Competition Policy in Japan: Sizing up the Takeshima Era

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In 2012, Kazuhiko Takeshima concluded a ten-year term as Chairman of the Japan Fair Trade Commission. We take this opportunity to reflect on the development of Japan's competition policy during Takeshima's tenure. By way of introduction (Part I), we provide some food for thought about what is meant by a "competition culture" in the Japanese context. This rather broad (but unavoidably brief) introduction, in which we present the concept of "cultural hybridization," is included here because purely juristic discussions of Japanese competition policy that neglect such matters will generally yield only a thin understanding of complex dynamic forces. In Parts II and III, respectively, we then highlight the most positive achievements recorded over the last decade in Japanese antitrust, while noting our reservations where less progress has been made; and, we report on the newly installed leadership and developments on the horizon.

JAPANESE COMPETITION CULTURE BETWEEN 'HARMONIZATION' AND COMPETITION

The idea of a "competition culture" is continually conjured but rarely defined. The core of the idea can perhaps be located, but its outer contours remain vague. We submit it could not be otherwise: a monolithic, universal competition culture is an unattainable mirage. Even the core of the idea is too often taken for granted; scholars should deconstruct it and debate which notions can realistically have universal portability. It seems to us that, at a minimum, to achieve a competition culture, certain presumptions have to be reversed. Instead of asking why rivalry should be embedded within a country's economic infrastructure, in a country with a competition culture people ask: what exceptional circumstances might there be that justify deviating from (dynamically defined) open and competitive markets? The more deeply ingrained competing paradigms are about, say, social solidarity or consensus (or the appearance thereof) and conflict-avoidance/resolution-through-harmony (the Confucian value of *wa*[1]), the more difficult it may be to reverse that original presumption (which holds that 'excessive competition', or maybe even competition *per se*, is a social evil). There are of course additional complications: different values that have been assigned different weights by different people – efficiency, "openness," competition-as-democracy, etc. But when one digs down to these essentially contested values, at this level portability starts to fade, unless perhaps the "competition culture" circulates among relatively homogeneous societies. Fortunately, it is probably unnecessary to achieve universal values at that level. For example, if there is common agreement that cartels are socially bad, different understandings of the reasons for their badness are unlikely to prevent shared, albeit more shallow, cross-cultural values.

Why so much here about culture? We agree with Thomas Cheng that culture is of great significance in the global sphere of competition policy and the globalized dialogue that comes with it.[2] Many scholars have considered Japan's distinctive cultural characteristics, and we don't have room here to enter into the subject. But to appreciate the important

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1 The Japanese word *wa* means "harmony." Its pervasive cultural significance stretches back well over a thousand years. Article I of the Constitution of 604 A.D. declared: "*wa wo motte tōtoshi to nasu*" ("harmony is to be valued").

2 Cheng, "How Culture may Change Assumptions in Antitrust Policy", in Ioannis Lianos and D. Daniel Sokol, eds., *The Global Limits of Competition Law,* Stanford University Press, 2012, chapter 13.

changes afoot in the last two decades, it is useful to recall Japan's point of departure, the so-called "harmonization" culture. This term refers not just to relations between people but also to business relations. In some sense, *wa*-based "harmonization" is antithetical to both rivalry (where, on a micro level, one's gain is another's loss) and litigation (which eschews more humble notions of mediation and forgiveness). Small wonder that the antitrust transplant of 1947 could not be tolerated in its original form by the host body.[3]

In the Japanese context, the idea of a "competition culture" has not displaced the country's harmonization culture (and maybe could not do so), but the absorption of the idea has triggered a process of cultural hybridization.[4] Each of these cultural orientations is diluted to some degree but the resulting blend (which will continue to develop over decades) is becoming the relevant variety of competition culture for Japanese society and Japanese business operators.

It is implicit in the foregoing introduction that Japan has been going through a period of cultural change (hybridization), and the seeds of change were sown in the 1970s. For reasons of space we limit our remarks to the recent past (i.e., the "Takeshima era") and the foreseeable future.

