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Marketing and Antitrust in Japan

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The Japanese marketing system is commonly described as an acutely inefficient network of small wholesalers and retailers, costly to consumers and discriminatory in its bias against imported goods. Indeed the failure of retail prices for imports to reflect the rising value of the yen since August, 1971 and the reportedly poor performance by foreign sellers in penetrating the Japanese market are problems increasingly attributed to the Japanese system of distribution. Population density and limited space require consumers to make daily purchases of immediate needs and force merchants to maintain only the barest inventories. As a result, Japan has nearly two times as many retail stores and wholesale outlets per capita as the United States. Most are "mom and pop" stores. In 1976, for example, 85 percent of all retail stores and 46 percent of all wholesale outlets had less than five employees.

Although retail and wholesale establishments have continued to increase in number, since the early 1960's there have been ex-

1. Aside from journalistic accounts, there are remarkably few detailed studies of the Japanese distribution system in English. The best scholarly work remains M.Y. YOSHINO, THE JAPANESE MARKETING SYSTEM (1971). Others worth noting include: DISTRIBUTION ECONOMICS INSTITUTE OF JAPAN, OUTLINE OF JAPANESE DISTRIBUTION STRUCTURES (1971); JAPAN EXTERNAL TRADE ORGANIZATION, PLANNING FOR DISTRIBUTION IN JAPAN (n.d.c. 1972). All emphasize the complex fragmentation of the Japanese marketing system and recent changes toward greater manufacturer control. One of the best recent Japanese studies is Gotō, Ryūtsū keiretsuka to shijo keizai (Channelization of Distribution and Market Economics), in RYŪTSŪ KEIRETSUKA TO DOKKIN HÔ (Channelization of Distribution and the Antimonopoly law) 9-40 (M. Matsushita ed. 1978) [hereinafter cited as Gotō].

As to the problems foreign manufacturers face in penetrating the Japanese market, see D. F. HENDERSON, FOREIGN ENTERPRISE IN JAPAN 33-34, 146 (1974).

2. See, e.g., Remarks by Kazuo Nukazawa, in United States — Japan Trade Council, Council Report No. 14, March 22, 1977, p. 3. A recent Ministry of International Trade and Industry report takes exception to this view. MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, WHITE PAPER ON INTERNATIONAL TRADE 86-89 (1978) [hereinafter cited as 1978 WHITE PAPER ON INTERNATIONAL TRADE]. But the report notes that the normal margin allowed importers exceeds that for similar domestic products or imports into other countries. Id. at 87.

3. See statistics cited in Gotō, supra note 1, at 11; 1978 WHITE PAPER ON INTERNATIONAL TRADE, supra note 2, at 88.

4. 1978 WHITE PAPER ON INTERNATIONAL TRADE, supra note 2, at 88.

5. Gotō, supra note 1, at 17.
panding efforts toward manufacturer control and reorganization of distribution channels. Exclusive dealings arrangements, territorial restrictions, manufacturer-dominated retail associations and franchises have become increasingly common. Because of the inefficiencies of the present distribution structure and consequent cost to consumers, many observers have viewed the trend toward greater manufacturer control in channelling distribution of their products and the resulting rationalization of traditional patterns of marketing as both necessary and beneficial. Apparently, however, such views are not shared by the Japanese Fair Trade Commission (FTC) and its staff. In a recent series of cases, the FTC has adopted a strict illegality approach and held one of the more typical manufacturer-imposed market channelling arrangements to constitute an unfair business practice in violation of article 19 of the Japanese Antimonopoly and Fair Trade Law. The purpose of this article is to assess these cases and their implications in the context of Japanese antitrust regulation of marketing.

Marketing Restrictions as Unfair Business Practices

For purposes of Japanese antitrust policy, most manufacturer-imposed marketing restrictions are regulated solely under the article 19 proscription of unfair business practices. The alternative is article 3, which prohibits “private monopolization” and “unreasonable restraints of trade” as defined in articles 2(5) and (6). Although

6. Id. at 22.
7. See, e.g., Yoshino, supra note 1, at 124-28. According to Yoshino, the traditional market system has developed three identifiable patterns of distribution: distribution through outlets owned by the manufacturer, through manufacturer-controlled franchises, or through a group of affiliated wholesalers and retailers. However, there is little functional difference between use of a franchise or other means of affiliation. Consequently, it is probably more accurate to say that there are two basic patterns.
8. Shiteki dokusen no kinshi oyobi kosei torihiki no kakuho ni kansuru horitsu (Law concerning the prohibition of private monopolization and the maintenance of fair trade), Law No. 54 (1947) as amended 2 EHS KA 3 [hereinafter referred to as the Antimonopoly and Fair Trade Law]. Article 19 provides: “No entrepreneur shall employ unfair business practices.” Article 19 provides: “No entrepreneur shall employ unfair business practices.”
9. As noted at p.57 infra, although the prohibition of article 19 is broad enough to control international transactions, it is used primarily to prevent unfair business practices employed by individual entrepreneurs in domestic transactions.
10. Article 2(5) provides:

“The term 'private monopolization' as used in this law means such business activities, by which any entrepreneur, individually, or by combination or conspiracy with other entrepreneurs, or in any other manner, 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.”

