conditions, imposition of such restrictions on B raises problems. Consequently, it was advised that the provision imposing restrictions on B be deleted. (4) The restrictive provision further went on to limit the scope of competitive products to those "which are competitive with the Product in terms of price and quality." However, the manufacture of products of highly extensive quality levels in the instant case was considered possible without a significant change of manufacturing facilities or methods. Therefore, the FTC apparently did not think it important to take up the case in which the scope of competitive products was limited.

B. Acquisition and Control of Japanese Business Enterprises

Generally speaking, in the acquisition and control of Japanese business enterprises the following antimonopoly restrictions are most relevant: (1) prohibition of holding company; (2) restriction of stockholding by a company; (3) restriction of stockholding by a financial company; (4) restriction on interlocking directorates;
(5) restriction of stockholding by a person other than a company; (6) restriction on merger; and (7) restriction of transfer of business.

(1) Holding Company—A pure holding company is prohibited under Article 9 of the Antimonopoly Law regardless of the size and the effect of a proposed holding company. A pure holding company (mochikabu kaisha) is defined in Article 9(3) of the Law as "a company whose principal business is to control the business activities of a company or companies in Japan by means of stockholding (including partnership share)." Therefore, an "operating holding company" is not prohibited. If a company which is primarily engaged in the production and sale of some commodity or in some other business also holds stocks of various other companies, it is not regarded as a holding company under the Japanese Antimonopoly Law.

A foreign holding company which holds stocks of Japanese companies probably is outside the ban of Article 9 as long as it does not transact business in Japan. Furthermore, it is likely that Article 9 would not apply to a situation where a foreign holding corporation acquires shares in a Japanese company in connection with the business activities of its subsidiary — for example, a situation where a holding corporation acquires shares in a Japanese joint venture with which a subsidiary of the holding corporation enters into a technological assistance agreement. However, the prohibition would apply to a situation where such foreign holding corporation acquires shares in a Japanese company merely to control the company without any substantial connection with business activities of the holding corporation or its subsidiaries.

There is considerable doubt as to whether a domestic holding company which holds stocks of foreign companies operating in foreign countries falls within the prohibition of Article 9. It may be that such a holding company is also prohibited as long as it is a pure holding company established in Japan. On the other hand, it can be argued that such a holding company has no adverse effect upon the Japanese economy and therefore it should be considered to be outside the scope of the domestic Antimonopoly Law.

(2) Stockholding—Under the Japanese Antimonopoly Law, acquisition and holding of stocks of a company by another company

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39 Note, however, that Article 9(2) of the Antimonopoly Law states: "Any company (including a foreign company; hereinafter the same) shall neither become nor operate as a holding company in Japan."
is prohibited whenever such acquisition or holding may substantially restrain competition in some area of business. The relevant provision is Article 10(1) of the Law which provides: "No company shall acquire or own stock of a company or companies in Japan in the event that the effect of such acquisition or owning of stock may be substantially to restrain competition in any particular field of trade, or that such acquisition or owning of stock is made through unfair business practices." To fall within the prohibition of this Article, it is not necessary that a company acquire or own the stock of a competitor. On the contrary, if a company engaged in manufacturing acquires or owns stocks of a company engaged in retailing, it may come under the prohibition of Article 10 if such acquisition or owning may substantially restrain competition in any particular field of trade. The key problem here is to determine the meaning of "may substantially restrain competition in any particular field of trade."

In FTC v. Nihon Gakki Kabushiki Kaisha, a case in point, Nihon Gakki, a powerful manufacturer of music instruments, held shares in companies whose output totaled 54% of the market's production of pianos, 64% of the organ market, and 27% of the harmonica market. This company acquired 24.5% of the outstanding shares of Kawai Gakki Kabushiki Kaisha, a competing company holding shares totaling 16% in the production of pianos, 13% in organs, and 7% in harmonicas. This acquisition was made in the name of a third party which was controlled by Nihon Gakki. By holding 24.5% of the outstanding shares of Kawai Gakki, Nihon Gakki was able to control Kawai Gakki, its competitor. Therefore, through this acquisition and the holding of stocks, competition would be lessened as much as 70% in the production of pianos, 77% in organs and 35% in harmonicas. This acquisition was held illegal by the FTC since it amounted to a violation of Article 17 which prohibits, inter alia, the evasion of the prohibitions set forth in Article 10 of the Antimonopoly Law.