TAKING STOCK

Achievements of Mr. Takeshima

The greatest achievements in Japanese competition policy over the past 10 years can be summarized as: (i) stronger enforcement of the Antimonopoly Act (Law No. 54 of 1947, as amended); (ii) increased international cooperation; and (iii) greater alignment of procedures with those of competition agencies overseas. More concretely, with regard to (i), i.e., stronger enforcement, the most significant reform was arguably the amendment of the AMA in 2005, which introduced a leniency program for the first time. Since then, a remarkable 623 leniency applications have been filed with the JFTC. Another change that enhanced the power of the agency was the conversion of the administrative hearing procedure to an *ex post* hearing system. In addition, while the JFTC strictly enforced the AMA to expose price-fixing and bid-rigging cartels during the Takeshima era, emphasis was also placed on enforcement of the prohibition of abuse of a superior bargaining position (ASBP) and on stopping violations of the Subcontract Act.[5] In November 2010, the JFTC

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3 Several historical accounts discuss the initially radical antitrust measures imposed during the Allied occupation, and their progressive softening once Japan regained its sovereign independence in April 1952 by virtue of the San Francisco Peace Treaty. See, e.g., Mitsuo Matsushita, *International Trade and Competition Law in Japan*, Oxford University Press, 1993.

4 This perspective builds on but deviates from the idea that there is room for just one culture in a given community (here the Japanese business and public communities), and that one culture lays siege to another until the other is driven out and replaced. This dichotomous view of culture is a rather natural assumption and is reflected, for example, in Akinori Uesugi, 'Where Japanese Competition Policy is Going – Prospect and Reality of Japan', speech at Fordham Law School, 7 October 2004, pp. 2-3.

5 The stated purpose of the Subcontract Act (originally enacted in 1956 and amended several times) is "to ensure that transactions between main subcontracting entrepreneurs and subcontractors are fair

established a task force in the investigation division to focus on ASBP cases. As of this writing, more than 90 cases have led to an administrative warning from the JFTC, and three administrative surcharge payment orders have been imposed.

As for (ii), international cooperation, one of the authors has been involved in a number of international cartel cases in which the JFTC coordinated with the US Department of Justice and with EU's DG Competition more and more frequently than ever before. To our knowledge, although it coordinates with agencies overseas, the JFTC does not appear to be sharing the evidence and testimony obtained through its investigations with them; however, under the AMA it may be authorized to do so. When the JFTC begins to exchange information as a routine practice, this will drastically change the landscape of antitrust investigations in Japan. But the JFTC has already begun to expand the global reach of its enforcement activities, actively applying the AMA to cases involving (only) foreign firms, a chief example of which is the failed business combination between BHP Billiton and Rio Tinto.[6]

As regards (iii), i.e., the JFTC's attempts to achieve greater procedural interoperability with other jurisdictions, the JFTC abolished the notorious prior consultation procedure in merger control, whose opaque features had long been criticized by many Japanese businesses. Although the JFTC submitted a bill to abolish another procedure that has drawn criticism, i.e., *ex post* administrative hearings, the bill languished in the Diet while Japan turned its attention to the Fukushima nuclear accident and subsequent debate over whether to suspend operation of the country's nuclear power plants.

Perhaps less obviously, during Takeshima's era the interpretation of the AMA has been advanced as a result of challenges brought against the JFTC's decisions. Many appeals have been filed with the Tokyo High Court, and thereafter to the Supreme Court. The Supreme Court's judgment of February 20, 2012 in a bid-rigging case is a recent and important example. In this case, the Court held that:

(a) it was the underlying ("fundamental") agreement that amounts to an unreasonable restraint of trade;
(b) since the fundamental agreement is defined as forming a consensus as to who will win the anticipated bid and its final price, it is obvious that the business activities of each undertaking are thereby restricted, and consequently the necessary condition (where an unreasonable restraint of trade is alleged) of a "mutual restriction" is satisfied; and
(c) an administrative surcharge should be applied to cases where the undertaking designated to accept the order as a result of coordination based on the fundamental agreement does accept it, since, in this case, the business

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and, at the same time, to protect the interests of the subcontractors, thereby contributing to the sound development of the national economy."

6 Japan Fair Trade Commission, Termination of Prior Consultation Process regarding establishment of a joint venture for producing iron ore by BHP Billiton PLC and BHP Billiton Limited, and Rio Tinto PLC and Rio Tinto Limited (18 October 2010).

activities of undertakings are found to be restricted and competition is substantially restrained.

The judgment just described does much to clear up some longstanding points of obscurity as regards the proper interpretation of the AMA.

