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I. INTRODUCTION

As in some major economies, competition policy in Japan has been revitalized in the past two decades.[1] In recent years, this trend has accelerated because of the rapid progress of globalization. The 2005 amendments to the Japanese Antimonopoly Law (JAML) contained provisions that: (1) increased the surcharge imposed on cartels from 6% of turnover to 10%; (2) made a type of monopolization (control of business activities of other enterprise(s)) subject to surcharge; and (3) introduced a leniency program.[2] The 2009 amendments to the JAML included: (1) a surcharge increase to 15% for ringleaders of cartels; (2) a surcharge increase to 15% on a party with a record of past violations; (3) a criminal penalty increase on individuals from the maximum of three years imprisonment to five years; and (4) the introduction of a surcharge on certain conduct which falls under unfair business practices.[3]

As the law is more strongly applied, the request for a fair and objective trial is more strongly voiced. There has been considerable debate in Japan about the proper role that the enforcement agency, i.e., the Japan Fair Trade Commission (JFTC) should play. Some argue that the JFTC lacks objectivity in enforcing the JAML and that its powers

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1. On historical aspects of the Japanese Antimonopoly Law, see TONY A. FREYER, ANTITRUST AND GLOBAL CAPITALISM 160–244 (2004). For general accounts of it, see H. IYORI & A. UESUGI, THE ANTIMONOPOLY LAWS OF JAPAN (1994). This work is a little old and does not contain recent developments and new cases. This is cited here because there is no comprehensive work of the Japanese Antimonopoly Law available in the English language, and this book gives a good general picture of what it looks like.

2. CHIZURU IKEDA, KOBE UNIV., INTRODUCTION TO THE ANTIMONOPOLY LAW 25–27 (2005), http://www.jftc.go.jp/eacpf/05/jicatext2/0825Int.pdf [hereinafter JFTC Release 2005].

3. JAPAN FAIR TRADE COMM'N, SUMMARY OF THE AMENDMENT TO THE ANTIMONOPOLY ACT 3–7, 10 (2009), http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf [hereinafter JFTC Release 2009].

should be curtailed.[4] Others argue that the independence of the JFTC from undue interference of politics is essential for fair and candid enforcement; accordingly, they believe that the existing powers of the JFTC to hold hearings and decide cases should be firmly maintained.[5]

As discussed below, the enforcement of the JAML was changed by the 2005 amendment from a "prior hearing" system to a "post hearing" system.[6] Oppositions have been raised to this new system, however, arguing that it lacks objectivity and neutrality. In the debates for the 2009 amendment, proposals were made to change the enforcement procedures of the JAML. However, no agreement was reached among the interest groups, the JFTC, the Ministry of Economy, Trade & Industry (METI), and critics, so no change was included on the enforcement procedures. The National Diet (legislature) stated in a resolution attached to the 2009 amendment that enforcement procedures of the JAML should be reviewed and, during 2009, an appropriate proposal for improving the enforcement procedures be recommended. At the time of writing this paper, discussions are underway among many circles on this subject, and the prospect is not yet certain.

The author had the opportunity to chair a task force on this subject in 2007–2008. This task force was composed of prominent lawyers and academics in Japanese competition law. It reviewed enforcement procedures in the United States and Europe, and interviewed foreign lawyers and business groups such as the American Chamber of Commerce in Japan (ACCJ)[7] and the Keidanren. It also consulted with

4. This view is represented by the "Keidanren," the Federation of Business in Japan. The Keidanren is composed of major business associations and represents entire industries in Japan. The Keidanren has been a major critic of the JFTC and has always played a role opposing the strengthening of the law. For its position on this issue, see NIPPON KEIDANREN, PROPOSAL FOR COMPREHENSIVE AMENDMENTS TO THE ANTIMONOPOLY ACT: TO ESTABLISH INTERNATIONAL PARITY IN THE INVESTIGATION AND APPEALS PROCESS (2007), http://www.keidanren.or.jp/english/policy/2007/091summary.pdf. The Ministry of Economy, Trade and Industry (METI) also takes this opposing view. Although the METI has never officially announced its view on this subject, it is clear from METI officials' comments made at hearings conducted by the Antimonopoly Law Committee of the Liberal Democratic Party and conferences.

