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**Are the Keiretsu Anticompetitive - Look to the Law**

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Are the Keiretsu Anticompetitive - Look to the Law

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Are the Keiretsu Anticompetitive? Look to the Law

By Ely Razin*

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I. Introduction

Record imbalance has characterized the trade relationship between Japan and the United States during the late 1980s and early 1990s. While the United States trade deficit has declined from its peak in 1987 of $59.8 billion, it is still considered insufferably excessive. The recent course of the trade imbalance has not changed the perception of excess; while the imbalance had fallen to $38 billion by 1990, it rose to $43.4 billion in 1991. The imbalance is projected to reach approximately $50 billion in 1992, a large part of the $120 billion global trade surplus that Japan is expected to amass.

The development of this situation is curious because the Japanese economy is formally the most open of the major industrialized economies. However, far more troubling to both trade partners has been the continuation of this situation. It has persisted despite the

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4 *Id.*


6 The average level of Japanese tariffs on a trade-weighted basis is 2.3%. *How Open is Japan?*, Focus Japan, Aug. 1, 1991.

elimination of most tariffs, the sharp fluctuation of exchange rates, and the agreement to numerous trade initiatives and agreements by both countries. The continuing imbalance has focused the collective mind of American policy makers in particular on the elimination of the American trade deficit with Japan. Two schools of thought shape American policy-making with respect to the trade deficit with Japan. The first school advocates liberalized trade as the means to eliminate impediments to foreign activity in the Japanese economy. The second school promotes managed trade as the means to guarantee American access to a certain percentage of the Japanese market in any single industry. The influence of each school of thought is evident in the seemingly schizophrenic American policy toward Japan.

8 Other than tariffs protecting agriculture and fisheries, Japanese tariff barriers have been virtually eliminated. Of the twenty-one categories of tariffs which are still applicable, only one applies to the manufacturing sector. The remaining tariffs apply to agriculture and fisheries. The rice market is the most notoriously protected market in Japan. Like all measures insulating inefficient domestic producers, the protection of Japanese rice producers inflates the costs consumers must bear; in effect, Japanese citizens pay twice to inflate rice prices — once in their capacities as taxpayers, for the payment of subsidies to domestic producers, and a second time in their capacities as consumers for the purchase of artificially-expensive domestic rice. The total annual cost for rice market protection is estimated at $800 per household. Isaac Shapiro & Constance C. Hamilton, How to Succeed in Japan: Time for U.S. Firms to Focus on Post Entry Survival, E. ASIAN EXEC. REP., May 15, 1990, at 8, 13. The U.S. trade authorities frequently point to the rice market as a major source of trade friction between the two nations. Id. This is curious, indeed, as the reduction of tariff barriers to rice would benefit low-cost South-East Asian producers to a far greater extent than it would benefit higher-cost American producers.

9 See Glenn Fukushima, United States - Japan Free Trade Area: A Skeptical View, 22 CORNELL INT'L L.J. 455 (1989). In 1987, Japan imported manufactured goods equivalent to only 2.4% of its Gross National Product. Comparable figures for the United States and West Germany, the other major trading economies, were 7.3% and 10.5%, respectively. Id. at 456.

10 The Reagan-Bush years have seen successive U.S. administrations forcefully promoting liberalized trade, though Congress has been less enamored of this policy. While the vehicle for trade liberalization has been the General Agreement on Tariffs and Trade (GATT) since the end of World War II, the early 1990s has witnessed both the faltering of the most recent Uruguay Round of the GATT and the reorientation of American liberal trade policy away from multilateral arrangements, like GATT, and toward bilateral arrangements like the Structural Impediments Initiative (SII). This increase in bilateralism is likely a necessary precondition to the emergence of extensively managed bilateral trade relations.


While the liberalized trade school's attempts have been likened to the "levelling of a playing field" in order to establish fair rules for competition, the managed trade school's efforts have been analogized to the leveraging of a closed door through the use of a crowbar. The continuing efforts of American negotiators to gain the benefits promised in one such managed trade agreement is illustrative of the second school's approach. The agreement between the United States and Japan with respect to the Japanese semi-conductor market, the world's largest, allocates 20% of the Japanese market to American manufacturers. The United States alleges it has attained only 14.6% of the market, falling far short of the target market share agreed upon by the two nations.
The same U.S. Administration emphasized liberal trade in the 1990 signing of the Structural Impediments Initiative Agreement (the Agreement) and then focused on managed trade in the 1992 ill-fated journey to Japan by President Bush. The Bush Administration mainly emphasized liberalized trade, and more specifically, the Agreement, because the former President himself was a powerful advocate of free trade. The Agreement is founded on the mutual commitment of each partner to undertake the necessary structural reforms that should make each economy more competitive and its transactions more transparent. To achieve these goals, the Agreement commits the parties to undertake steps immediately and to continue to meet in working groups. In the final Agreement, Japan committed to certain measures including the increased supervision and sanction of exclusionary business practices and the expanded monitoring of the keiretsu, Japan's distinct-

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13 See Paul Blusten, Bush’s Trip to Japan Sets in Motion Shift Toward “Managed” Trade, Wash. Post, Jan. 20, 1992, at A22; Leonard Silk, Economic Scene: A Time of Peril For World Trade, N.Y. Times, Jan. 17, 1992, at D2. The increasingly vociferous advocates of managed trade between the United States and Japan coerced President Bush to assume his ill-conceived, trade-oriented journey to Japan in January 1992. This journey achieved little and heightened international trade tension, providing a visual symbol for the collapse of American firms in the face of Japanese competitors. Blusten, supra at A22; Silk, supra at D2. The trip drew to an unceremonious close when the President of the United States slumped into the lap of Japanese Prime Minister Kiichi Miyazawa and vomited. This image was conveyed to millions of viewers in both nations and likely increased the hostility through which many Americans express their frustration at the seemingly indefatigable Japanese.

14 The Agreement constitutes an unprecedented bid at the solution of difficulties in international trade. It seeks to remove enduring nontariff barriers through the adoption of salutary macroeconomic policies intended to “level the playing field” between the two countries. This phrase succinctly expresses American perceptions of the foundations of the trade imbalance. In the American view, the rules by which each party is playing the “trade game” differ. By establishing common rules and thereby levelling the field of competition, the Americans hope to redress the trade imbalance.

15 The Japanese Government promised to examine and remedy six features of the Japanese economy: savings and investment, land use and reform, the distribution system, exclusionary business practices, industrial structure, and price levels. See Key Elements of the Agreement, supra note 12, at 1015-16.

16 Id. at 1014. Substantial revision of these practices, to allow for increased access to the Japanese market, has been agreed upon. The steps to be taken include an increase in the penalties and surcharges which violators are required to pay under the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, No. 54 (Japan 1947), amended by No. 214 (1949), amended by No. 259 (1953), amended by No. 63 (1977), amended (1982) [hereinafter Anti-Monopoly Law or AML], translated in Hiroshi Iyori & Akinori Uesugi, The Antimonopoly Laws of Japan (1983). In addition, exemptions from the
tive corporate groupings. Japan will carry out its promises primarily under its antitrust statute, the Anti-Monopoly Law (AML).

American efforts in the continuing Structural Impediments Initiative meetings have been directed at the examination of Japanese industrial relationships in general, and the keiretsu in particular. United States negotiators advocate enhanced monitoring in order to expose activities and relationships that are injurious to competition. To alleviate anticompetitiveness inherent in such activities and relationships, American negotiators advance measures which would facilitate the deconstruction and redesign of industrial relationships; chief among these measures is the application of Japanese competition law.