In the recent case of FTC v. Toyo Can Kabushiki Kaisha, the FTC investigated the establishments of seven can manufacturing companies in Japan alleging that Toyo Can Kabushiki Kaisha, the leading manufacturer of cans in Japan, had suppressed competition

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40 Kosha Torihiki Inkaai Shinketsu Shu (FTC Devisations Reporter) 51 (1957).
41 Reported in Nihon Keizai Shinbun (Japan Economic Newspaper), Jan. 12, 1972, at 2.
by acquiring stocks in competing companies and by establishing interlocking directorates in violation of Article 3 (private monopolization and unreasonable restraint of trade) and Article 10 of the Antimonopoly Law. The trial has not yet begun and it is too premature to predict what the outcome may be. However, one can reasonably say that this aspect of the Antimonopoly Law is becoming vitalized.

When a company in Japan, engaged in nonfinancial business, has total assets exceeding 500 million yen (roughly U.S. $1.7 million), or a foreign company engaged in nonfinancial business owns stock in another company or companies in Japan, it must submit a report to the FTC on such stock holding whether it is held in its name or in the name of a trustee at the end of every business year within two months therefrom, pursuant to Article 10(2) of the Law.

It has been reported that the FTC plans to tighten up the reporting duties vis-a-vis foreign enterprises operating in Japan. The reason given by the FTC is as follows. As the liberalization of foreign investment progresses, it can be anticipated that more and more foreign enterprises will enter the Japanese market. To keep a "proper surveillance" on these matters, it is necessary for the FTC to obtain appropriate information as to the relationship between these foreign enterprises and their Japanese subsidiaries. Under certain circumstances, the FTC may even order foreign enterprises to submit reports on their corporate relationships in foreign countries.

(3) Stockholding by Financial Companies—Restrictions are imposed on stockholding by a financial company under Article 11(1) of the Law which states: "No company engaged in financial business shall acquire or own stock of another company or companies in Japan in the event that it may be to own stock of the said company or companies exceeding ten percent (10%) of the total outstanding stock thereof." The test of illegality here is clear, since it is expressly provided that more than 10% of the stock cannot be acquired without prior approval of the FTC. However, under Article 11(1), it is provided that a financial company can acquire more than 10% of the outstanding stock of a company if (1) said

42 See, e.g., Nihon Keizai Shinbun (Japan Economic Newspaper), Mar. 18, 1972, at 3.
43 Id.
44 This may well pose some interesting jurisdictional problems. Cf. Emmerglichen, Antitrust Jurisdiction and the Production of Documents Located Abroad, 11 RECORD OF N.Y.C.B.A. 122 (1956).
acquisition or owning of stock is the result of the enforcement of a lien, pledge, mortgage, or of payment in kind, (2) said acquisition or owning of stock is made by a company engaged in the transaction of securities in the course of its business, or (3) said acquisition of stock is made for a securities trust or the holding in a securities trust wherein the trustor is the beneficiary and retains the voting rights.

Nevertheless, if a financial company has come to own stock in another company and wishes to continue owning such stocks after one year, it must obtain prior approval of the FTC.

(4) Interlocking Directorates—Domination or control of enterprises may be accomplished through the utilization of interlocking directorates.\textsuperscript{45} Such an interlocking directorate is prohibited under Article 13 of the Law if it may "substantially restrain competition in any particular field of trade" or if it may "coerce another company through unfair business practices." This means that an officer or employee of a company cannot simultaneously hold the position of an officer in another company when the effect is to substantially restrain competition in any particular field of trade. In case an officer or employee of a company currently holds the position of an officer in another company in Japan, a report must be filed with the FTC whenever the total assets of either company exceeds 500 million yen pursuant to Article 13(3) of the Law.