5. This view is strong among academics. They argue that the independence of the JFTC from political influences and pressures from business is possible only if it has the power to decide cases independently and according to its own discretion; to deprive it of this power would mean that the JFTC would be subjected to pressures coming from politicians and businesses. For their views, see http://www.pluto.dti.ne.jp/funada/0804HP-ikensho-kakuteiban.pdf (translated by author).

6. *See* JFTC Release 2005, *supra* note 2, at 19 (noting that hearings are now initiated when elimination or surcharge orders are objected to, and the hearings take place as a post-issuance review procedure).

7. For the ACCJ's view on the JAML, see AM. CHAMBER OF COMMERCE IN JAPAN, ACCJ PUBLIC COMMENT TO THE JFTC REGARDING PROPOSED REVISION TO THE ANTIMONOPOLY LAW

officials of the JFTC and the METI. The task force published a report in 2008 ("Report")[8] in which it recommended certain changes to the enforcement system of the JAML.

This short paper will describe and analyze major issues in reforming the JAML enforcement process and the organization of the JFTC, with reference to the proposals and ideas expressed in the Report.

II. A BRIEF SKETCH OF THE JAPANESE ANTIMONOPOLY LAW

The JAML was enacted in 1947, and the Occupational Forces proposed it as part of the Economic Democratization Policy. This policy included the agrarian land reform, labor legislation, the dissolution of Zaibatsu (large industrial combines which dominated the Japanese economy before the Second World War as well as during the War), and the enactment of the JAML. The JAML was modeled after United States antitrust laws, the only major competition laws effectively enforced at that time.[9]

The JAML provided for the prohibition of three types of conduct: (1) private monopolization; (2) unreasonable restraint of trade (horizontal cartels); and (3) unfair business practices. As the enforcement agency of the JAML, the JFTC was based on the model of the United States Federal Trade Commission.

As originally enacted, in addition to the three categories of prohibited conduct, the JAML included provisions for regulating mergers and acquisitions. Two special laws were also enacted to supplement the JAML: the Law to Regulate Unreasonable Premium and Unreasonable Representation and the Law to Prevent Unreasonable Delay in Payment of Subcontractors and Related Matters. This regulatory framework is still valid today.

During the first several years, from 1947 to about 1951, the JAML was strongly enforced and the Occupational Forces supported it. However, enforcement declined quickly after the conclusion of the Treaty of San Francisco in 1951, which ended the Occupation, and stayed dormant until the late 1960s. Since about 1970, its enforcement has gained momentum for a variety of reasons, including the high cost of economic infrastructure (construction, banking, etc.), a shift in emphasis of economic and industrial policies from producers' interests to consumers' interests, and economic globalization. In this context,

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(2004), *available at* http://www.accj.or.jp/doclib/pc/040625JFTC_E.pdf.

8. *See* Competition Law, http://www.jcl.gr.jp (translated by author).

9. On the historical aspects of the JAML, see generally E. M. HADLEY, ANTITRUST IN JAPAN (1970); FREYER, *supra* note 1.

globalization was especially important because Japan's continued integration into international markets called for convergence of the rules of conduct for enterprises and, for this purpose, Japan was urged to increase enforcement of its competition law.[10]

In 1977, an amendment passed which introduced a 2% administrative surcharge against cartels for the turnover of an enterprise which participated in a cartel. In 1992, another amendment increased the surcharge to 6%. The 2005 amendment increased it to 10%, and the 2009 amendment, to take effect in 2010, will raise it to 15% for ringleaders of cartels and repeat offenders. The 2005 amendment also introduced a leniency program and this has made JFTC enforcement more effective in dealing with international cartels.[11] In this way, the enforcement of the JAML has been revitalized since 1970 and this trend continues today.[12]