It is not clear that Japanese antitrust law could be convincingly used as a mechanism to facilitate deconstruction of industrial relationships. Even if such an application were possible in theory, in practice it would be subject to two caveats. First, the Japanese anti-

AML, which allow companies to establish cartels in order to jointly withstand harsh economic climates will be minimized. The Japan Fair Trade Commission (FTC) will be further empowered through an increase in FTC personnel and investigatory resources. The FTC will also be required to take more vigorous, formal action and to apply criminal sanctions more readily against schemes for price-fixing, bid-rigging, supply restraints, and group boycotts. Private remedies will be made more effective under the AML, with strong FTC enforcement to ensure the successful commencement of actions. In addition, the patent examination process will be improved both through a shortening of the approval time to twenty-four months and through an increase in the number of patent examiners. More transparency will be introduced into the provision of administrative guidance to ensure that it does not restrict market access or fair competition. Similarly, more transparency will be encouraged in the procurement of supplies by private Japanese companies. For an informal summary of the provisions of the Structural Impediments Initiative Joint Report, see Key Elements of the Agreement, supra note 12, at 1015-16.

The proper name of the groups that are popularly referred to as keiretsu is keiretsu kaisha (affiliated companies). Because they are amorphous, keiretsu are not easily described. The many attempts made in defining these corporate groups facilitate the understanding of their complex nature. For a general discussion of keiretsu, see Angelina Helou, The Nature and Competitiveness of Japan's Keiretsu, 25 J. WORLD TRADE 99 (1991); Yasuo Fujigane, Financial Keiretsu Strengthen Solidarity, TOKYO BUS. TODAY, Feb. 1991, at 26; Inside the Charmed Circle, ECONOMIST, Jan. 5, 1991, at 54; Yasuo Fujigane & Peter Ennis, Keiretsu: What Are They Doing, Where Are They Heading?, TOKYO BUS. TODAY, Sept. 1990, at 26; Intimate Links Within Japan's Corporate Groups, TOKYO BUS. TODAY, Jan. 1989, at 14.

Key Elements of the Agreement, supra note 12, at 1014. Where necessary, supervision and modification of the conduct of the keiretsu is to begin. Greater transparency of, and fairness in, intercorporate relations are to be fostered by the Japanese government. To encourage this, the AML and the FTC are being strengthened, offensive cross-shareholding arrangements are to be restricted, and disclosure and reporting requirements are to become more stringent. Id.

AML, supra note 16. See also infra Part III.A.


trust enforcement body, the Japan Fair Trade Commission (FTC),\textsuperscript{22} is woefully understaffed. Under present circumstances, it is incapable of assuming a significantly heavier case load.\textsuperscript{23} Second, enforcement measures may only be undertaken in conformity with the nature of the law and legal culture in Japan. Consensualism and conciliation govern the administration of Japanese law.\textsuperscript{24} In the context of these Japanese cultural norms,\textsuperscript{25} it is uncertain whether vigorous antitrust enforcement would effect the change American policy makers anticipate.

The applicability of Japanese antitrust law is therefore the critical determination: the caveats mentioned above would merely mold the actual enforcement. The relevance of the law, itself, rests on two findings. First, anticompetitive behavior and relationships must be identified. The initial section of this Article focuses on this identification through the description of Japanese industrial structures, with reference to the \textit{keiretsu} in particular, and their effects on the markets for goods and services.

Second, Japanese antitrust law must control any identified instances of anticompetitive activities. The latter section of this Article concerns a multi-stage analysis of this issue. The elements of Japanese competition law that are relevant to this analysis are outlined. Subsequently, these legal premises are applied to typical corporate conduct to test the restrictive effects, if any, of the law, particularly in the context of normative Japanese legal culture. Finally, the Article’s conclusion seriously questions the rationality of American hopes for dismantling particular Japanese industrial structures such as the \textit{keiretsu} through the extensive, forceful application of Japanese competition law.

\textbf{22} For a discussion of the history and operation of the FTC, see IYORI \& UESUGI, supra note 16, at 119-21.

\textbf{23} See Nigel Holloway, \textit{Freeing the Watchdog}, FAR E. ECON. REV., Oct. 19, 1989, at 48. While efforts were made to raise the number of FTC inspectors from approximately 125 in 1990 to 160 in 1992, the staffing levels remain inadequate to tackle allegedly pervasive anticompetitive activities in the Japanese economy.

\textbf{24} Punke, supra note 1, at 77-78 (comparing the U.S. approach to trade relations, which emphasizes “coercive legal regulation,” to Japan’s system, which stresses “informal, consensual restriction,” and contrasting the U.S. adversarial judicial system to the Japanese judicial system, which is based on conciliation and mediation).

\textbf{25} The objective of “levelling the playing field” is founded on American legal norms where the law rigidly structures societal arrangements. This legal norm has no parallel in Japan; Japanese legal norms conceive of law as a tool only for government intervention in society, in the absence of which societal arrangements are consensual and are far more fluid. See John O. Haley, \textit{Japanese Antitrust Enforcement: Implications for United States Trade}, 18 N. Ky. L. Rev. 335 (1991) (discussing the norms defining the Japanese legal system) [hereinafter Haley, \textit{Japanese Antitrust Enforcement}]; John O. Haley, \textit{Luck, Law, Culture and Trade: The Intractability of United States-Japan Trade Conflict}, 22 CORNELL INT’L L.J. 403, 416-22 (1989) (discussing Japanese attitudes towards law, the state, and consensual governance) [hereinafter Haley, \textit{Luck, Law, Culture & Trade}]. The attempted imposition of fair rules of the game may represent a radical misunderstanding of Japan and the potential impact of the Agreement in Japan.
II. Anticompetitive Behavior

A. Introduction

In order to make the first determination, the existence of anticompetitive practices, two elements of the architecture of Japanese industrial relationships must be distinguished. First, the current structure of corporate relationships must be found to negatively affect competition in the Japanese market. Second, if it is determined that the structure of relationships negatively affects competition through a reduction in market access, the cause of this reduced market access must still be established; antitrust law can be successfully applied toward the modification of industrial relationships only if they constitute actionable anticompetitive behaviour.

The first element in this determination, the reduction of competition, was established in a recent study conducted by Robert Lawrence. This study indicates that the structure of Japanese industry is statistically significant with respect to the levels of imports and exports in the Japanese economy. Keiretsu of all sorts were found to reduce market access for imports. However, the establishment of the first element, reduced market access, need not imply the second necessary element, actionable anticompetitiveness. Instead, it may indicate the greater efficiency of Japanese industry which fosters the tendency of Japanese firms to purchase from other Japanese firms and not from foreign firms. In the alternative, it may simply result from the widespread application of the principle of freedom of contract, which allows any economic entity the right to transact with another economic entity of its choice. Thus, the preference of many Japanese firms for transactions with other Japanese firms may negatively affect import levels without constituting an anticompetitive practice.

The second finding, that of actionable anticompetitive behaviour, therefore, is critical. Lawrence attempted to ascertain the degree of anticompetitiveness by comparing keiretsu effects on export levels to keiretsu effects on import levels. He found that only one type of keiretsu fostered greater export levels, and this type did so only moderately. He interpreted this lack of enhanced exportation as an indication that keiretsu did not enjoy significantly greater efficiency. As a result, he speculated that reduced import levels and unaffected export levels may result from the anticompetitiveness of keiretsu relationships.

Lawrence's conclusion is by no means certain. The failure of the keiretsu to heighten exports in a statistically significant manner may

27 Id.
28 Id.
indicate nothing more than the application of the freedom of contract principle. Speculative musings over comprehensive economic statistics are inadequate bases for a determination of legally actionable anticompetitiveness. The evaluation of anticompetitiveness rests on the characterization of actual keiretsu practices as anticompetitive, if they indeed are so.

B. Keiretsu Practices

The keiretsu are amorphous corporate groupings that are unique to Japan because they are, in large part, the product of the Japanese setting in which they have developed.\(^{29}\) Two overall distinguishing features, one structural, the other operational, define the nature of the keiretsu and integrate their disparate memberships. These integrating features comprise an intricate web of relationships and extensive relational contracting and pooling of resources.