[English translation, not identical, available in 2 EHS KA 2, 5].
11. Article 2(6) provides:
vertical restraints could be condemned under United States law as "unreasonable restraints of trade," the Japanese FTC has adhered to an early Tokyo High Court decision in which the phrase "concerted activities" of article 4 (deleted in 1953) was construed to apply only to horizontal restraints. The court's construction is thought to apply to the definition of "unreasonable restraints of trade" in article 2(6).

There is also the Noda Shoyu case in which resale price maintenance was attacked as "private monopolization" under article 3 on the theory that when in an oligopolistic industry the consumer identifies quality with price, vertical price-fixing by the leading firm is tantamount to controlling the pricing of other manufacturers who wish to maintain the reputation of equivalent products. Carried to its logical conclusion, Noda Shoyu would have been guilty of private monopolization any time it changed its prices. Despite the acceptance of this bizarre argument by the Tokyo High Court on appeal, this case has no sequel and is best considered an aberration.

Reliance on the prohibition against unfair business practices as the primary antitrust mechanism to police marketing and other vertical restraints gives rise to a number of problems, however. Not the least of these stem from the ambiguities of the definition of unfair business practices in article 2(9) and related FTC regulations.

The term "unfair business practice" (fukosei na torihiki hōhō), employed at present, dates from the 1953 amendments. To consti-

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"The term 'unreasonable restraint of trade' as used in this law means such business activities, by which entrepreneurs by contract, agreement or any other concerted activities, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or enhance prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to public interest, substantial restraint of competition in any particular field of trade."

[English translation available in 2 EHS KA 2, 3].

12. K.K. Asahi Shimunshsa v. Kōsei Torihiki (Fair Trade Comm'n) [hereinafter cited as FTC], 4 Kōsei Torihiki Inka Shinketsushū [hereinafter cited as Shinketsushū], 145 (Tokyo High Ct., Mar. 9, 1953). The implication to the contrary in Tsuji, Regulation of Resale Price Maintenance in Japan, 18 N.Y.L. Forum 397 n. 3 (1972) is incorrect, presumably the result of editorial error. Also, most of the examples cited by Tsuji involved resale price maintenance by trade associations and other instances of horizontal price-fixing.

13. See, e.g., A. Shōda, Cartel to hōritsu (Cartels and Law) 27 (1968).


16. As enacted in 1947, article 19 referred to "unfair methods of competition" (fukosei na kyōso hōhō), following the language of section 5 of the United States Federal Trade
tute an unfair business practice as defined currently in article 2(9), conduct must come within one of the following six categories:

1. Unduly discriminating against other entrepreneurs;
2. Dealing at undue prices;
3. Unreasonably inducing or coercing customers of a competitor to deal with oneself;
4. Trading with another party on conditions as will restrict unjustly the business activities of said party;
5. Dealing with another party by unwarranted use of one's bargaining position;
6. Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or with the company of which oneself is a stockholder or an officer and his customers; or in case such entrepreneur is a company unjustly inducing instigative or coercive means on stockholders against the interest of such a company or an officer of such company to act.

In addition, however, the conduct must have been designated in advance by the FTC as an unfair business practice and "endanger fair competition." Pursuant to this definition, in 1953 the FTC issued its General Designation of Unfair Business Practices. The Commission Act. The definition in old article 2(6) set out six specific types of conduct that, if not justified as reasonable, came within the prohibition.

"The term 'unfair methods of competition,' as used in this Law, shall mean such methods of competition which come under any one of the following items:

(1) Unwarranted refusal to receive from or to supply to other entrepreneurs commodities, funds and other economic benefits.
(2) Supplying of commodities, funds and other economic benefits at unduly discriminative prices;
(3) Supplying of commodities, funds and other economic benefits at unduly low prices;
(4) Inducing or coercing unreasonably customers of a competitor to deal with oneself by means of offering benefits or that of threatening disadvantages;
(5) Trading with another party on condition that said party shall, without good cause, refuse acceptance of supply of commodities, funds and other economic benefits from a competitor of oneself;
(6) Supplying commodities, funds and other economic benefits to another party on such conditions that shall unduly restrain transactions between said party and his suppliers of commodities, funds and other economic benefits or customers or that shall unduly restrain relations between said party and his competitors, or on condition that the appointment of officers (hereinafter referring to directors, unlimited partners who are executives, auditors or persons similar thereto, manager or chief of the main or branch office) of the company of said party shall be subject to prior approval on part of oneself."

Subparagraph (vii) provided for the inclusion of other practices which were found to be "contrary to the public interest" and designated by the FTC under rulemaking powers in articles 71 and 72.

17. In addition to the General Designation, the FTC has designated unfair business practices in eleven specific industries. These include: the Specific Designation of Unfair
General Designation lists twelve unfair business practices in equally broad terms.

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 specific 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 reason, 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 condition that they shall, without good reason, not supply commodities, funds, or other kinds of economic benefit to, or not receive commodities, funds, or other kinds of economic benefit from a competitor of oneself.


The FTC has also issued two sets of guidelines listing restrictions that "risk" being deemed unfair business practices in international contracts prohibited under article 6(1); Guidelines for International Licensing Agreements (FTC, May 24, 1968) and Guidelines for Sole Import Distributorship Agreements (FTC, November 21, 1972).

There have been only seven formal decisions under the specific designations and one under the guidelines. See Tables 1 and 2.
(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 customers and their competitors.