(5) Stockholding by a Person Other Than a Company—As to stockholding by a person other than a company, under Article 14 of the Law the same restrictions are provided as in the case of stockholding by a company (discussed above).

(6) Merger—With regard to merger,\textsuperscript{46} the following restriction is provided in Article 15(1) of the Law: "No company in Japan shall effect a merger . . . (1) In case a substantial restraint of competition in any particular field of trade may be caused by the merger; (2) In case unfair business practices have been employed in the course of the merger." Article 15(2) provides that every company desirous of becoming a party to a merger must file a prior report with the FTC. The parties involved cannot effect a merger until thirty days have elapsed after such filing, during which period the FTC must initiate an action against such proposed merger if it


\textsuperscript{46} For an English language discussion of merger regulation in Japan, see Ariga, \textit{Merger Regulation in Japan}, 5 \textit{Texas Int'l L.F.} 112 (1969).
The Antimonopoly Law of Japan considers that the merger would be illegal. This waiting period can be extended thirty more days by the FTC with the consent of the parties (Article 15(3)).

Even though small and medium size Japanese enterprises are turning to mergers, the major trend in the merger and consolidation area has been "among the larger companies that have made up the prewar Zaibatsu system." This trend lends particular significance to the merger provisions of the Antimonopoly Law.

There have been four major instances reported in this area. Three of these cases involved the merger of the Snow Brand Dairy Company and Clover Dairy Company (share of total market: butter 57.7% and cheese 75% in 1958), that of Chuo Textile Company and Teikoku Linen Company (share of total linen thread market: 56.8% in 1959), and that of three Mitsubishi Heavy Industry Companies (share of total market: shipbuilding 27.6%, steam power generating turbines 24%, trucks 25%, buses 25%; capital stock 76 billion yen in 1963). Antimonopoly issues were informally raised in each of these cases, but the mergers were subsequently approved in each case. All three of these cases were resolved pursuant to the administrative guidance of the FTC and therefore no formal adjudications or FTC decisions resulted therefrom. In the merger of Yahata Steel Company and Fuji Steel Company, by which Japan Steel Company (Shinnihon Seitetsu Kabushiki Kaisha) was established, some additional problems occurred. This newly merged Japan Steel Corporation was to occupy 100% of the market in the production of rails for railroads, 61.2% in tin-plates, 56.3% in steel ingots, and 98.3% in sheet pile. This merger was finally approved by the FTC on the condition that the Japan Steel Corporation would help its competitors in certain ways (to be directed by the FTC) so that they might effectively compete with it.

In 1968 three big paper manufacturing companies — Ohji Seishi Ltd., Jujo Seishi Ltd. and Honshu Seishi Ltd., which together constituted Ohji Seishi Ltd. prior to the dissolution immediately after the War — were desirous of merging into one company. However, on September 20, 1968, anticipating that the FTC would not approve of it, these companies decided to call off the merger plan. This was not the result of formal action taken by the FTC; how-

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47 See Chase Manhattan Bank, supra note 10, at 32.
ever, the case is noteworthy in that the merger plan was cancelled because of Antimonopoly Law considerations.

(7) Transfer of Business—Transfer of business is prohibited under the Antimonopoly Law if its effect may be to substantially restrain competition in any particular field of trade. Pursuant to Article 16 of the Law, activities such as acquiring the whole or a substantial part of the business or the fixed business assets, taking a lease or undertaking the management of a whole or a substantial part of the business in Japan of another company, or entering into a contract which provides for a joint profit and loss account for business in Japan with another company are subject to FTC regulation.