1. Structural Elements

The keiretsu are associations which are the outcome of a complex interweaving of relationships on the levels of both the corporation and the individual.\(^{30}\) On both planes, the ties that bind the relevant parties endure in the long term and infuse their entire relationship. On the level of the corporation, these ties constitute any of several interconnections, including intra-keiretsu financing, intercorporate shareholding, and interlocking executive structures and corporate directorates. Each of these interconnections is conceived as a means by which to achieve greater operational cohesion, rather than as an end in itself.\(^{31}\) On the level of the individual, these ties include inter-

\(^{29}\) Yasuhiro Hasegawa, _The Keiretsu System in a Different Perspective_, TOKYO BUS. TODAY, Nov. 1991, at 58. The importance of the context in which the keiretsu system has developed should not be minimized. They are outgrowths of the collaborative nature of Japanese society.

An interesting theory has been advanced by one author, who asserts that the keiretsu system is simply a modernized form of the Japanese feudal system. \(\text{id.}\) This theory is presented by way of metaphor in which the parallels between the keiretsu and their feudal predecessors are drawn. The keiretsu companies are compared to the han, the groups of aristocratic samurai, each headed by a feudal lord, termed the daimyo. The daimyo is analogized to the company president, because of the great power wielded within the group. Certain han were linked horizontally with one another, as are companies in modern horizontal keiretsu. The lives of the samurai were dependent on the efforts of the merchants and farmers, like the reliance of principal manufacturers on modern-day sub-contractors in vertical keiretsu. Today, manufacturers try to maximize their profit margins at the expense of their vertically linked subcontractors and distributors; in feudal Japan, samurai similarly tried to extract the maximum amounts of money and rice from the merchants and farmers, respectively. The final stage of the earlier version of the feudal system was the cause of the end of the bakufu-han system — the forcible opening of Japan by the Americans. It is not yet clear whether this, too, will have a modern parallel. For a greater elaboration and discussion of this metaphor, see \(\text{id.}\)

\(^{30}\) Helou, supra note 17, at 99-100, 100 n.5.

\(^{31}\) Inside the Charmed Circle, supra note 17, at 54. The effects of these mechanisms include the removal of approximately 70% of all shares of companies traded on the Tokyo
personal contacts that are maintained by the elements of individual interaction that accompany the corporate ties.

a. Financial Links

Intra-keiretsu financing includes both debt and equity financing. Debt financing within a keiretsu is provided by several firms central to the keiretsu organization, comprising banks, manufacturing concerns, and international trading companies (sogo shosha). Banks associated with keiretsu companies provide debt financing in the form of loans. Manufacturing and international trading firms within a keiretsu provide trade credit that, like the direct loans extended by keiretsu banks, finances other keiretsu firms. This arrangement meets the needs of both parties to the financing. From the point of view of the financing firm, debt financing allows the financing firms extensive input into the operations of the financed firms. From the perspective of the financed firm, the credit extension is appealing because it provides access to otherwise unattainable financial resources and provides a tax advantage.

Equity financing is provided by many firms within a keiretsu through the common practice of intercorporate shareholding. Several keiretsu companies assume minority stakes in a target keiretsu firm using this mechanism. The assumption by many keiretsu companies of similar minority stakes in other keiretsu firms creates a bewildering network of cross-shareholdings within each corporate grouping. Rarely do any of these stakes exceed five to ten percent of the outstanding equity of a firm because the primary purpose of this cross-shareholding is the creation of an intercorporate bond, rather than the investment of equity capital oriented toward ownership or a return on capital.

From the perspective of the firm in which shares are held, the

Stock Exchange from circulation on the market and the exclusion of outsiders from the corporate boards of the relevant companies. These are mere unintended side effects of these inter-relationships which are, as noted, intended merely to fortify relationships. Id. at 107, 111-12.

Each of these firms is a principal member of the keiretsu with which they are affiliated. Because of their central financing position and their long-term investment of debt capital in member firms, banks are often considered the most important players in the keiretsu. Manufacturing concerns assume a similar importance, particularly in those keiretsu which are organized around the operations of a central manufacturing process. International trading companies, as the outlet of the keiretsu to the world and a secondary source of financing, are also accorded a respected position in keiretsu. See sources cited supra note 17.

Interest expenses are deductible from gross revenue and thereby reduce the amount of taxable income. In contrast, dividends, the analogous payment to equity investors, are paid out of after-tax income and therefore are a less tax-efficient form of financing. Id. at 107, 111-12.


shareholding provides both equity capital to the firm and establishes a connection between the firm and other keiretsu companies. From the point of view of the investing company, the practice of cross-shareholding has several benefits, including a tax advantage and corporate control. The taxation regime provides preferential treatment of capital gains and intercorporate dividends, the two forms of direct return on equity;\(^\text{37}\) the tax-related advantage of returns on equity over returns on debt encourages corporate equity investment. However, the shareholding is not undertaken primarily as a vehicle for short-term return on equity. Contracting with related firms constitutes the effective return earned by investing firms on their cross-held shares\(^\text{38}\) because they actually receive little return in the form of dividends.\(^\text{39}\)

In addition, cross-shareholding allows effective control of keiretsu firms to pass to the shareholding firms and, in particular, to the central keiretsu companies. Few keiretsu companies are majority-owned by any one company. This allows effective control of keiretsu members to be established through the extensive cross-shareholding among a number of keiretsu companies. The reliance of many of the smaller affiliates on the larger banking, trading, and manufacturing con-

\(^{37}\) The practice of extensive share ownership receives some support from the Income Tax Act, which taxes capital gains at a lesser rate and excludes intercorporate dividends, in part or in whole, from taxable corporate income. \textit{Id.} Prior to 1988, corporate dividends received from other domestic corporations could be fully excluded from taxable income. Reforms of the Income Tax Act which took effect commencing April 1, 1989, reduced the exclusion from taxable income of dividends from domestic corporations. For shareholdings of less than 25% of outstanding shares, the maximum exclusion was reduced to 80%; for larger shareholdings, though, the exclusion remains at 100%. Even in the aftermath of the reforms, the effect of this law has been the encouragement of large-scale, domestic, intercorporate share-holding. \textit{Id.}

Its importance is less than it might be in the Anglo-American economies because of the relatively small dividends typical of Japanese companies. The long-term, interlocking nature of Japanese shareholding allows Japanese firms to distribute only a small part of their earnings as dividends and to retain the vast majority for reinvestment. Japanese tax law favors the retention of profits rather than the payment of dividends by providing that the capitals gains from sales of securities are tax free. \textit{Id.} at 74. Investor returns on equity portfolios in the form of dividends, therefore, are limited. Keiretsu companies, instead, receive a return on their equity investment in the form of profitable, ongoing business relationships, rather than dividends.

\(^{38}\) This form of return on investment is actually more efficient than returns in the form of dividends. Dividend income is subject to double taxation, at the level of the firm issuing the dividend and at the level of the ultimate recipient of the income. In contrast, return in the form of operational business relationships is subject to taxation only at the level of the ultimate recipient of the income; the corporation paying for the relationship pays no tax on its business expenditures.

The advantage of dividend income as a return on investment is that dividend income is easily isolated and quantified. In contrast, business transactions may have resulted even in the absence of the investing firm's equity investment. Typical Anglo-American dividend return foregoes the tax efficiencies, at least in part, in order to ease the quantification of return on investment. \textit{Making Foreigners Cross}, supra note 35, at 62.

\(^{39}\) Cries have risen for an increase in dividend levels from their current paltry amounts. Dividends paid by Japan's larger companies currently average only about 1% of annual income. \textit{Id.}
cerns, in particular, grants these latter companies a much greater say in the conduct of their smaller affiliates than their small shareholding would otherwise allow. Although the involvement of these larger firms may affect the decision-making of smaller affiliates, it also provides stability to each company and effectively eliminates the possibility of a hostile takeover of the company.