(9) Dealing with a company on condition, without good reason, that the appointment of officers of that company (meaning those as defined by subsection (3) of Section 2 of the Act concerning 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 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.

The language of both the statute and the General Designation has obvious breadth and ambiguity. Almost any conceivable vertical (or other) restraint is potentially subject to FTC challenge as an unfair business practice. Yet enforcement of article 19 has been sporadic at best (see Table 3). Between 1947 and 1976, the FTC, the sole enforcement agency, decided only 113 cases involving unfair business practices (see tables 1 and 2). Of these, 32 involved trade associations under article 8(1)\(^\text{18}\) and 23 international contracts

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18. Article 8(1) provides:

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

(i) Substantially restricting competition in any particular field of trade:
(ii) Entering into an international agreement or an international contract as provided for in Section 6(1);
(iii) Limiting the present or future number of entrepreneurs in any particular field of business;
(iv) Unduly restricting the functions or activities of the constituent entrepreneurs (meaning an entrepreneur who is a member of the trade association hereinafter the same);
(v) Causing entrepreneurs to do such acts as constitute unfair business practices."

[English translation in 2 EHS KA 8].
under article 6. Of a total 31 decisions between 1947 and 1953, in only 9 cases were domestic transactions challenged. Since 1953, there have been only 42 decisions involving unfair business practices by individual entrepreneurs in domestic transactions.

Table 1

Formal FTC Actions Involving Unfair Methods of Competition 1947-1953

<table>
<thead>
<tr>
<th>Challenged Conduct Under Article 2(6) *</th>
<th>(i)</th>
<th>(ii)</th>
<th>(iii)</th>
<th>(iv)</th>
<th>(v)</th>
<th>(vi)</th>
<th>(vii)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(domestic transactions) Article 19</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 cases</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>(international contracts) Article 6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 cases</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>21</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>31 cases total</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>24</td>
<td>6</td>
<td>0</td>
</tr>
</tbody>
</table>

*Several cases involved more than one unfair method of competition.

One must not confuse, of course, the number of formal FTC actions with the number of actual cases the Commission handles. Most cases are resolved through the ubiquitous process of administrative guidance and negotiated settlement and generally do not find their way into the statistics. An exception has been the FTC reports on international contracts, which do provide some data on the volume of cases the FTC resolves without formal decision. From 1970 to 1976, for instance, the Commission reviewed 31,889 international contracts under article 6. In 1,934 of these cases, some form of “guidance” was given. But during the entire period from 1953 to the present there has been only one formal decision under article

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19. Article 6(1) provides:
"No entrepreneur shall enter into an international agreement or an international contract which contains such matters as constitute unreasonable restraint of trade or unfair business practices."

[English translation in 2 EHS KA 6].

20. The FTC reports on international agreements as reprinted each year in the April or May issue of Kōsei Torihiki (Fair Trade).
Table 2  
Formal FTC Actions Involving Unfair Business Practices  
1953-1976  
Challenged Conduct Under General Designation  

<table>
<thead>
<tr>
<th>Article 19</th>
<th>Item</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>12</th>
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<tbody>
<tr>
<td>42 cases</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>7</td>
<td>10</td>
<td>21</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Article 6</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 8(1)</td>
<td>32 cases</td>
<td>23</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>8</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>75 cases total**</td>
<td>27</td>
<td>4</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>7</td>
<td>13</td>
<td>30</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>0</td>
</tr>
</tbody>
</table>

*Several cases involved more than one unfair business practice.

**One case was decided under article 19 relating to the Specific Designation of Unfair Business Practices in the Marine Transportation Industry (FTC Notification No. 17, 1959) and six cases were decided under the Specific Designation of Unfair Business Practices in Textbook Industry (FTC Notification No. 51, 1956).

6. However useful administrative guidance may be to the particular parties and their attorneys in providing an understanding of how the staff officials of the FTC construe the antimonopoly statute and Commission’s designations, it does not substitute for formal decisions as a means for public clarification of the Commission’s views. One is therefore left with the task of piecing together odd fragments of possible policy by examining a few isolated cases.

The Commission has assailed a variety of restrictions and practices. In terms of formal actions, by far the most numerous have involved resale price maintenance schemes, followed by exclusive...
Table 3

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1953</td>
<td>1</td>
</tr>
<tr>
<td>1954</td>
<td>2</td>
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<tr>
<td>1955</td>
<td>3</td>
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<tr>
<td>1974</td>
<td>1</td>
</tr>
<tr>
<td>1975</td>
<td>5</td>
</tr>
<tr>
<td>1976</td>
<td>4</td>
</tr>
</tbody>
</table>

dealing arrangements. Other practices the Commission has successfully challenged include below cost sales and other pricing practices, discounts and other special benefits to customers and dealers, and pyramid sales. These cases are generally bereft of analysis. In lieu of a carefully developed rationale, one finds a bald application of the statute to a minimal finding of facts. Absent also, are cases on several practices, such as territorial restrictions and tying arrangements, condemned or at least seriously questioned by most Japanese authorities.