C. Distribution Agreements.

Recently the distribution and retail aspects of the Japanese economy have attracted much attention of both the FTC and the public at large from the following two standpoints. (1) Consumer prices have kept rising in the past decade in spite of the various efforts on the part of the government agencies to combat inflation. In this regard, the restraints on competition at the distribution and retail level which may hinder retail prices from dropping may be a partial cause for such inflation. (2) Despite the recent revaluation of yen, the prices of some imported products in the domestic market have remained at as high a level as they were before the revaluation. It may well be that some sole distributors of certain imported products have monopoly positions and manipulate the domestic prices. Both the FTC and the Economic Planning Agency of the Japanese Government have embarked on an investigation of these problems.

Often, when a foreign company wishes to establish sales channels in Japan, some kind of distributorship agreement will be involved. In this section an attempt will be made to delineate some of the antimonopoly problems which can arise in this area. Assume an American company A, a British company B, and a Japanese company C (the manufacturers of commodity X) establish a Japanese joint venture D to distribute commodity X throughout Japan. In this case, D is a jointly owned subsidiary-distributor of A, B and C in Japan. The relationship between the parents, A, B and C, on the one hand and the subsidiary, D, on the other may take various forms depending on the contents of the related contracts. It may be that the parents will contract to sell commodity X to D and that a trademark will be licensed to D. Whatever the relationship be-
tween the parents and the subsidiary may be, various types of restrictions will most likely be imposed on the activities of the subsidiary. In the above example, an attempt may be made by A, B and C to prohibit D from handling any commodity in competition with commodity X. Or A, B and C may attempt to dictate to D the resale price of commodity X in Japan. Or some other kinds of restrictions may be imposed on D, such as a restriction of sales territory, kinds of customers, and so forth. Each of these restrictions may raise antimonopoly problems.

Roughly classified, there appear to be the following four kinds of problems in relation to the usual restrictions attempted to be imposed on Japanese distributors: (1) exclusive dealing arrangements; (2) various kinds of tie-in clauses; (3) restrictions on sales territories and kinds of customers; and (4) resale price maintenance. These restrictions may sometimes fall within the categorization of Items Nos. 7 and 8, as set forth in the FTC’s General Designation of Unfair Business Practices.49

(1) Exclusive Dealing Arrangements—Exclusive dealing arrangements are those in which one party to a contract deals with the other party on the condition that the latter does not deal with the former’s competitors. In the above example, if A, B and C impose a restriction on D to the effect that D should not deal with the competitors of A, B and C, then the arrangement between A, B and C on the one hand and D on the other may be said to be an exclusive arrangement. Under the Japanese Antimonopoly Law, these practices are not illegal per se. However, under some circumstances, they may fall within the prohibition of Item No. 7 of the FTC’s General Designation of Unfair Business Practices which prohibits “dealing with customers on the condition that they shall, without good cause, not supply commodities, funds or other kinds of economic benefit from a competitor of oneself.” Note, that to hold an exclusive dealing arrangement illegal under this designation, the arrangement should be “without good cause.”

According to existing precedents, it is usually only when the parties imposing exclusive dealing conditions are so powerful that they can effectively deprive competitors of channels of distribution that such exclusive dealing arrangements are held to be illegal under the Law. In the case of FTC v. Taisho Seiyaku Kabushiki Kaisha,50

49 See note 16 supra & accompanying text.
50 4 KOSHI TORIHIKI IINAKI SHINKTESU SHU (FTC Decisions Reporter) 119 (1953).
the restriction imposed by Taisho, a powerful manufacturer of pharmaceutical products, on over three thousand retail drugstores to the effect that they should not handle competing products as long as they wished to distribute Taisho’s products, was held illegal. On the other hand, in FTC v. Nihon Kogaku Kabushiki Kaisha, the exclusive dealing restriction imposed by a manufacturer of cameras and binoculars upon a distributor in the export market coupled with an exclusive sales territory was held lawful. In Kabushiki Kaisha Hokkaido Shinbung Sha v. FTC, Hokkaido Shinbun Sha, the most powerful newspaper company in Hokkaido, forced the sellers of newspapers to stop selling newspapers of a competitor, Hokkai Times, in order to drive this company out of the market. The Supreme Court decided that this practice by Hokkaido Shinbun Sha was illegal under the Antimonopoly Law. The case of FTC v. Amano Seiyaku Kabushiki Kaisha, discussed previously, is also a case involving a distributorship agreement in which the restrictions imposed on the distributors contained such items as resale price maintenance, exclusive dealing and others.