In return for the benefits accruing to them, smaller firms are often constrained to accept the “leading role” of the larger affiliate firms and financial institutions. These large firms, particularly the affiliated banks, manufacturing companies, and international trading companies, undertake the coordination and integration of functions typically associated with holding companies in Western countries. The most important roles assumed include capital investment and production integration. The notion of wa (harmony) that permeates Japanese culture thereby directly impacts on keiretsu practices because the central companies facilitate the harmonious integration of the diverse resources and functions of the keiretsu firms.

b. Managerial Links

Interlocking corporate executives and directorates are constructed through the exchange of corporate executives and directors. These structures not only foster personal integration through personal networking, but also engender intra-keiretsu long-term strategic cooperation and short-term operational integration. The introduction of outsider input into individual firm decisions enables the strategic cooperation and operational integration. Because this method of influence is undetectable, its impact is unclear. It is likely that intercorporate strategic or operational integration is facilitated only when it is to the economic advantage of each of the coordinating companies.

40 Fujigane & Ennis, supra note 17, at 26.
41 This practice removes all but 25-30% of the shares of many corporations from the marketplace and, thereby, facilitates the manipulation of the prices of outstanding shares. Making Foreigners Cross, supra note 35, at 62. However, the ongoing collapse of Japanese equity markets, as evidenced by the fall of the Nikkei Stock Index from its 1989 heights of close to 40,000 to its August 18, 1992 nadir of 14,309 may compel Japanese firms suffering liquidity crises or continuing losses to dispose of large blocks of shares held in keiretsu member companies. Going Nowhere, ECONOMIST, Oct. 10, 1992, at 84.
42 The identity of these integrating firms varies with the nature of the keiretsu. These firms include lead banks, large manufacturing concerns, and sogo shosha (international trading companies). See sources cited supra note 17.
43 Article 9 of the Japan’s Anti-Monopoly Law forbids holding companies. AML, supra note 16, ch. IV, § 9, translated in IYORI & UESUGI, supra note 16, at 222-26.
44 Helou, supra note 17, at 119.
45 Fujigane, supra note 17, at 28.
2. Operational Elements

In addition to being an intricate web of relationships structurally, the *keiretsu* are operational affiliations of companies that engage in extensive intra-*keiretsu* contracting for goods and services. Relational contracting among member firms enables the traffic of goods within a *keiretsu*. Similarly, the passage of services through the *keiretsu* is engineered by substantial interfirm pooling of resources. Both of these forms of intra-*keiretsu* dealings are important to the cost minimization efforts of the *keiretsu*.

a. Operational Links

Long-term relational contracting is a transactional practice through which supplies are purchased from, or sold to, related companies. This form of contracting, motivated by the long-term relationships that bind *keiretsu* companies, pervades all *keiretsu* relationships. However, it does not characterize all *keiretsu* company purchases; while most *keiretsu* company purchases are made from other *keiretsu* companies, many transactions are made with non-*keiretsu* companies.47

Like all economic actors, *keiretsu* companies are concerned with the fundamentally sound economics militating in favour of cost minimization. Although this might suggest, prima facie, a willingness of *keiretsu* companies to go outside the *keiretsu* to procure lowest cost items, a preference for intra-*keiretsu* dealings remains,48 goods of similar quality and cost available both within and without a *keiretsu* will almost always be sourced from within the group.49 Intra-*keiretsu* transactions will be foregone only when preferential intra-*keiretsu* transactions would occur at the expense of economically advantageous dealings with non-*keiretsu* firms. The seeming inconsistency of these two predispositions, toward cost minimization and intra-*keiretsu* reciprocal dealing, must be understood in the context of the long-term time horizon shared by *keiretsu* firms.50 This long-term perspec-

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47 Intra-*keiretsu* dealing has been reduced in its relative scope. While it still dominates the purchases of *keiretsu* firms, it no longer excludes outside companies from supplying *keiretsu* firms. See infra note 282.

48 Examples of these preferred dealings are legion, but sometimes the most mundane are the most striking. As an example, employees of Mitsubishi companies are restricted in their place of business to purchasing beer produced by the affiliated Kirin brewery, while employees of Sumitomo firms are similarly limited to purchasing the output of Asahi brewery. Fujigane, supra note 17, at 30.

49 Id.

50 No description of the *keiretsu* is complete without a juxtaposition of stereotypical characteristics -- Japanese long-termism and American short-termism. It is presumed that American attitudes, summed up in the notion of "What have you done for me lately?", constrain business relations to accord entirely with the short-term ability of suppliers and related companies to provide low-cost inputs to American companies.

In contrast, Japanese attitudes emphasize the cultivation of relationships in the long-term and discourage the formation of business relations solely on the basis of short-term
tive prevents concern with cost minimization in the short-term from overwhelming other concerns. Consequently, keiretsu firms often forego the short-term cost minimization achieved through the purchase of lower cost items of acceptable quality from non-keiretsu companies.51

Instead, keiretsu firms will purchase goods from within a keiretsu in order to assist a keiretsu affiliate in the production of goods52 of cost and quality at least equal to that produced by the competitor non-keiretsu firm.53 This course allows keiretsu firms to attain the long-term cost minimization which is available through the reduction not only of production costs,54 but also of transaction costs and uncertainty costs.

Intra-keiretsu reciprocal dealings help reduce these last two forms of cost. Transaction costs are associated with constant renegotiation of contractual relationships and amendment of contracts in the event of changes in circumstance. Similarly, uncertainty costs are created by the company’s need to garner information about contracting firms and the markets in which they are active. The minimization of these costs results from the entry into long-term relationships with affiliated firms, the close operational relationship between the firms, and the desire of the firms to collaborate in order to optimize their shared efforts.

Thus, because of the lasting benefit of intra-keiretsu expertise, reciprocal dealings provide a greater degree of cost minimization than does the short-term cost reduction effected by purchases of inexpensive goods from non-keiretsu firms; purchases of the latter sort lower production costs but do not reduce transaction costs and uncertainty costs. Therefore, a keiretsu firm will choose to transact with a non-keiretsu company only when that non-keiretsu firm produces a product that offers a cost or quality advantage unattainable within the keiretsu.55

This approach ensures the stability of keiretsu companies and intercorporate ventures because it guarantees keiretsu firms that they will retain their keiretsu clientele, regardless of most short-term cost

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51 Punke, supra note 1, at 63 (discussing the reliance of keiretsu on relational contracting); Haley, Law, Luck, Culture & Trade, supra note 25, at 418.
52 Haley, Law, Luck, Culture & Trade, supra note 25, at 418.
53 This approach prevents both gains in market share by outside companies and uncoordinated changes in price by affiliates.
54 This is the sole source of short-term cost minimization through non-keiretsu purchases.
55 Where the non-keiretsu firm possesses patented products or proprietary technology or knowledge, a keiretsu firm will often choose to transact with it.
disadvantages. In return, *keiretsu* firms are expected to expend all necessary effort to achieve cost reductions and quality enhancement. Empirically, the preference of *keiretsu* firms for dealing with other companies within the *keiretsu* limits the gains in market share available to companies outside the *keiretsu*. However, this *keiretsu* preference does not completely exclude dealings with outside companies.56

b. Resource-Pooling Links

The *keiretsu* structure facilitates the pooling of resources by member firms. Within the *keiretsu* resources are amassed, developed, distributed, and utilized by *keiretsu* affiliates.57 For example, production companies, collectively, serve as a repository for operations and process expertise. Financial service companies similarly serve as a collective pool of financial resources. These pools and others like them are accessible to *keiretsu* members.