Nor can one look to the courts. Through 1976 there have been reported appeals from only fifteen FTC cases. Of these, only seven


24. See, e.g., FTC v. K.K. Chūbu Yomiuri Shimbunsha, 28 Kōsa 174 (Tokyo High Ct., April 30, 1975), granting preliminary injunction against below-cost sales of newspapers. One of the arresting aspects of this case is the court's acceptance of the FTC's construction of the costs of the defendant, a local subsidiary of a major daily newspaper, based on presumptions of what its costs would have been if independent.


26. See, e.g., In re Nihon Suisan K.K., 12 Shinketsushū 746 (FTC [Recommendation] No. 14, 1964, Nov. 7, 1964) (refusal to supply wholesalers unless they promised not to sell product to large cooperatives).


reached the Supreme Court, three of which were third party appeals dismissed for lack of standing. In addition, only three damage actions have been decided in the entire thirty-year history of the Antimonopoly and Fair Trade Law in Japan. As yet there has been no satisfactory explanation of this dearth of appeals.

One therefore approaches analysis of any area of Japanese antitrust law — and particularly the problem of marketing restrictions — with considerable caution. There are simply too few cases and too little doctrinal development.

Notwithstanding the uncertainties inherent in Japanese regula-


31. K.K. Kōsaka Yakkokyo v. Taishō Seiyaku K.K., 9 Shinketsushū 162 (Tokyo High Ct., Jan. 22, 1965) (compromised in court); Ōkawa v. Matsushita Denki Sangyo K.K., Hanrei Jindō 20 (No. 863) (Tokyo High Ct., Sept. 19, 1977) (held consumers have standing to bring damage action but dismissed action because of inability to determine amount of damages). The third case is cited as Kato v. Kansai Slippers Mfg. Co., 2 Keizai Ho 60 (Tokyo High Ct., Nov. 24, 1958) in Tanaka and Takeuchi, The Role of Private Persons in the Enforcement of Law, 7 Law in Japan 34, 37 n. 10 (1974), dismissing damage action under article 25 of the Antimonopoly and Fair Trade Law for lack of a prior formal FTC decision that there had been an antitrust violation. This case is not cited, however, in any of the standard reporters. Two other damage actions are said to be pending. See Rabinowitz, Antitrust in Japan, in CURRENT LEGAL ASPECTS OF DOING BUSINESS WITH JAPAN AND EAST ASIA 111 (J. Haley ed. 1978).
tion of unfair business practices, some conclusions can be suggested at least with respect to two particular vertical restraints: vertical price-fixing (or resale price maintenance) and exclusive dealing. It has been against these two restrictive marketing arrangements that the FTC has directed its most vigorous policing efforts.

Resale Price Maintenance

Resale price maintenance is treated in practice, though not in theory, as a *per se* violation of article 19 unless within the exemption of article 24-2. The applicable provision of the General Designation is item 8, which lists as an unfair business practice:

Dealing with customers on conditions, which, *without good reason* [emphasis added], restrict any transaction between the said customers and the suppliers 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.

Article 24-2, an addition of the 1953 amendments, exempts manufacturer-imposed resale price maintenance where the product is of “existing identified uniform quality” (*i.e.*, trademarked goods) and has been designated for exemption by the FTC.\(^{32}\) The exemption does not apply if the restraint is “grossly unfair to consumers” or is employed “against the will” of the manufacturer.\(^ {33} \) In addition, article 24-2 precludes the Commission from exempting a product unless it finds that the product is for the “daily use of consumers in general” and is sold in a freely competitive market.\(^ {34} \) There is also a post-conclusion reporting requirement for price-fixing contracts covering exempt products.\(^ {35} \)

Although the first formal FTC decision involving resale price maintenance under article 19\(^ {36} \) was not handed down until 1965,\(^ {37} \)

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32. Article 24-2(1), Article 24-2(4) provides that copyrighted works are exempt without designation.
33. *Id.*, proviso to article 24-2(1). [The quoted material appears in the OECD translation but appears as “unduly to injure the interest of the general consumer and contagious to the will” in the 1978 EHS translation].
34. *Id.*, article 24-2(2)(1) and (2). [This is translated as “daily used by the general consumer” in the 1978 EHS translation].
35. *Id.*, article 24-2(6).
36. Only three resale price maintenance cases were decided prior to 1953. There are cases in which resale price maintenance was attacked as an “illegal concerted activity” under old article 4(1) or an “unreasonable restraint of trade” under article 3. See *In re* Nakayama Taiyōdō, 2 Shinketsushū 225 (FTC [Decision] No. 58, 1950, Mar. 15, 1951); *In re* Hokkaido Butter K.K., 2 Shinketsushū 103 (FTC [Decision] No. 78, 1950, Sept. 18, 1950). The Hok-
sixteen of the twenty-six article 19 cases decided thereafter were directed against its use. In other words, since 1965, prevention of unauthorized resale price maintenance has been the primary object of FTC enforcement under article 19.

In theory, resale price maintenance, even when not authorized under article 24-2, would not be illegal per se. Both the definition of unfair business practices in article 2(9) and the General Designation appear to include a Japanese version of the “rule of reason.” No restrictive practice is prohibited outright; all are subject to the justification that they are imposed for “good reason” or are not unfair. But if in any instance the FTC has acknowledged the existence of “good reason” for unauthorized resale price maintenance, it has not been reported.

More important, the 1975 Supreme Court decisions in the Wakōdō and Meiji Shōji cases appear to have effectively ruled out any economic justification.