Even though the test for judging illegality under Item No. 7 of the FTC’s General Designation is not entirely clear at this time, one can probably state, based on a review of the previous cases, that:

1. when the party imposing an exclusive dealing restriction demands the other party upon whom such conditions are imposed to stop dealing with its competitors, despite the fact that they have been dealing with them in the past, the danger of such conditions being held illegal under the Antimonopoly Law becomes very great; and

2. when the restrictions extend beyond the life of the main contract they may be regarded as illegal per se.

(2) Tie-in clause—Tie-in clause refers to restrictions whereby the purchase of commodities or services is conditioned on the purchase of some other commodity or service. For example, if A, B and C supply commodity X to D on the condition that D purchases another commodity Y from Company E, another subsidiary of A, B and C, then this supply contract between A, B and C on the one hand and D on the other is a tie-in contract. Tie-in clauses fall generally within the regulation of Item No. 8 of the FTC’s General

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81 4 KOSEI TORIHIKI INKAI SHINKETSU SHU (FTC Decisions Reporter) 30 (1952).


83 See discussion accompanying note 25 supra.
Designation which prohibits "dealing with customers on conditions which, without good reason, restrict any transaction between the said customers and the supplier of commodities, funds, or other kinds of economic benefit to them or between the said customers and any person receiving those from them, or any relationship between the said customers and their competitors."

Tie-in clauses are regarded generally to be an unreasonable expansion of the monopoly power enjoyed by the party or parties imposing such restriction with respect to the tying commodity to the tied commodity of which they had originally no control. For this reason, such clauses are considered to be illegal, except for special cases in which they are deemed necessary to maintain the efficiency of the technology licensed or the goodwill of the trademark licensed. If, for instance, A, B and C manufacture ice-cream mix and license the trademark "ABC" to D and impose upon D the restriction that he should purchase some products to go with ice-cream (for example, chocolate, strawberries, etc.) from A, B and C, such restriction is likely to be held lawful if it is deemed necessary to impose such restriction in order to maintain the reputation of the trademark "ABC." This situation may occur when there is no other manufacturer capable of manufacturing chocolate or strawberries of the high quality necessary for preserving the reputation of the trademark. Or it may be due to the efficient manufacturing of certain kinds of materials which are not available except from the designated source. In such exceptional situations, a tie-in clause may be exonerated from the ban.

(3) Territorial and Customer Restrictions—Concerning territorial and customer restrictions, the rules of law are not clear at this time in Japan since neither the FTC nor the courts have handed down a decision directly relating to these matters. However, problems are likely to arise in these areas in the near future due to the fact that the so-called franchise system of distribution is becoming very popular in Japan and such restrictions are usually involved in franchise agreements.

Most likely these kinds of restrictions will not be regarded as per se violations of the Antimonopoly Law. Under some circum-

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stances, however, they may fall within the prohibition of Item No. 8 of the FTC's General Designation. It is likely that the restriction of territorial areas and customers imposed upon a distributor will be considered illegal when the party imposing such restriction is very powerful or when such restriction is coupled with the prohibition of handling competing products.

(4) Resale Price Maintenance and Some Other Problems—
Pursuant to Article 24—2 of the Antimonopoly Law, resale price maintenance provisions are exempted from its ban under certain circumstances. To qualify for the exemption the commodity must be so designated by the FTC and the uniform quality of such commodity must be easily identifiable. This means in effect that the commodity must be a trademarked good. In spite of the above, exemption is not granted if the resale price maintenance is deemed to grossly injure the interest of consumers in general. Furthermore, such resale price maintenance cannot be practiced against the will of the manufacturer.