In general, *keiretsu* variously serve as repositories of human resources, informational and technological resources,58 including production expertise, and financial resources.59 Most of these resources would be unattainable for the member firms in the absence of the *keiretsu*. Access to these resources allows *keiretsu* firms stability far beyond that attainable by member firms standing alone.

i. Human Resources

High quality human resources are among the most difficult to procure because managerial talent and employee skills must be honed through training programs and actual experience. The limited experiences of many firms prevent the development of managers and employees equipped to deal with all of the exigencies that may confront their firms. The *keiretsu* relationship with other firms whose managers or workers may have gained the requisite experience allows young firms access to the necessary human resources at times when these firms are unable to provide it themselves. These linkages

56 Because *keiretsu* arrangements are so fluid and overlapping, it is difficult to describe with any degree of precision the extent of intra-*keiretsu* purchases. Empirical evidence indicates that *keiretsu* companies are open to purchases from nonaffiliate companies. One survey indicated that intra-*keiretsu* trade in goods accounted for 70.4% of consumer good supplies and 62.7% of capital good supplies. Fujigane & Ennis, supra note 17, at 30. While this indicates there is scope for non-*keiretsu* firm dealings with *keiretsu* members, only a small portion of *keiretsu* needs are satisfied by firms external to the *keiretsu* system.

Anecdotal evidence also weighs in this direction. In reference to Japanese transplant automotive factories in the United States, one Japanese auto company executive explained principles guiding supply procurement: “First choice is a *keiretsu* company, second is a Japanese supplier, third is a local company.” Carla Rapoport & Sally Solo, *Why Japan Keeps on Winning*, FORTUNE, July 15, 1991, at 76.

57 Helou, supra note 17, at 114.
59 Helou, supra note 17, at 112-14.
allow firms greater latitude in determining their human resource procurement and deployment strategies. When necessary, human resources may be sourced from outside affiliates. Similarly, when the human resource requirements of firms diminish, employees and executives may be deployed at other keiretsu firms.60

ii. Informational And Technological Resources

Customer information,61 production technology,62 and research and development are among the many elements of informational and technological resources. Only limited amounts of these resources would be available to most firms in the absence of any interfirm pooling arrangement. The extensive cost of developing and exploiting these resources is often beyond the limited capacities of individual firms. For example, specialized expertise in production processes, financing, marketing and distribution possessed by individual firms within a keiretsu may prove valuable to other firms within a keiretsu. Without access to this expertise, these other firms would have to assume significant development and deployment costs.63 These costs, associated with new product or process research, innovation, and development frequently would be prohibitively expensive. As a member of a keiretsu, however, part or all of the expense and associated risk64 may be dispersed over several participating keiretsu firms interested in the same research in operations and products.

The informational, technological, and financial resources available within the keiretsu allow for large interfirm investments in innovative developments of benefit to the entire system of firms.65 The

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60 It is these relations, in part, which permit large Japanese companies to commit themselves to their vaunted life-long employment practices. Human resources which become superfluous may be shifted to affiliated companies. However, small affiliates are often required to bear the excess cost created by this practice, as their employment levels must vary radically in order to accommodate the needs of their larger affiliates.

The onset of recession in the Japanese real economy and the refusal of Japan's trade partners to absorb increased levels of Japanese exports that might allow Japan to temper the domestic recession have prompted corporate Japan to reassess its values, particularly regarding employment practices. No longer is the pursuit of market share, at the expense of overworking the Japanese labour force blindly accepted. See Leaner and Meenan, Economist, July 11, 1992, at 66 (noting that companies are seeking lessened work hours). The influential head of Sony Corporation, Akio Morita, among others, has pressed for a reduction in Japanese annual work hours from an average of 2100 hours per year to 1800 hours per year. Id.

61 Information about customers and their individual needs is valuable for the development of production standards and marketing programs.

62 Technology developed by one firm within a keiretsu may prove extremely valuable to many keiretsu affiliates. The technology and the process may be adaptable to the needs of several keiretsu firms.

63 Helou, supra note 17, at 110.


65 This analysis ignores the more complex issue of inter-keiretsu cooperation on basic research prior to the stage of application of technology, which raises further competition
importance of this reciprocal access to expertise is increased by economy-wide keiretsu affiliation, which fosters massive competition for innovation in operations and products within the Japanese economy. 66

iii. Financial Resources

The collection of financial resources within the keiretsu may include equity capital invested by keiretsu members through intercorporate shareholding, debt financing provided by affiliated banks, 67 and trade credit extended by other keiretsu members. Financial resources, which would otherwise be beyond the capacities of all but the largest affiliate companies and financial institutions, are placed by the keiretsu policy concerns. The encouragement of cooperative inter-keiretsu basic research by Japan's Ministry of International Trade and Industry (MITI) has been cited as one source for Japanese success in semiconductor production. When American producers attempted a similar arrangement, it was deemed anticompetitive. The initial American governmental resistance to cooperative research efforts among competitor firms has dissipated in the face of continued Japanese success and U.S. industry's complaints about an unfair disadvantage. The semiconductor and automobile industries provide only two recent examples of growing cooperation in basic research. Gail DeGeorge et al., Learning From Japan, Bus. Week, Jan. 27, 1992, at 52.

66 The intensity of competition and the pools of financial resources available within keiretsu foster the rapid innovation associated with successful Japanese industries. For example, companies in the automotive industry are able to design, develop, and produce new car models in forty-three months; in contrast, until recently it has taken American car companies sixty-three months to complete the same process. Hasegawa, supra note 29, at 59-60. Of course, other factors contribute to this speed. In the case of new automobile development, the "shaken" system of automobile inspection and the associated expense of car weight taxes, insurance premiums, and repair charges motivate new car purchases by Japanese consumers in advance of inspections. Because these inspections are required three years after purchase, consumers often trade in their cars in advance of this time. This provides great incentive for car companies to rapidly develop new models. Id.

67 The highly-leveraged financial structures that many keiretsu firms possess as a result of the availability of long-term bank debt financing allow keiretsu firms certain advantages. Among these are the tax advantages granted by the exclusion of interest expenses from taxable income. In addition, constant interest payments allow companies a measure of certainty with respect to their financing costs and facilitate long-term strategic planning.

Once again, recent events have overtaken the keiretsu system. The Japanese banking system has been thrown into complete disarray by the confluence of asset price deflation and the coming into effect of the Final International Risk-Based Capital Standards Adopted by the Basle Committee on Banking Regulations, commonly known as the Basle Accord. COMMITTEE ON BANKING REGULATIONS & SUPERVISORY PRACTICES, FINAL INT'L RISK-BASED CAPITAL STANDARDS ADOPTED BY THE BASLE COMMITTEE ON BANKING REGS. (1988) [hereinafter BASLE ACCORD], reprinted in 51 Banking Rep. (BNA) 143 (July 25, 1988). The collapse of Japanese financial asset prices has sharply reduced the value of keiretsu bank cross-shareholdings that served as the storehouse for much of the banking system's capital. In addition, falling property prices have threatened the very viability of banks and other financial institutions that are heavily exposed to the property market through extensive property lending. The capital held by each such institution has fallen as a result of reductions in reserves held in the form of share portfolios or large amounts of bad debt owed by defaulting property borrowers. This decline in capital reserves has developed concurrently with the application of the Basle Accord's requirements that capital be adjusted on a risk-weighted basis to reflect the true riskiness of a bank's loan portfolio. BASLE ACCORD, reprinted in 51 Banking Rep. (BNA) at 146-49. These events cannot be neutral in their impact on keiretsu financing practices.
structure at the disposal of all companies within the grouping. Access to these finances allows keiretsu affiliates both a degree of financial stability and an ability to engage in long-term planning denied to non-keiretsu companies. In addition, the pooling of these financial resources may facilitate the most efficient allocation of financial resources to those firms within the keiretsu able to provide the highest long-term return on investment.68

C. Types of Keiretsu

1. Introduction

Consideration of the keiretsu mandates the development of a typology to facilitate a more detailed analysis. However, several characteristics of keiretsu render the development of a typology very difficult. Although defining the elements of these corporate groups is possible, identifying the existence of actual keiretsu is less easily accomplished. The varying degrees of corporate integration, the fluidity of keiretsu arrangements, and the interconnection of different sorts of keiretsu all contribute to this difficulty.69