In this pair of decisions two petty benches of the Japanese Supreme Court separately affirmed the tenet that the justification for a restrictive practice under article 19 must be viewed in terms of “maintaining a free competitive order.” But the ten justices refused to consider or require the FTC to consider the economic arguments presented by the defendants. So long as there is any “fear of a restraint of trade or obstruction of free competition,” the economic reasonableness of resale price maintenance (and presumably other restraints) is to be considered irrelevant. Even if reasonable as an economic or business matter, the justices agreed, that alone is not sufficient as “good reason” where the competitive freedom of the other party is restricted. The justices thus seem to say that the kaido Butter case involved a vertical restriction on dealers; but the latter apparently dealt with a horizontal agreement among manufacturers, and thus the vertical restriction was incidental as a policing mechanism for the cartel. As noted above, the K.K. Asahi Shimbunsha v. FTC, 4 Shinketsushū 145 (Tokyo High Ct., Mar. 9, 1953), precluded further resort to either article 3 or 4(1). It appears no attempt was made prior to 1953 to invalidate resale price maintenance agreements as an unfair method of competition. In addition the FTC did bring the action against Noda Shōyu, 9 Shinketsushū 57 (Tokyo High Ct., Dec. 25, 1957), under the private monopolization provision of article 3. The Noda Shōyu case can thus be explained as an early resale price maintenance case before the FTC had developed the unfair business practice theory.

38. The cases are cited at note 22 supra.
41. 29 Minshū at 894, 980. Although the language used conforms with the thinking of
FTC may properly condemn any restriction on distributors that has an adverse impact on competition—interbrand or intrabrand.

The Wakōdō and Meiji Shōji cases arose out of FTC proceedings brought against general distributors affiliated with three of Japan’s largest milk producers, Sankyō Nyūgyō K.K., Meiji Nyūgyō K.K. and Morinaga Nyūgyō K.K. The Commission found each firm in violation of article 19 for having fixed the wholesale and retail prices of each manufacturer’s particular brand of dehydrated baby formula. Also deemed illegal in each instance was the system of maintaining a list of registered retailers who separately agreed to honor the prices set by each defendant and prohibiting wholesalers from selling to anyone other than a registered retailer. If a retailer violated the terms of the price agreement, his registration and right to sell the product could be cancelled. If the wholesaler sold to an unregistered retailer, rebates or other benefits from the general distributor or manufacturer could be forfeited. Under prior FTC decisions such arrangements were illegal, and the Commission had little difficulty in reaching a similar result in each of these cases. Wakōdō and Meiji Shōji lost on appeals to the Tokyo High Court and, as noted, the Supreme Court. Morinaga did not appeal.

The FTC apparently regards the primary evil of resale price maintenance to be the consequent reduction of price competition among wholesalers and retailers with respect to a single differentiated product—in other words, the reduction of intrabrand price competition. By treating resale price maintenance as an unfair business practice per se on this ground, however, the FTC, with the Supreme Court’s sanction, construes the phrase “endanger fair competition” to cover any practice that has an adverse impact on competition at any level regardless of how it may ultimately affect consumers or competition generally. This approach is equally ap-
parent in the FTC's more mixed challenges of exclusive dealing arrangements.

**Exclusive Dealing**

The earliest case dealing with an exclusive dealing arrangement was the 1950 case *In re Marukin Shōyu K.K.* The principal defendant, a leading Japanese producer of soy sauce, had designated a Honolulu firm as its exclusive distributor in Hawaii. The distributor in turn promised not to sell competing products and to purchase exclusively through Nishi Nippon Bōeki K.K., a Japanese exporter and the other defendant in the case. The FTC held this arrangement illegal under articles 6(1) and 19. Two years later, however, the Commission expressly repudiated the *Marukin* decision in reversing a trial examiner's initial decision against Nihon Kogaku Kogyo K.K. Since 1952 there have been several decisions holding exclusive dealing arrangements to be illegal, but none offer much guidance. In the first of two decisions against Taishō Seiyaku K.K., for instance, the Commission distinguished the *Nihon Kōgaku Kōgyō* case on the grounds that the restriction in the latter case was imposed on only one party whereas in creating a network of chain stores Taishō Seiyaku had entered into exclusive dealing arrangements with over four thousand dealers. The Commission expressed particular concern that other pharmaceutical manufacturers were establishing similar chain store systems, with the consequence, the Commission asserted without elucidation, of limiting competition. No other cases were brought and left unanswered was Taishō Seiyaku's argument that since there were many other manufacturers and tens of thousands of resale outlets, its arrangements would not appreciably affect competition.

The leading case in this area remains the *Hokkaidō Shimbunsha* case. The defendant was the publisher of the leading local newspaper in Hokkaidō with a 56 percent share of the market.

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49. Both decisions are cited at note 23, *supra.*
50. In the first case, Taishō Seiyaku had only required members of the chain to promote sale of its products and not to join another chain. The second case dealt with contractual obligations not to handle any competing products at all. Violation would result in termination of chain store status and loss or reduction of rebates.
in the prefecture and 46 percent in Sapporo, the largest city. The case arose in the context of intense rivalry between *Hokkaidō Shimbun*, published only in the morning, and its principal local competitor the *Hokkai Times*, which had only an evening edition. When both began to appear in morning and evening editions, the publishers began aggressive campaigns to pressure dealers to handle only one of the two papers. As one might expect, the leading paper, *Hokkaidō Shimbun*, was the more successful and the FTC stepped in.