The FTC may designate a commodity as exempted if it is for the daily use by consumers in general, and if free competition exists with respect to the commodity, that is, there are some competing brands. At present, cosmetics, drugs, and some other products are designated as exempted commodities. If the commodity of which the resale price is maintained does not fulfill the requirements provided in Article 24—2 of the Law, then such restriction will probably be held illegal since the direction of the resale price of the commodity already sold is tantamount to the restriction imposed upon the distributor's pricing activity — a type of restriction prohibited under Item No. 8 of the FTC's General Designation.

Resale price maintenance is sometimes enforced by means of refusing to supply the commodity or by threatening to reduce or cut rebates given to the distributors. If, for example, a distributor were to undersell a commodity of which the resale price has been set by the manufacturer, the manufacturer may withdraw supply from the distributor in an effort to penalize the distributor, or the manufacturer may reduce or cut the rebate to be given to the distributor. These practices are illegal as long as the main transaction, that is, the resale price maintenance, is not exempted from the FTC prohibition. In many cases, the manufacturers set the wholesale price and retail price and thereby decide the margins of profit to be made by the wholesalers and the retailers. Often these margins are set very small and the profit of the wholesalers and retailers must be
derived from the rebate which is given by the manufacturers. However, practically speaking, the payment of such rebate and its amount may be conditioned upon whether or not the distributors observe the resale price. This type of rebating practice is unlawful because it is an enforcement measure for maintaining the resale price of the commodity not exempted from the regulation.55

Concerning restrictive provisions found in distributorship agreements it may be generally stated that in determining the vulnerability under the Antimonopoly Law the FTC appears to give substantial weight to considerations of "fairness" of the agreement in question as well as to more conventional antitrust considerations of economic injury to the consuming public. "Fairness" is of course an elusive concept, but one criterion heavily relied upon by the FTC in assessing fairness is whether or not, in situations in which it would be feasible to do so, the various engagements of the parties have been symmetrically drawn so as to create substantially analogous rights and obligations in the parties. For example, the FTC generally takes the position that an undertaking by a supplier not to supply to other distributors in a particular territory must be accompanied by an undertaking by the distributor not to deal in the territory in products competitive with those which are the subject of the distributorship agreement in question.

III. Conclusion

This article has attempted to set forth a general introduction to the Antimonopoly Law of Japan with special emphasis placed on those provisions of the Law which are relevant to international business transactions, including the licensing of patents and technology, the acquisition and control of Japanese business enterprises, and the utilization of distributorship agreements.

The Amano case established the precedent that it is possible to implement the Antimonopoly Law as a partial countermeasure against liberalization of trade and investment in Japan. The FTC appears to be taking the view that in an effort to preserve orderly competition in the Japanese market and to place some controls on the present internationalization era the Antimonopoly Law will be utilized for controlling the foreign induction of technology and

capital tie-ups under terms and conditions which might be unreasonable and unfair to Japanese companies.

Antimonopoly Law concepts of impermissible restraints on competition and prohibitions against unfair business practices are highly elastic in Japan, as elsewhere. However, there are indications that these concepts may in general receive more expansive construction and broader application in Japan over the next several years, especially where international agreements or foreign-invested enterprises are concerned.

APPENDIX A

ANTIMONOPOLY LAW GUIDELINES FOR INTERNATIONAL LICENSING AGREEMENTS

(Translated by the Staff Office of the Fair Trade Commission)

May 24, 1968

Fair Trade Commission of Japan

I. Among the restrictions which are liable to come under unfair business practices in international licensing agreements on patent rights or utility model rights (hereinafter referred to as patent rights, etc.) the following are the outstanding:

(1) To restrict the area to which the licensee may export the goods covered by patent rights, etc. (hereinafter referred to as patented goods).