III. THE ORIGINAL ENFORCEMENT PROCESS OF THE JAML

Because JFTC enforcement procedures were modeled after the United States Federal Trade Commission, the two enforcement schemes

10. During the 1970s and 1980s, the big political and economic issue between the United States and Japan was a large trade imbalance in favor of Japan. Japan enjoyed a huge trade surplus in relation to the United States, and this led to political tensions. In 1989–1990, both governments were engaged in a trade negotiation called "The Structural Impediments Initiative" ("the SII"). In 1990, the SII Report was submitted to both the President of the United States and the Prime Minister of Japan. This report recommended certain reforms in both countries to ease the trade tensions. With regard to Japan, the report stated that an important reason for difficulty of access to the Japanese market on the part of foreign businesses and commodities was anti-competitive conduct on the part of Japanese enterprises. The report recommended that the Japanese government take steps to invigorate the enforcement of the JAML. Thereupon, the Japanese government made amendments to the JAML and issued guidelines on distribution matters and took other measures to strengthen its enforcement. On the SII and its consequences, see M. Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436, 439–49 (1991).

11. JAPAN FAIR TRADE COMM'N, CEASE AND DESIST ORDER AND SURCHARGE PAYMENT ORDER AGAINST MARINE HOSE MANUFACTURERS 2–3 (Feb. 22, 2008), http://www.jftc.go.jp/e-page/pressreleases/2008/February/080222.pdf. In this case, the JFTC, for the first time, cooperated with competition law agencies in the United States, the EU, and others, to jointly raid establishments of the defendants in Japan and hand down a decision holding the international marine hose cartel unlawful under the JAML. Yokohama Rubber Company, one of the participants of the cartel, filed a report with the JFTC in accordance with the leniency program. The company received immunity from penalty not only in Japan, but also in the United States and the EU. *See* Stephen Blake, *The Marine Hose Cartel: The First UK Cartel Offence Convictions*, COMPETITION LAW INSIGHT, July 29, 2008, at 3. *See also* Press Release, EUROPA, Antitrust: Commission Fines Marine Hose Producers € 131 Million for Market Sharing and Price-Fixing Cartel (Jan. 28, 2009), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/137&format=HTML&aged=0&language=EN&guiLanguage=en.

12. *See* JFTC Release 2005, *supra* note 2, at 12, 32–36 (citing the history of Japan's antimonopoly act).

contain only minor differences. Besides the administrative procedures of the JFTC, the JAML established criminal penalties for individuals and enterprises which participated in private monopolization and cartels, as well as civil suits for damages by injured parties who allege that they sustained damage by conduct that violated the JAML. Thus, there were three ways to enforce the JAML: (1) administrative procedures before the JFTC; (2) criminal penalty; and (3) private enforcement. However, the latter two procedures were not used effectively and, in fact, the JFTC procedures were the main tool for enforcing the JAML.

Under those procedures, when the JFTC had reasonably available evidence of a violation, it initiated an investigation. When it was convinced that a violation had been committed, it issued a recommendation to the party in violation indicating the facts that the JFTC found and that the facts constituted a violation. The party to which such a recommendation was issued had a choice of whether to accept it. If the party accepted it, the JFTC issued a decision with the same recommendation without an administrative hearing—a recommendation decision. Despite its name, a recommendation decision was binding on the party to which it was addressed, and non-compliance incurred a criminal liability. If a recommendation was rejected, then the JFTC initiated a formal administrative hearing and issued a decision based on that hearing. During an administrative proceeding, a respondent could propose to the JFTC an intention to settle the case by indicating that it would accept the facts alleged by the JFTC and the illegality as stated in the complaint; the respondent would also propose a program to resolve the illegality. If the JFTC agreed with this proposal, the administrative proceeding was terminated and a consent decision was rendered. Thus, there were three types of decisions under the original enforcement procedures of the JAML: recommendation decisions, administrative hearing decisions, and consent decisions. It is important to note that, in this system, the major feature was that the hearing procedures preceded a decision except for cases in which recommendation decisions were issued.