The Commission found that Hokkaidō Shimbunsha had violated article 19 of the Antimonopoly and Fair Trade Law in demanding that dealers that had theretofore sold both papers not sell the *Hokkai Times*. Those who refused had their contracts terminated. Hokkaidō Shimbunsha lost on appeals in both the Tokyo High Court and the Supreme Court.52

Both courts upheld the FTC on the basis of the substantial evidence rule,53 the Supreme Court noting without further explanation that, while exclusive distributorship agreements were in themselves not illegal, the Commission had properly condemned the actions by Hokkaidō Shimbunsha.54

The import of these decisions is perhaps best summarized in the FTC's Guidelines on Sole Import Distributorship Agreements. The Guidelines affirm the general validity of exclusive dealing agreements, absent other disfavored restrictions (such as resale price maintenance).55 The *Hokkaidō Shimbunsha* decisions are es-

52. Id.
53. Articles 80 and 82(1) of the Antimonopoly and Fair Trade Law limits the scope of judicial review on direct appeal (but not in a private action for damages) to the substantial evidence test.

54. 15 Minshū at 119.
55. The Sole Import Distributorship Guidelines Announcement (Nov. 21, 1972) provide:

1. Among the restrictions which are likely to constitute unfair business practices in continuous import and sale agreements including sole import distributorship agreements, the following are outstanding:
   (1) To restrict the resale prices of the goods covered by an agreement.
   (2) To restrict the persons to whom the goods covered by an agreement are resold.
   (3) To impose the obligation to purchase parts, etc., for the goods covered by an agreement from the foreign party or a person designated by such foreign party. Provided, that this provision is not applicable to the case where the foreign party requires on reasonable grounds that the domestic party stock a certain quantity of parts, etc., for example, so that the domestic party can adequately meet the demand of the consumers for repair parts, etc.
   (4) To unduly hinder parallel importation of the goods covered by an agreement.
   (5) To impose an unduly disadvantageous condition for the termination of the agreement.
sentially summarized in the provisions of item 6 that proscribe any restrictions on dealing with competitive goods that are being handled by the distributor at the time the contract is concluded.

As in the case of resale price maintenance, one detects here too a willingness on the part of the FTC to condemn restrictions that curtail existing competition in any way, regardless of their ultimate impact. In two more recent cases, *In re Mutō Kōgyō K.K.* and *In re Pijon K.K.*, the FTC did challenge the exclusive dealings agreements where the distributors had not handled competing goods prior to the arrangement. These cases clearly go beyond both the Supreme Court's holding in the *Hokkaidō Shimbunsha* case and the FTC's own guidelines. Both, however, involved resale price maintenance and may be distinguished on that ground.

(6) To restrict manufacturing, using or selling goods competitive with those covered by the agreements. Provided, that this shall not include the case where the domestic party has been granted an exclusive license to sell and he is not restricted from manufacturing, using or selling those goods which he has already been manufacturing, using or selling.

2. In case the parties to the sole import distributorship agreement are in a competitive position with each other with respect to the goods covered by the agreement or the same kind, and if the domestic party would come to occupy either 25 percent or larger share or the largest share in the domestic market for the goods covered by the agreement or the same kind as a result of the agreement, such agreement is likely to constitute an unfair business practice: Provided, that this shall not apply where, in the light of such competitive conditions in the industry concerned and economic conditions regarding the agreement and the goods covered by the agreement it is considered that there is no likelihood of hindering fair competition. Conditions to be taken into account include the following:

1. The business capacity of the parties and competitors;
2. The circumstances of distribution of the goods concerned.
3. The circumstances regarding new entry into the industry and its degree of difficulty; and
4. Competition with Substitute goods. For the purpose of this paragraph, the term "parties" include their affiliated companies, namely companies whose management is substantially controlled by such parties (subsidiaries, sub-subsidiaries, etc.), companies which substantially control the management of such parties (parent companies, etc.) and companies whose management is substantially controlled by a common parent company (affiliated companies, etc.)

3. Depending on the actual circumstances the preceding two paragraphs shall apply mutatis mutandis to an agreement between a domestic party and a foreign party, under which the domestic party is to handle goods on consignment, or act as intermediary.” FTC Recommendation No. ———, 1972. See Matushita, *supra* note 23, at 63-78.

The most recent FTC cases on exclusive dealing have also involved resale price maintenance. *In re Mutō Kōgyō K.K.*, *supra* notes 22, 23; *In re Dijon K.K.*, *supra* notes 22, 23; *In re France Bed K.K.*, *supra* notes 22, 23.
The Itten Itchōai System Cases

On November 28, 1977, the FTC handed down formal decisions in three separate cases again involving sale of dehydrated baby formula against Yukijirushi Nyūgyō K.K. (Snow Brand Milk Products),66 Meiji Nyūgyō K.K. (Meiji Milk Products)67 and Morinaga Nyūgyō K.K. (Morinaga Milk Products),68 the three leading dairy product manufacturers in Japan. At the time the FTC commenced the cases, the three firms had a combined share of 94% of the market for dehydrated baby formula (Meiji led with 46%, followed by Snow Brand with 30% and Morinaga with 18%). In each case the Commission determined that the companies had committed unfair business practices in requiring retailers to purchase their product from designated wholesalers and employing various payments schemes to enforce the restrictions. Each of the three defendants had put into effect a marketing arrangement referred to in Japanese as the itten itchōai ("single store, single-account-entry") system whereby retailers are required to purchase from a single designated wholesaler and wholesalers are similarly obligated to sell only to a specific group of retailers. It is one of the more typical arrangements being used by manufacturers to control and simplify marketing channels.59