Integration among keiretsu companies and between keiretsu companies and outsiders need not differ in a significant manner. Because visible linkages between keiretsu members may be few, keiretsu affiliates and nonaffiliates are often difficult to distinguish. In addition, keiretsu arrangements are frequently fluid ones. Companies are not restricted to membership in a single keiretsu. Hitachi Corporation, which is a member of both the Dai-Ichi Kangyo group and the Sanwa group, is only one example of this fluidity.70 Keiretsu are also often interlinked with other keiretsu which do not compete with them because they are a different type of keiretsu.71 This situation renders the identification of affiliation between individual firms and single keiretsu imprecise because it is difficult to deconstruct the web of relationships comprising each keiretsu to determine to which of the two or more integrated keiretsu the individual firm belongs.72

Efforts to develop a keiretsu typology have been extensive. Cor-

68 Haley, Japanese Antitrust Enforcement, supra note 25, at 359.
69 Lawrence, supra note 26, at 313.
70 Hitachi itself is a central manufacturer within its own keiretsu, in which 688 firms are involved. Inside the Charmed Circle, supra note 17, at 54. This massive keiretsu, and not merely Hitachi Corporation, is actually the affiliate of both the Dai-Ichi Kangyo group and the Sanwa group. Rapoport & Solo, supra note 56, at 76.
71 This sort of inter-keiretsu affiliation occurs between keiretsu organized horizontally and keiretsu organized vertically.
72 Several striking examples of this interlinkage exist. Among these are the association of the NEC keiretsu with the Sumitomo group, the integration of the Toyota group and Toshiba group with the Mitsui group, and the affiliation of the Nissan keiretsu with the Fuyo group. See Rapoport & Solo, supra note 56, at 81 (discussing the interlinkage in various keiretsu).
porate groups have been characterized according to their function,\textsuperscript{73} the direction and nature of their interconnections,\textsuperscript{74} and their motivation for integration.\textsuperscript{75} To achieve a measure of simplicity without sacrificing accuracy, the distinction of keiretsu on the basis of the nature and direction of their interconnections is adopted in the analysis contained below. This categorization distinguishes between keiretsu organized horizontally and keiretsu organized vertically.

2. Horizontal Keiretsu

a. Introduction

Horizontal keiretsu unite companies acting in a wide variety of industrial sectors that appear to have few synergies.\textsuperscript{76} Typically, the industries in which these keiretsu have affiliates include banking, cars, electronics, food and beverages, industrial equipment, insurance,

\textsuperscript{73} This characterization categorizes keiretsu by their functional elements, such as the flow of capital, the consolidation of production, and the integration of distribution. See Fujigane & Ennis, supra note 17, at 27. The distinction between the functional elements of production and distribution appears to be an artificial one, as both production and distribution are steps along the same vertical chain. For this reason, among others, this categorization is not utilized here.

\textsuperscript{74} This “interconnections” categorization distinguishes between horizontal keiretsu and vertical keiretsu. The former “functional elements” categorization includes keiretsu uniting companies in disparate industries which, at first glance, appear to have few synergies with one another. The second “interconnections” category includes keiretsu organized in order to integrate the production and distribution functions necessary for the generation of revenue from a principal product produced by the company constituting the “center of gravity” of each of these keiretsu. This second category, which the author employs in the article, escapes the artificiality of the distinction between production-connected keiretsu and distribution-connected keiretsu outlined briefly in the above note. For a more detailed discussion of this method of distinction, see Helou, supra note 17, at 103-04.

\textsuperscript{75} This categorization is applied differently for horizontal keiretsu and vertical keiretsu. For horizontal keiretsu, a distinction is made between the former zaibatsu (pre-World War II corporate groups) and non-zaibatsu keiretsu. For the four horizontal keiretsu based on the former zaibatsu — Mitsubishi, Sumitomo, Mitsui, and Fuyo (the reformed Yasuda group) — the motivation for integration was the power of the family dominating the zaibatsu prior to World War II and the gradual re-structuring of those ties after the dissolution of the zaibatsu forced by the American Occupation following the War. IYORI & UESUGI, supra note 16, at 1-10. For the two non-zaibatsu horizontal keiretsu — the Dai-Ichi Kagyo Bank group and the Sanwa Bank group — the motivation for integration appears to be the economic leverage exercised by the bank at the center of these keiretsu. Inside the Charmed Circle, supra note 17, at 54.

Kenichi Imai has developed a different typology for the vertical keiretsu. In this typology, he identifies five types of vertical keiretsu: (1) keiretsu centered around a principal manufacturer but with webs of cross-shareholdings; (2) keiretsu developed by a parent company spinning off divisions into subsidiaries; (3) keiretsu established by a principal manufacturer creating a pyramid of sub-contractors; (4) keiretsu which have not only spun off former divisions but also have encouraged new affiliates and entered into new fields of business; and (5) keiretsu related principally through the charisma of the parent company's owner. Id. This analysis is not applied in this article both because of its complexity and because of the questionable relevance of the motivation for integration to the legal treatment of keiretsu.

\textsuperscript{76} HERBERT HOVENCAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 12.1 (Student ed. 1985) (discussing competition and conglomerate mergers).
and international trade. Consensus among analysts indicates there are six such keiretsu in Japan, four of which are based on their pre-World War II counterparts, the zaibatsu, while two are centered around the large banks for which they are named.

The zaibatsu were pre-World War II groups of companies controlled by central holding companies, which were dissolved by the American Occupation following the end of the War. The integration and power of the horizontal keiretsu are weak echoes of those of the zaibatsu. However, although they no longer retain the same degree of dominance in the Japanese economy, these corporate groupings are still responsible for a substantial portion of Japanese economic activity.

Horizontal keiretsu, like conglomerate mergers, offer certain synergies which enable cost minimization to the integrated firms. These

77 The industries included in these groupings are more diverse than those few named above. In addition to those named, horizontal keiretsu include companies in the following industries, among others: cameras and optics; cement; chemicals; construction; fibers and textiles; metals; mining and forestry; oil and coal; pulp and paper; real estate; rubber and glass; and shipping and transportation. For greater detail, see Rapoport & Solo, supra note 56, at 76.

78 These companies were, in turn, controlled by the powerful families at the helm of each zaibatsu. These organizations were alleged to have assumed the leading role in Japan's entry and participation in World War II. As a result, one of the primary acts of the American Occupation in the aftermath of the War was to dissolve the zaibatsu and to design a statute to prevent the re-emergence of these groupings. This statute, the Anti-Monopoly Law, included provisions unique to Japanese antitrust law that are intended to prevent the redevelopment of zaibatsu. These provisions included prohibitions on the formation or operation of holding companies in Japan and restrictions on the extent of permissible inter-corporate shareholding.

Although there were many more than four zaibatsu, the principal zaibatsu were the Mitsubishi, Sumitomo, Mitsui, and Yasuda zaibatsu. While the AML has succeeded in preventing the reemergence of these zaibatsu, these four groups have reunited in much more loosely integrated keiretsu. Three of the keiretsu carry the same names. The fourth, the Fuyo group, is the reformed Yasuda group. For more detailed discussion of the zaibatsu, see Iyori & Uesugi, supra note 16, at 4-11, 77-85; Restriction Spawns Keiretsu, JAPAN ECON. J., Sept. 1, 1990, at 5.

79 Like the four zaibatsu-based keiretsu, these two bank-centered keiretsu, the Dai-Ichi Kangyo Bank group and the Sanwa Bank group, developed during the 1960s, the period of the most rapid growth of the Japanese economy. See Hiroshi Iyori, Antitrust and Industrial Policy in Japan: Competition and Cooperation, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY 56, 65 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986).