Doubts

While Mr. Takeshima deserves praise for his significant achievements, certain aspects of the JFTC's practice in the last decade can be criticized. For example, while the JFTC has strengthened the enforcement of the AMA, its investigators have not always held themselves to adequate standards of due process. It has to be recalled that the JFTC's investigators are career bureaucrats steeped in an administrative culture. They are not qualified lawyers. Most of them spend their entire professional life at the JFTC. They are deeply loyal to their employer but few of them have had the opportunity to internalize respect for due process through personal experience. In Japan it is a well-known fact that, when interrogating witnesses, JFTC agents have given short shrift to due process, and witness statements are taken with little regard for legal guarantees familiar in other jurisdictions. This unsatisfactory state of affairs has not been touched upon at all during Mr. Takeshima's mandate.

In terms of substance, neither the enforcement of the prohibition of "private monopolization" nor the policy behind it has received attention during the Takeshima era. These issues have essentially been eclipsed by the much greater emphasis on cartels and on the abuse of a superior bargaining position.

A 'balance sheet'

Just ten years ago, the JFTC still could not shake loose its "sleeping dog" reputation. The enforcement of the AMA focused predominantly on domestic bid-rigging. There was hardly any action in the areas of price-fixing cartels and international cases. Mr. Takeshima tore up this placid picture, revitalized the institution and began coordinating with overseas competition agencies and modernizing much of the JFTC's enforcement policy. As we have noted, the JFTC still faces several challenges going forward. Nevertheless, under Mr. Takeshima's leadership the JFTC has exceeded expectations and it is poised, for the first time in its six-decade history – if left free from political tragicomedy – to leave its dysfunctional past behind for good.

LOOKING AHEAD

The new JFTC Chairman, Kazuyuki Sugimoto, took office on March 5, 2013. Due to the political confusion already mentioned, and due in part to concerns about the fact that Mr. Sugimoto was from the Ministry of Finance, it took almost five months for the Diet to confirm him. Mr. Sugimoto's career background was similar to that of Mr. Takeshima in the sense that he built his career as a top-level bureaucrat at the Ministry of Finance, serving as vice-minister there from July 2008 until July 2009. Under the Yoshiro Mori cabinet, from

2000 to 2001, Mr. Sugimoto was a senior adviser to the prime minister, and he made significant contributions to the reform of the pension system in 2004. As for competition policy, Mr. Sugimoto served as first secretary of Japan's Mission to the European Economic Community from 1988 until 1991, where he was able to observe the administration of EEC competition policy and to learn about its distinctive characteristics. At the press conference held for his inauguration on March 5, 2013, Mr. Sugimoto stated his belief that, without competition, there could be no economic growth – a note of continuity with the messages of the last decade.

Mr. Sugimoto also made clear that his leadership focus would be on: (i) rigorous enforcement of the AMA; (ii) active enforcement of the Subcontract Act and other regulations such as those on the abuse of a superior bargaining position to protect small- and medium-size businesses; and (iii) improved antitrust compliance and the prevention of bid-rigging.[7] In addition, he emphasized the importance of international coordination. While these goals were already pursued under Takeshima's administration, Sugimoto's administration is expected to devote more effort and resources to achieve them – although it is unclear where the additional resources will come from. As if to drive the point home, the very next week (March 13, 2013), the JFTC conducted a dawn raid involving no less than 50 undertakings for the suspicion of fixing prices for underground cable. This was followed on March 27, 2013 by another raid of more than 10 domestic construction firms on suspicion of bid-rigging.

Under Sugimoto the JFTC resubmitted the bill to amend the AMA on May 24, 2013. This bill would abolish the *ex post* hearing procedure for antitrust cases in favor of what is perceived to be a more transparent system designed to (i) give companies suspected of anticompetitive behavior more of a chance to defend themselves before the JFTC issues cease-and-desist orders, and (ii) change the jurisdiction for competition appeals to the Tokyo District Court. Despite the political shift from the former Democratic Party of Japan (Noda's administration) to the Liberal Democratic Party (Abe's administration), the reform of the hearing procedure is still strongly supported by Japanese business communities. Although the regular session of the Diet closed on June 26, 2013, the bill is being deliberated during the official closure period so that it can be adopted with a minimal delay during the next legislative session.

7 Japan Fair Trade Commission, Taking Office as the Chairman of the Japan Fair Trade Commission (March 2013).