Two of the defendants (Snow Brand and Meiji) enforced this form of systematized distribution through an arrangement involving add-on payments to be repaid by the manufacturer. Their retailers were required to add a percentage of their marginal profit to the wholesale price of the product. The wholesaler would pay this amount to the manufacturer, which would make direct periodic repayments to the retailers. A similar arrangement applied to wholesalers. If either a retailer or wholesaler violated the terms of the distribution restriction, he would forfeit all or a part of a payment. Presumably because of a weaker bargaining position, the other defendant (Morinaga) sold its product on consignment, although in practice wholesalers dealt with retailers in their own names. Paradoxically, it seems sales to wholesalers and retailers were made ostensibly on credit, at least the distribution contracts with the

59. See Kawagoe, Ryūtsū keiretsuka to dokkin seisaku (Channelization of Distribution and Antitrust Policy) JURISUTO 95 (No. 678) (1977).
manufacturer included an acceleration clause activated in the event of violation of any provision, including the customer restriction.

The FTC found each of the defendants guilty of unfair business practices under the General Designation and thus in violation of article 19 of the Antimonopoly and Fair Trade Law. The *itten itchōai* marketing system was found to come under item 8 and the enforcement schemes, item 10 of the General Designation. The Commission ordered each defendant to eliminate the restrictions and so to advise their wholesalers and retailers. 60

Left unanswered—perhaps purposefully—are questions regarding the scope and applicability of the decisions. Does the Commission's emphasis on the market share of the three defendants indicate, for reasons stated that similarly restricted channels of distribution will not be considered illegal unless in an oligopolistic market? 61 Exercising its new powers under the 1977 amendments, the FTC has already indicated that 26 fields, including dairy products, are in a “state of monopoly” (*dokusen-teki jōtai*). 62 Does this mean that customer and supplier restrictions in the distribution of these products are illegal?

A cautious reading of the decisions leads to the conclusion that they may be resale price maintenance cases in another guise. The cases were essentially a continuation of the earlier *Meiji Shoji, Morinaga* and *Wakōdō* cases, although only two of the decisions in each set involved the same parties. And there is some evidence, at least in the initial decisions by the trial examiner, that the FTC viewed the *itten itchōai* system as a mechanism by which manufacturers were enforcing resale price maintenance. 63 Indeed, in six prior

60. This summary is based on the facts found in initial decisions (shinketsuan) by the FTC trial examiners. NBL (No. 152) 45, NBL (No. 152) 57, NBL (No. 154) (57).
61. Under a literal reading, item 8 of the general designation supra p. 4 would apply to similar restrictions regardless of how oligopolistic the industry might be. Moreover, since efficiencies or other economic benefits to the public will not apparently be considered as a defense, presumably the FTC will not have to show economic harm, thus there would seem to be no reason for the FTC to limit the prohibition to oligopolistic markets. The Commission's formal decisions in these cases do not refer to the market share of the defendants. However, there is considerable emphasis on this factor in the trial examiners' initial decisions. See, e.g., *In re Yukijirushi Nyūgyō K.K.*, NBL (No. 153) at 46. See also Negishi, *Ryōtsū keiretsuka o meguru dokkin hō-jo no mondaiten* (I) (Problems Relating to the Channelization of Distribution Under the Antimonopoly Law), NBL 7 (No. 158) (1978).
62. In addition to dairy products, they are: monosodium glutonate, salad dressing, beer, whiskey, instant coffee, synthetic fiber, calcium cyanamide, rayon filament, color film, plate glass, heavy rails, ball bearings, tinplate, cast iron pipe, cans, farm tractors, heavy construction equipment, electric tools, communication equipment (e.g., telephones), radio and television equipment, automobiles, motorcycles, wrist watches, clocks, pianos. *Nihon Keizai Shim bun* (Japan Economics Newspaper) Nov. 29, 1977, at 2 (evening ed.).
63. *In re Morinaga Nyūgyō K.K.*, NBL (No. 154) at 51-52; *In re Yukijirushi Nyūgyō K.K.*, NBL (No. 153) at 50; *In re Meiji Nyūgyō K.K.*, NBL (No. 152) at 58. See also Kōsei
decisions the FTC had questioned similar customer and supplier restrictions on these grounds.