81 A recent survey by Toyo Keizai Inc. indicates that the member companies of these six keiretsu, excluding their affiliated financial services companies, account for 4% of Japan's total work force, 14% of Japan's total assets, and 14.2% of Japan's total net income. In recent years, the importance of these groups appears to have begun to wane. Four years ago, they accounted for 14.2% of total assets and for 17.2% of total net income. This drop is not due to a reduction in the absolute size of these groupings. For example, in the same four year period, the total assets of the six groups actually rose by 80%. Instead, the size of these groups relative to the remainder of the economy has changed. One suggestion for this change is the growing importance of non-traditional industries and service activities, in which the keiretsu have little impact. Fujigane, supra note 17, at 27-28.
may include shared advertising costs, shared research and development expenses, and collective benefit from the goodwill amassed by any one of the integrated firms. In addition, synergy may result from the great possibilities for intra-keiretsu reciprocal dealing; this sort of transaction generally is a noncontractual arrangement through which related firms consent to transact with one another when business needs so dictate.

b. Links Between Companies in Horizontal Keiretsu

The formal links between companies in a horizontal keiretsu are few. A bank and sogo shosha (comprehensive trading company) are at the center of each group, but the affiliation between these central companies and others within the keiretsu is loose. None of the related companies are a division of other keiretsu firms and few are subsidiaries of other companies within the group; often, no more than ten percent of a firm’s shares are owned by any one company. Instead, the cohesion of the horizontal keiretsu is ensured through the use of several links. These include intra-keiretsu financing, intercorporate shareholding, interlocking directorates, and close intercorporate operational relationships. An additional link, unique to horizontal keiretsu, is the regular meeting of societies of presidents of major member firms.

82 Hovenkamp, supra note 76, § 12.2.
83 Because the relationship is an ongoing one, these transactions benefit from the consequent reduction in both information costs and transaction costs. Further, because transactions between the firms may coincide in time, transportation costs can be minimized. The transportation vehicle in which firm A sends goods to firm B need not return empty, as it would in the absence of reciprocal dealing; instead, it may be used for the shipment of goods purchased from firm B by firm A.
84 Particularly during the period of rapid economic growth during the 1950s and 1960s, the banks provided their corporate affiliates with otherwise-scarce capital. The main banks continue to provide essential services to keiretsu affiliates. First of all, they provide long-term debt financing to member firms that assures stability and enables long-term planning. Secondly, in the event of insolvency, the banks either will provide an injection of finances or, in conjunction with other keiretsu firms, will engineer the takeover of the failing firm by a more successful affiliate. See sources cited supra note 17.
85 Particularly during the period of rapid growth in 1950s and 1960s, the sogo shosha played a critical role in corporate development, as they provided their affiliates with raw materials otherwise unavailable in Japan. In addition, they marketed the output of affiliates abroad.
86 Neff & Holstein, supra note 46, at 98.
87 Id.
88 See supra Part II.B.1-2.
In the horizontal *keiretsu*, intra-*keiretsu* financing assumes both debt and equity forms. Debt financing is provided in large part by the main bank and *sogo shosha* central to each *keiretsu*; additional financing is provided by large manufacturing companies associated with the *keiretsu*. The bank provides long-term debt financing that, in effect, renders the bank an equity investor.\(^8^9\) The *sogo shosha* and manufacturing companies provide trade credit that is of a similar effect. As outlined above,\(^9^0\) equity financing, in the form of extensive cross-shareholding, is provided by many firms within the *keiretsu*.

The impact of intra-*keiretsu* financing on interfirm relationships is reinforced by three personnel practices. These comprise the intercorporate exchange of employees and executives, the integration of firm directorates, and the periodic meetings of the presidents of major *keiretsu* firms. The effect of intercorporate exchanges of employees, executives, and directors were also described above.\(^9^1\)

The impact of the unique presidential meetings is not easy to discern\(^9^2\) because the meetings are not recorded and the decisions that may be taken remain unknown to all but the participants in the meetings.\(^9^3\) It is unclear whether these meetings serve as fora for the coordination of policies and activities\(^9^4\) or merely as settings for per-

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\(^8^9\) The intimate relationship of each affiliate to the *keiretsu* bank is such that it more closely resembles an equity or ownership relationship. Banks provide long-term financing, where needed, to affiliates, in order to ensure the continued viability of corporate affiliates. This provides a significant competitive advantage to Japanese firms, which, in many cases, are virtually guaranteed to continue as going concerns. Western companies are unable, therefore, to take advantage of the market weakness of Japanese firms in order to gain access to the Japanese market.

\(^9^0\) *See supra* Part II.B.1.a.

\(^9^1\) *See supra* Part II.B.1.b.

\(^9^2\) The potential impact of the meetings on the economy is great, as each of the six horizontal *keiretsu* assemble the heads of numerous large corporations in their monthly meetings of each *keiretsu*’s society. The chart below identifies each *keiretsu*’s society and lists the number of presidential participants in each monthly meeting.

<table>
<thead>
<tr>
<th>Horizontal <em>Keiretsu</em></th>
<th>Name of Society</th>
<th>Number of Participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mitsui</td>
<td>Nimokukai</td>
<td>24</td>
</tr>
<tr>
<td>Mitsubishi</td>
<td>Kinyokai</td>
<td>30</td>
</tr>
<tr>
<td>Sumitomo</td>
<td>Hakusuikai</td>
<td>20</td>
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<tr>
<td>Fuyo</td>
<td>Fuyokai</td>
<td>29</td>
</tr>
<tr>
<td>Sanwa</td>
<td>Sansuihki</td>
<td>44</td>
</tr>
<tr>
<td>Dai-Ichi Kangyo</td>
<td>Sankinkai</td>
<td>47</td>
</tr>
</tbody>
</table>

Among the twenty-four companies meeting in the Nimokukai are such prominent firms as Mitsui Taiyo Kobe Bank, Mitsui Trust & Banking, Mitsui Life Insurance, Taiho Marine & Fire Insurance, Mitsui & Co. (*sogo shosha*), Mitsui Petrochemical Industries, Mitsui Engineering & Shipbuilding, Toshiba Corporation, and Toyota Motor. Fujigane, *supra* note 17, at 28-29.

\(^9^3\) The extent of coordination achieved at each of the horizontal *keiretsu*’s monthly meetings is a subject of debate because of the secrecy of the content of the meetings. *Id.*

\(^9^4\) Helou, *supra* note 17, at 105-06.
sonal interaction.\textsuperscript{95} Regardless of the content of the meetings, they provide a significant tax benefit to participating corporations because sums expended on corporate entertainment are excluded from taxable income.\textsuperscript{96}

Intercorporate operational relationships further the integration of the horizontal \textit{keiretsu}. Relational contracting involves frequent interfirm reciprocal dealings and less frequent exclusive dealings; the latter form of transaction is one in which a firm requires a related firm to sell to it all of its output or to purchase from it all of its input of a certain type. As a result of both sorts of preferred dealing, many of the purchases of horizontal \textit{keiretsu} firms are made within the group.

Resource pooling also typifies the horizontal \textit{keiretsu}. In addition to the aspects of this pooling outlined earlier,\textsuperscript{97} intra-\textit{keiretsu} joint ventures are common. Typically, they are arranged by the \textit{sogo shosha}, which enjoy a leading role as a result of their comparative advantages in both information technology and activity coordination;\textsuperscript{98} both of these elements are critical to the organization of successful joint ventures. The reliance of the other \textit{keiretsu} firms not only on the \textit{sogo shosha}, but also on the banks heightens the influence these companies have over other \textit{keiretsu} companies.

c. Effects on Market

Market foreclosure effects occur when a potential or actual participant in a market is prevented from participating in the market by the closure of the market resulting from competitive practices. The foreclosure effects of all of the integrating elements of the \textit{keiretsu} are

\textsuperscript{95} This is the assertion of Yohei Mimura, Chairman of Mitsubishi Corporation, who represents the Kinyokai, the monthly Friday meeting of the presidents of companies affiliated with the Mitsubishi \textit{keiretsu}. He described the course of a typical meeting:

\begin{quote}
We gather once a month, on the second Friday, at noon. We take fifteen minutes to eat, mostly curry and rice or beef and rice in a bowl. The next fifteen minutes are for talks about donations, various events planned and reports from companies with the Mitsubishi name on them. Finally, we listen to outside guest speakers for an hour and adjourn at 1:30. We are all busy, so we all leave as soon as the meeting ends.
\end{quote}

Fujigane, supra note 17, at 29. Further detail was added by Motoyoshi Shiraishi, the Chief Manager of the Kinyokai, who stated that "The members never argue about [such important matters as] joint projects. They don't talk about business while eating, either. It's like relatives getting together for an informal talk." \textit{Id.}

\textsuperscript{96} The importance of this exemption becomes clear when it is realized that Japanese corporations have annual corporate entertainment expenditures of five trillion yen (approximately $35 billion).