IV. THE ENFORCEMENT PROCESS UNDER THE 2005 AMENDMENT—THE CURRENT ENFORCEMENT PROCESS

Japan's monopoly laws fundamentally changed with the 2005 amendment of the JAML. This Part will explore the specifics of the amendment and its criticisms.

A. The Post Hearing System

In 2005, the enforcement process of the JAML was amended. A procedure was introduced authorizing the JFTC to issue a cease-and-desist order to an alleged violator, requiring it to stop the conduct in question. The 2005 amendment also imposes an administrative surcharge on the alleged violator if the conduct in question belongs to the category in which administrative surcharges must be imposed.[13] This order is subsequently subject to review by the JFTC.

Under the current procedures, the JFTC initiates an investigation, and when it concludes that a violation has occurred, it notifies the party in violation that it will take an adverse action. The JFTC also holds a summary hearing in which it presents evidence of the conduct in question and the legal reasons why it constitutes a violation. The suspected party can present a summary argument advocating its position. After this summary process, the JFTC issues a cease-and-desist order and an order for administrative surcharge when appropriate.

If a party subject to a cease-and-desist order or administrative surcharge order is dissatisfied, it can file a complaint with the JFTC. The JFTC then must open a formal hearing proceeding wherein the complainant is afforded the opportunity to present facts and legal arguments that the order was wrongly decided. The JFTC attorneys who investigated the matter are the respondents in the case, and hearing examiners conduct the hearing and create an initial draft decision. A draft decision is presented to the Commission, which consists of five commissioners including the Chairman, and the Commission renders its decision after taking into account the draft decision, the records of the formal hearing, and the objections of the complainant to the draft decision. A decision of the JFTC can take the following courses of action: uphold the cease-and-desist or administrative surcharge order; remand the case back to the investigatory attorneys for reinvestigation; or reverse it as being wrongly decided.

A decision of the JFTC can be appealed to the Tokyo High Court that has the exclusive jurisdiction to examine the validity of JFTC orders. The substantial evidence rule applies here, and the Court is bound by facts that the JFTC found if substantial evidence supports such facts. A

13. Administrative surcharges must be imposed on cartels that affect prices and monopolization by way of controlling activities of other enterprises. The JFTC has no discretion to decide whether or not to impose them. Once the JFTC finds that such conduct occurred, it must impose an administrative surcharge on the enterprise. The 2009 Amendment adds monopolization by excluding from the category of required surcharges activities of other enterprises and certain types of unfair business practices.

petition can then be filed with the Supreme Court against a decision of the Tokyo High Court.

B. Criticisms of the Post Hearing Procedure and Proposals for Reform

When this enforcement procedure came into effect in 2006, Keidanren-represented business groups criticized it. Bar associations, academics, and others also proposed reforms.

The Keidanren argued that the post hearing procedure is unfair because the same JFTC initiates the investigation, issues the administrative order, and reviews the order.[14] Due to institutional bias inherent in the bureaucracy, JFTC hearing examiners and commissioners cannot be expected to make an objective and candid judgment on the validity of an order which it itself issued. It argued that the administrative hearing procedure of the JFTC should be abolished altogether and replaced by a procedure in which a party who is subject to a JFTC order is allowed to petition against the order directly in court. The Keidanren has not yet announced which court would have jurisdiction to review JFTC orders. Presumably, a district court, which is a court of first instance, would have jurisdiction over JFTC orders.