However, cases coming under a, b, or c listed below are excluded.

a. In case the licensor has patent rights, etc. which have been registered in the area to which the licensee's export is restricted (hereinafter referred to as the restricted area);

b. In case the licensor is selling patented goods in the restricted area in his normal business;

c. In case the licensor has granted to a third party an exclusive license to sell in the restricted area.

(2) To restrict the licensee's export prices or quantities of patented goods, or to make it obligatory for the licensee to export patented goods through the licensor or a person designated by the licensor.

However, such cases are excluded where the licensor grants license to export to the area coming under either of the preceding a, b, or c and the said restrictions or obligations imposed are of reasonable scope.
(3) To restrict the licensee from manufacturing, using or selling goods, or employing technology which are in competition with the licensed subject.

However, such cases are excluded where the licensor grants an exclusive license and imposes no restriction on goods already being manufactured, used or sold, or technology already being utilized by the licensee.

(4) To make it obligatory for the licensee to purchase raw materials, parts, etc. from the licensor or a person designated by the licensor.

(5) To make it obligatory for the licensee to sell patented goods through the licensor or a person designated by the licensor.

(6) To restrict the resale prices of patented goods in Japan.

(7) To make it obligatory for the licensee to inform the licensor of knowledge or experience newly obtained regarding the licensed technology, or to assigning the right with respect to an improved or applied invention by the licensee to the licensor or to grant the licensor a license thereon.

However, such cases are excluded where the licensor bears similar obligations and the obligations of both parties are equally balanced in substance.

(8) To charge royalties on goods which do not utilize licensed technology.

(9) To restrict the quality of raw materials, parts, etc. or of patented goods.

However, such cases are excluded where such restrictions are necessary to maintain the creditability of the registered trademark or to insure the effectiveness of the licensed technology.

II. The aforementioned guidelines shall apply to international know-how licensing agreements.

III. In international licensing agreements on patent rights, etc., the following acts shall be regarded as the exercise of rights under the Patent Law or the Utility Model Law:

(1) To grant license to manufacture, use, sell, etc. separately;

(2) To grant license for a limited period within the life of patent rights, etc. or for a limited area within the whole area covered by patent rights, etc.;

(3) To restrict the manufacture of patented goods to a limited field of technology or to restrict the sale thereof to a limited field of sales;
(4) To restrict the use of patented processes to a limited field of technology;
(5) To restrict the amount of output or the amount of sales of patented goods or to restrict the frequency of the use of patented processes.
TABLE 1

Status of Reports of International Contracts Reported to the FTC for First Half of 1971*

<table>
<thead>
<tr>
<th>Classification of Business</th>
<th>Import of Technology</th>
<th>Loan</th>
<th>Purchases (Agency)</th>
<th>Joint Venture</th>
<th>Others</th>
<th>Sub-total</th>
<th>Technical Assistance</th>
<th>Sale (Agency)</th>
<th>Joint Venture</th>
<th>Others</th>
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Status of FTC Administrative Guidance Concerning International Contracts*

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<th>Unfair Business Practices</th>
<th>Unreasonable trade restrictions</th>
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<th>(% )</th>
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<td>Restriction of selling of raw materials and components</td>
<td>Collection of excessive consideration</td>
<td>Restriction of resale price</td>
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<tr>
<td>Total</td>
<td>38</td>
<td>14 (2)</td>
<td>2 (2)</td>
<td>2 (1)</td>
<td>1 (1)</td>
</tr>
<tr>
<td>(% )</td>
<td>66.6</td>
<td>24.6</td>
<td>3.5</td>
<td>3.5</td>
<td>1.8</td>
</tr>
</tbody>
</table>

Note: Figures within parentheses represent overlapping figures for those cases involving more than two matters in each case which have become the cause of guidance. Further, on the basis of types of contracts, of 51 cases for which guidance was administered, five were purchase contracts, two were joint venture agreements and one was another kind of contract and the rest were contracts relating to import of technology (inclusive of technological cross licensing agreements).