The first were the three *Dairitenkai* (association of sales agencies) cases in which the defendant associations agreed to the Commission's recommendation that they had fixed resale prices. These cases also involved a form of the *itten itchōai* system except that the members could purchase from two wholesalers. The FTC did not, however, require the associations to cease using the customer-supplier restrictions. The next case was *In re Nihon Kōgaku Kōgyō K.K.* The manufacturer had adopted a restricted dealer system in connection with resale price maintenance. The FTC held the resale price maintenance arrangement to be illegal but again did not require the defendant to eliminate the customer-supplier restrictions, although it did order the defendant to withdraw instructions advising wholesalers and retailers whom to sell to or buy from. The fifth case was *In re Gunze.* Gunze had organized its distributors into regional "Gunze associations" and prohibited each member from making wholesale purchases or sales except from other members. The FTC deemed this to come under item 8 of the General Designation in violation of article 19. It was viewed, however, as a mechanism to enforce resale price maintenance. A sixth case, *In re Hakugen,* was decided after the trial proceedings commenced in the dehydrated baby formula cases but before the decision. Hakugen, a leading manufacturer of toilet articles, violated article 19, the FTC held, in designating to wholesalers the resale price of its products and the retailers to whom they could sell. The latter was treated, however, as an independent issue.

Given the Commission's limited investigatory powers and the difficulties of proving an agreement to maintain prices in the Japanese setting, the FTC would welcome a policing approach that reduces the problems of proof. It also is reasonable to assume that the affected retailers and wholesalers would be more willing to complain.

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to the FTC about restrictions on the parties with whom they could
do business than about resale price maintenance since they would
have more to gain from the latter than the former. The Commiss-
ion could have also perceived that since retailers had no choice as
to which wholesalers to purchase from there must be some degree
of control by the manufacturer over at least wholesale prices. Conse-
quently, these cases may turn out to be isolated decisions that re-

clect continuing FTC concern with retail price maintenance and
only secondarily customer and other marketing restrictions, but,
like the prior cases on exclusive dealings, lack a consistent and
coherent policy or doctrine.

A broader—and more troubling—view of the cases is to see
them as the first of a series of proceedings against various forms of
manufacturer-controlled marketing systems. That the Commission
brought separate actions challenging the itten itchōai system iso-
lated from resale price maintenance lends support to this view.

By definition the itten itchoai system precludes competition at
the wholesale level. Thus, given the concern with any restriction of
competition that seems to underlie past FTC decisions with respect
to both resale price maintenance and exclusive dealings, it is subject
to FTC attack. Yet it is not clear that these restrictions affect con-
sumers or competition at the retail level adversely. Quite the con-
trary, it can at least be argued that the marketing efficiencies
achieved are apt to enhance at least interbrand competition and
benefit the consumer by making it easier for new entrants to organ-
ize marketing channels, and encouraging greater promotional activ-

ities, services and other forms of nonprice competition. Moreover,
the immediate impact of insulating wholesalers from competition is
to reduce their need for high profit margins, a cost savings that can
be passed directly to retailers and the ultimate buyers. In short, an
extension of the per se approach or the Wakōdō and Meiji Shōji
cases to this area is difficult to justify.

One explanation of this foray by the FTC is a misperceived
concern over the independence of small business enterprises. The
Commission lists the loss of economic independence of wholesalers

69. This is evidenced at least to some extent by the fact that there have been nearly as
many cases of resale price maintenance by trade associations or other horizontal agreements
as manufacturer-imposed resale price maintenance. See, e.g., the cases cited in Tsuji, supra
note 12.

70. For a forceful summary of the variety of possible economic benefits of vertical re-
straints and the disadvantages of a per se rule, see the opinion by Justice Powell for the
Bork, The Antitrust Paradox 280-309 (1978); E. Gellhorn, Antitrust Law and Economics
250-95 (1976).
and retailers and the enhancement of the bargaining position of manufacturers relative to their distributors as two of the principal evils of such customer restrictions.\textsuperscript{71} Having expressly accepted \textit{Wakōdō}'s rejection of any economic justification for the restrictions, in effect the FTC has chosen in these cases to protect the independence of existing wholesale and retail establishments at the expense of any economic efficiencies that might benefit the consumer. It would be ironic, however, for the FTC to move in this direction. The likely effect of FTC efforts to prevent manufacturers from organizing existing retailers and wholesalers will be to expand use of manufacturer-owned outlets, franchise chains and large scale merchandizers (such as the "super") at the expense of those the Commission seeks to shelter.

The other evils the FTC apparently associates with such marketing arrangements are equally ironic. The Commission has argued that such restrictions may operate as a barrier to new entrants and reduce promotion, offer sales service and other forms of nonprice competition.\textsuperscript{72} Yet in most instances, as noted above, these are among their principal justifications.\textsuperscript{73}

In any event, over the next two years the most interesting developments in Japanese antitrust regulation are likely to take place in this area.

\begin{itemize}
  \item \textsuperscript{71} Kōsei torihiki iinkai, \textit{supra} note 44, at 378.
  \item \textsuperscript{72} Id. See also, Itoda, \textit{Ryutsu keiretsuka to dokkihō no unyo} (Channelization of Distribution and the Trend of Antimonopoly Law) 126-27 (M. Matsushita ed. 1978).
  \item \textsuperscript{73} The cases have met with unusually strong criticism in Japan. See, e.g., Negishi, \textit{supra} note 61. The second and concluding part of the article appears in NBL 37 (No. 161) (1978). Kurusu, \textit{Dokkihō ni yoru ryūtsu keiretsuka kisei no shintenkai} (New Developments in the Regulation of Channelization of Distribution Under the Antimonopoly Law), in Kōsei Torihiki 24 (No. 327) 2 (No. 328), 11 (No. 329), 7 (No. 331), 32 (No. 332) (1978).
\end{itemize}