A group of academics in the area of competition law has advocated maintaining the JFTC hearing procedure.[15] The academics argued that it is essential to keep a hearing system to safeguard the independence of decision-making of the JFTC. They noted that the JFTC is the expert organization in competition law and policy, and as a result, is the most appropriate entity to make judgment on competition matters. The Japan Federation of Bar Associations advocates a dual system in which a party subject to a JFTC order would have a choice of petitioning in court or requesting that the JFTC initiate a formal administrative hearing.[16]

A resolution of the National Diet attached to the amendment of 2005 stated that the JFTC hearing procedure should be reviewed after two years, and an appropriate recommendation should be made regarding possible change in the enforcement procedure of the JAML. Accordingly, a taskforce was organized within the Cabinet Office. After a two year deliberation, the taskforce published a report in which it stated that, although the post hearing system created by the 2005 amendment had operated satisfactorily, in the long run it should be

14. For its view on the post-hearing procedure, see KEIDANREN, *supra* note 4, at 1.

15. *See generally* KEIDANREN, *supra* note 4 (discussing Keidanren proposal for comprehensive amendments).

16. For the report of the Federation's position, see http://www.nichibenren.or.jp/ja/opinion/report/080508_2 html (translated by author).

changed back to the "prior hearing" system that existed before the 2005 amendment.[17]

The JAML was again amended in 2009 but contained nothing with respect to the JFTC administrative hearing due to differing views on this subject and a lack of consensus. However, a resolution attached to the 2009 amendment states that a proposal for a reform of the JFTC enforcement procedure should be made.[18] At the time of writing this paper, such a proposal had not been announced.

V. ISSUES REGARDING HEARING PROCEDURES

There are strong criticisms of the current post hearing process in which the JFTC issues a cease-and-desist order and initiates a formal proceeding when the party to which the order is directed brings a complaint against the JFTC. As stated above, critics such as the Keidanren, who argue against the current system, advocate its complete abolition. They argue that in the JFTC hearing process, decisions are likely to be affected by bias no matter how the hearing procedure is arranged because one division of the JFTC reviews decisions made by another division of the same agency. In the Japanese context, this argument is persuasive because the majority of JFTC officials are so-called "career officials" who spend all of their working years at the JFTC and develop a strong sense of loyalty to the agencies in which they serve.

These critics argue that after the JFTC has issued a cease-and-desist order, the respondents in JFTC proceedings should be allowed to petition to courts directly. In this design, courts of the first instance—i.e., district courts—would entertain suits against the JFTC. Advocates for this position assume that courts are truly independent and will make objective and candid judgments. However, it is not certain that courts will make completely impartial and objective decisions. In Japanese

17. *See* ADVISORY PANEL ON BASIC ISSUES REGARDING THE ANTI-MONOPOLY ACT, REPORT ISSUED BY THE ADVISORY PANEL ON BASIC ISSUES REGARDING THE ANTI-MONOPOLY ACT 39–40 (2007), *available at* http://www8.cao.go.jp/chosei/dokkin/kaisaijokyo/finalreport/finalreport_en.pdf. Although the report states that, in the long run, the current post hearing system should be converted to a prior hearing system, it does not explain the reasons why this change should be desirable. Undoubtedly, the taskforce took into account criticisms raised against the post hearing system by business groups and others and probably implied that there is a defect in the present post hearing system.

18. The resolution states that the present post hearing system should be done away with but should not return to the prior hearing system as enforced before the 2005 Amendment. It is not clear from reading the resolution's text whether it means only that the prior hearing system as exercised before 2005 should not be revived, or that any prior hearing system should not be adopted.

administrative law, a formal decision of an administrative agency is presumed to be lawful, and courts respect this presumption of lawfulness. In addition, courts generally lack expertise in competition law and tend to adhere to JFTC decisions. Accordingly, in the majority of past cases where decisions of the JFTC were subject to judicial review, courts have generally upheld decisions of the JFTC.

As discussed above, the Japanese Federation of Bar Associations, together with some economic organizations, argue that a complainant should be allowed to choose whether to bring a complaint in court or to request the JFTC to initiate a formal hearing. In this proposed system, there would be two streams of cases: those that the courts decide and those that the JFTC decides. Different interpretational doctrines may be established on the same subject matters; for example, vertical territorial restraint agreements could be decided by presumptive illegality but also could be judged by a rule of reason analysis. This dualism, or the existence of disharmonious doctrines, creates legal uncertainty and confusion. There is no institutional mechanism through which this discrepancy can be remedied. It is probably the Supreme Court which has the final say on any differences of interpretational doctrines; however, it takes a long time to get a case through to the Supreme Court. Therefore, it seems that this system will make the enforcement procedure too complex and cause confusion and legal uncertainty.

The Report advocates a prior hearing system. According to the Report, a prior hearing system should be introduced in which the JFTC must initiate a hearing when it is convinced of the existence of a violation. This process occurs as follows: first, the JFTC designates investigatory attorneys for a case and the attorneys conduct an investigation including a dawn raid, an order for production of documents, and interrogation of suspected persons. Then, upon their report that the existence of a violation is likely, the JFTC initiates a formal hearing in which the investigatory attorneys and the suspected party are positioned in an adversarial way, and both present their versions of facts and legal claims. Three hearing examiners are named to deal with the case. They act as arbiters with respect to the dispute before them and come up with draft decisions that are presented to the Commission and to the respondents. Finally, the Commission decides the case after reviewing the draft decisions that the hearing examiners prepare, any objections that the respondents make, and the complete record of the case.

This system looks similar to the one before the 2005 amendment. But considering the criticisms raised against the JFTC procedures, the Report proposes a number of improvements. The major improvements

are explained below.

One of the criticisms of the JFTC proceeding is that it takes too much time. To address this issue, the Report suggests that administrative regulations should state that a JFTC hearing process should take no more than one year, and hearing examiners are required to conduct hearings so that proceedings are completed within this timeframe. A complaint that the investigatory attorneys present must clearly specify the subject matters to be dealt with, applicable provisions of law, any proposed cease-and-desist order, and any surcharge in a case in which a surcharge must be imposed.

The Report also maintains that hearing examiners should make judgments independently from the Commission. For this purpose, although it is the Commission that initiates an administrative hearing, the Commission refrains from interfering in the hearing process.

Likewise, the Commission should make an independent judgment and should not be unduly influenced by draft decisions. In the past, the JFTC almost always adhered to those draft decisions that hearing examiners prepared. The JFTC cited draft decisions and merely stated that the judgment of the Commission was the same as that of the draft decision, and simply referred to the draft decision without stating the facts and legal assessment of the Commission. This has raised concern among respondents as to whether the Commission closely examined the case and came up with an independent decision. In light of this, the Report recommends that the JFTC should nominate an expert counselor who advises the Commission when it comes to a decision. The counselor should be independent from the Secretariat of the Commission and should not be a member of it. He or she who acts as the counselor should be selected from outside the JFTC, e.g., from among eminent lawyers, academics, or ex-government officials who are regarded as highly reputable persons in their fields. The counselor's view would not bind decisions of the Commission, but the Commission must hear views of the counselor before rendering a decision.

This idea derived from the advocate general in the European Court of Justice. In Europe, the advocate general participates in proceedings, and its opinions are highly respected. The advocate general does not represent any of the disputing parties but presents an objective view with regard to the interpretation of the law. It was thought that this system should be introduced into the JFTC proceeding to maintain objectivity in judgment.

Another important issue is disclosing documents and information regarding the case before the JFTC to respondents that are in the hands

of investigatory attorneys. At present, the JFTC is only required to disclose documents and information that the investigatory attorneys acquire if the documents and information are introduced into the hearing process. Therefore, the investigatory attorneys can withhold other documents and information from being disclosed to the respondent if they so decide. The Report advocates a new system in which a respondent to a JFTC proceeding is given the right, with minor exceptions, to request any documents and information that investigatory attorneys acquire through compulsory discovery process.

Investigatory attorneys are given compulsory power to seize any documents and other information necessary for investigation and order private parties to produce them. As discussed below, Article 70–15 of the JAML states that parties in interest in a JFTC proceeding can request to review and copy documents that constitute the records of the case.[19] However, the Supreme Court stated that the records in this sense include only those documents that the investigatory attorney submits for the hearing and do not include pieces of evidence that the investigatory attorneys acquired prior to the initiation of the hearing but did not submit for the hearing. If the respondent is prevented from reviewing all of the documents and information gathered by the investigatory attorneys, the respondent in a JFTC hearing is seriously disadvantaged due to lack of information. The above system is advocated to keep a "level playing field." This concept is modeled after the principle of equality of arms incorporated in regulations of the European Communities regarding the enforcement of their competition rules.[20]

VI. CONSENT JUDGMENT

As explained above, the original enforcement procedures of the JAML consisted of: (1) a recommendation issued by the JFTC; (2) a formal hearing process if the recommendation was rejected; and (3) a final decision. In the majority of cases, respondents accepted JFTC recommendations and decisions were rendered without a hearing. Respondents had the right to reject recommendations and, if rejected, there would be a formal hearing process. In this way, a prior hearing was guaranteed if the respondent so wished. Under the current system,

19. 9 Antimonopoly Regulations Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54, art. 70-15 (1947).

20. Commission Notice on the Rules for Access to the Commission File in Cases Pursuant to Article 81 and 82 of the EC Treaty, Article 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004, 2005 O.J. (C 325) 7.

there is no equivalent option to challenge the recommendation decision.

If the JAML is amended to introduce a new enforcement process that includes a formal hearing before a JFTC final decision, there would need to be a mechanism for resolving issues without going through the formal hearing process, if respondents so desire. In most cases under the old system, respondents preferred to resolve the problems quickly without resort to formal proceedings. After closely reviewing consent judgments as used in the United States, and commitments and settlements as exercised in the European Communities, the Report concluded that a U.S.-type consent judgment should be adopted. In Europe, a settlement is based on admission on the part of respondent to the facts and illegality as alleged by the Commission, and this admission could be used in subsequent civil litigation as evidence of the facts and illegality of the conduct in question.

If an early termination mechanism is to be utilized by enterprises, the settlement procedure should not involve too much risk of subsequent civil litigation. For this reason, the Report recommends that a system similar to the consent judgment system in the United States should be adopted in which a consent decree does not involve an admission of facts and illegality on the part of defendant. For the sake of transparency and protection of public interests, there should be a procedure where a draft consent judgment is disclosed to interested parties and to the public in general for a certain period of time for comments. This idea is similar to the "competitive impact statement" that the United States Department of Justice uses.

VII. INVESTIGATORY PROCESS

In Japan, the rights of the respondent in a JFTC proceeding are not accorded as much respect as in the United States and Europe. Issues here include the right to counsel in JFTC proceedings, attorney-client privilege, early disclosure to respondents of information that investigators gathered, and immediate disclosure of the records of interrogation and related matters. The most important among these are the right to counsel and attorney-client privilege, which are recognized both in the United States and Europe. The JFTC organized a study group to prepare for the 2005 amendment and this group recommended[21] that the respondent's right to counsel in a JFTC proceeding and attorney-client privilege need not be introduced because other agencies (police, securities exchange commission, tax office, etc.)

21. *See* http://www8.cao.go.jp/chosei/dokkin/kaisaijokyo/finalreport/finalreport_en.pdf.

do not allow these rights to suspects, and to allow such rights only with respect to a JFTC proceeding is not congruent with the Japanese regulatory system. With respect to the right to counsel, the Report states that the presence of counsel in a JFTC interrogation may delay the process and invite undue interference on the part of counsel into JFTC investigations.

This view is hardly tenable because the right to counsel and attorney-client privilege are universally recognized human rights, and to deny them only for the reason that other agencies in Japan do not recognize them would mean that Japan refuses to harmonize its judicial system with other major countries. For this reason, the Report strongly advocated the adoption of the right to counsel and attorney-client privilege in JFTC proceedings. This right to counsel would prevent the JFTC from ordering production of documents that the attorney-client privilege covers.

VIII. DISCLOSURE OF INFORMATION TO OUTSIDE PARTIES

According to JFTC policy, it must disclose facts gathered through compulsory investigation to civil courts when civil actions are brought following JFTC actions. In fact, Article 70–15 of the JAML states that parties in interest have the right to see and take copies of the records of JFTC proceedings. It is clear that parties in interest include respondents at JFTC hearings, but the question is who else would be regarded as a party in interest. Court decisions interpreting this article indicate that parties in interest include not only parties in the JFTC proceeding but also parties who bring a separate and subsequent civil action against the conduct that is the subject matter of a JFTC proceeding.[22]

It seems, however, that the scope of disclosure of information gathered by the JFTC through compulsory discovery proceedings should be limited to the parties to that JFTC proceeding, i.e., the respondents. Too wide a scope for such disclosure may lead to infringement of the respondent's right of defense in a separate civil proceeding. The 2009 amendment contains a provision stating that information that the JFTC holds must be disclosed to courts "unless

22. The Supreme Court had a chance to speak on this issue. *See* Japan Fair Trade Comm'n, 50 SHINKETSUSHŪ 739 (Sept. 9, 2003). The case involved bid rigging on the part of construction companies with respect to a local government's bid of waste disposal facilities. *Id.* The court stated that a party who brings a civil suit for the recovery of damage sustained due to a violation of the JAML against the party which had been held as violating provisions of the JAML should be regarded as a party in interest in the sense of Article 70-15. The party can request review and copies of documents submitted by the investigatory attorneys and the respondent to the JFTC hearing which preceded the civil damage suit. *Id.*

there is a legitimate reason not to disclose that information."[23] The phrase following "unless" provides that the JFTC can refuse to disclose sensitive information if it decides that it is appropriate to do so. This is a partial remedy to the situation described above.

Foreign interest groups argue that there is uncertainty whether confidential information submitted by private parties to the JFTC is kept strictly confidential and does not leak under current practice. They argue that, unless confidentiality is absolutely guaranteed, foreign enterprises will be hesitant to use the leniency program as exercised by the JFTC and to submit evidence to the JFTC.[24] For this reason, the Report advocates that disclosure of information that the JFTC acquired through the compulsory process should be limited to the parties to the proceeding and for the specific purpose for which the information was gathered.

There may be an argument that a private party intending to bring a civil action against a malefactor is disadvantaged due to insufficient information regarding the violation in question. After the JFTC has held that certain conduct violates the JAML, that decision is binding on the defendant. If any civil proceedings emerge pertaining to that same conduct, such as a civil court handling a plaintiff's claim against the defendant for a violation of the JAML, the substantial evidence rule should apply.

IX. CONCLUSION

As markets of the world become more integrated, there will be the need to promote convergence of competition laws of major trading nations. Such convergence, or harmonization, is related not only to substantive regulations (such as how much merger and acquisition activity should be allowed or prohibited) but also to enforcement procedures, because it is through enforcement that substantive provisions are put into effect. Fairness, objectivity, and transparency of proceedings are the essential elements of due process of law.

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23. *See, e.g.*, JFTC Release 2009, *supra* note 3, at 17–18 (noting the disclosure requirements under the revised JAML).

24. For the American Bar Association's view regarding the 2005 Amendment, see H. STEPHEN HARRIS, JR. ET AL., JOINT SUBMISSION OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE JAPAN FAIR TRADE COMMISSION'S DRAFT RULES ON REPORTING AND SUBMISSION OF MATERIALS REGARDING IMMUNITY FROM OR REDUCTION OF SURCHARGES IMPLEMENTING THE AMENDED ACT CONCERNING PROHIBITION OF PRIVATE MONOPOLIZATION AND MAINTENANCE OF FAIR TRADE, 2005 A.B.A. SEC. ANTITRUST & SEC. INT'L L., http://www.abanet.org/intlaw/committees/business_regulation/antitrust/commentsJFTC.pdf.