\textsuperscript{97} See supra Part II.B.2.b.

\textsuperscript{98} Sophisticated information technology is necessary for the management of the complexities inherent in the business of the \textit{sogo shosha}. As part of these activities, the company must coordinate a multiplicity of products and many international offices. As a result, the complex decision-making skills and communications capabilities of the \textit{sogo shosha} are the most sophisticated among all \textit{keiretsu} firms. See Helou, supra note 17, at 106-07 (discussing the comparative strengths of the \textit{sogo shosha}).
significant because they often erect insurmountable barriers to participants in the sectors in which the keiretsu are active. Reciprocal and exclusive dealings make Japanese companies reluctant to purchase goods from new sources of supply, including imports. Similarly, reciprocal and exclusive dealings restrict a keiretsu member from selling output to new companies trying to establish themselves in Japan. In addition, fierce competition between different keiretsu and the massive financial and corporate clout available to the keiretsu may render the entry of foreign competitors into the Japanese market prohibitively expensive. However, the existence of these foreclosure effects does not automatically render the practices of horizontal keiretsu anticompetitive; this evaluation must be made in the context of Japanese standards of antitrust law.

3. Vertical Keiretsu
   a. Introduction

   Vertical keiretsu unite companies acting in several sectors that comprise one vertical chain of activity directed at the generation of revenues from a principal product. These keiretsu typically involve companies engaged in the production of component products, the assembly of principal products, and the distribution of keiretsu output. They have gained particular prominence in the automotive and electronics sectors, which currently employ over twenty-five percent of the Japanese workforce. As a result of the prominence of vertical keiretsu in certain sectors, eighty-five percent of small and medium enterprises in certain sectors act as subcontractors to larger firms. In some industries, the keiretsu not only have channelized subcontractors, but also have adapted the pre-existing distribution system to their needs. The distribution system, which consists of multiple, interlocked layers of small businesses, is economically inefficient and results in

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99 The results of a recent survey indicate that members of the horizontal keiretsu sourced 29.6% of their consumer good supplies and 37.2% of their capital good supplies from non-keiretsu firms. Fujigane, supra note 17, at 30. While this indicates there is scope for non-keiretsu firm dealings with keiretsu members, 70.4% of consumer goods and 62.7% of capital goods are still supplied within keiretsu, leaving only a small portion of keiretsu needs to be satisfied by firms external to the keiretsu system. Id.
100 See infra Part IV.
101 See infra Part IV.
103 Richard Katz, Author Skeptical of MITI's Plan to Hike Imports, JAPAN ECON. J., Feb. 17, 1990, at A1. These arrangements are particularly prevalent in industries in which Japanese economies have captured significant international market share. In the transport industry, 88% of small and medium enterprises (SME) are subcontractors, while in the electrical machinery industry and the automobile industries, 85% of SME are subcontractors. Id.; Helou, supra note 17, at 116 n.57 (discussing extent of the vertical keiretsu).
104 The industries in which keiretsu distribution networks are prevalent include electronics, cameras, cosmetics, and pharmaceuticals. Lawrence, supra note 26, at 325.
extremely high retail prices. However, it should not be evaluated on a pure economic efficiency standard. Its current form is the product of several factors, including social welfare, financial requirements, and cultural preference.

The distribution system fulfills social welfare objectives because it effectively supplants the need in Japan for more extensive unemployment and public pension systems; the distribution system provides employment for thousands of workers who might otherwise require public assistance. It also satisfies the financial needs of distribution firms since it eliminates the need for more extensive direct debt financing; each layer in the system often provides generous credit terms to those below it. In addition, the distribution system conforms with a Japanese cultural preference for local distributorships which permit the traditional purchase of fresh goods daily from a neighborhood institution. Despite these influences, the extent of keiretsu channelization of distribution systems is beginning to decline as the profitability of these proprietary distribution systems has fallen.

Vertical keiretsu still suit the interests of both the central manufacturing firm and the smaller sub-contractor or distributor firms. The central manufacturing concern is guaranteed a quantity and quality of inputs at reasonable cost by the subcontractors; it is similarly guaranteed both a reasonable revenue and an acceptable quality of promotional and distributional service from the distribution outlets. The smaller subcontractor firms receive extensive managerial, technological, and financial support from the larger firm.

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105 Shapiro & Hamilton, supra note 8, at 14. As a result, Japan has double the number of retail stores per capita found in other industrialized economies. Each of these businesses, in acting as a middleman, adds a mark-up to the value of the goods. The result is the creation of great inefficiency and extremely high retail prices, perhaps 300% greater than the original producer price. Punke, supra note 1, at 61.

106 Michael R. Czinkota, Distribution in Japan: Problems and Changes, 20 Colum. J. World Bus. 65, 66 (Fall 1985). The large number of small channel operators provides significant amounts of employment and functions as a social welfare net. The distribution system serves to absorb excess labor during past economic downturns and thereby eliminates the need for a more extensive unemployment insurance and welfare framework. Id.

107 Id. In a manner similar to the replacement by the distribution system of the need for a more extensive unemployment insurance system, the purchase of small retail operations by retired Japanese employees replaces the need for a more substantial public pension system. These purchases are facilitated by the lump-sum pension distributed to retirees by large, corporate employers upon retirement. Id.

108 The distribution system acts as a system of financing, in which large wholesalers grant longer payment terms to small retailers, to the ultimate profit of the large companies. Shapiro & Hamilton, supra note 8, at 14 (citing McKinsey & Co., Japan Business: Obstacles & Opportunities 17 (1983)).

109 This process is the outcome of the emergence of discount stores able to undercut the prices of traditional distributorships and, thereby, attract their customers. See sources cited infra notes 129, 133.

110 Fujigane & Ennis, supra note 17, at 27.

111 Id.
Small distribution outlets benefit from the provision of trade credit by keiretsu wholesalers. The large firm guaranties business stability and a reasonable long-term profit to both sorts of smaller affiliates.112

The efficiencies available through vertical keiretsu are more obvious than those attainable through horizontal keiretsu. Both transaction costs and information costs are minimized by the entry into long-term relationships with related subcontractors and distributors.113 Long-term exclusive relationships foster a commitment by each firm to the other and a willingness to cooperate and not to litigate in the event of a change of circumstance.

b. Links Between Companies in Vertical Keiretsu

The integrative mechanisms used to unite the members of a vertical keiretsu include intra-keiretsu financing, intercorporate shareholding, interlocking directorates, and close intercorporate operational relationships.114 These links differ from those binding the horizontal keiretsu largely because of the dominant position enjoyed by the principal manufacturers in vertical keiretsu. Horizontal keiretsu do not have single firms enjoying the same relative degree of economic power with respect to other firms in the keiretsu.

Intra-keiretsu financing is provided, in large part, by principal manufacturers and keiretsu wholesalers. Banks and sogo shosha are not directly related to the vertical keiretsu. Corporate shareholding is not reciprocal; although principal companies hold shares in their dependent affiliates, the affiliates typically hold no shares in the central manufacturing companies.115

While directorates are related, the relationship is also unidirectional. The central company has great influence over the appointees to the dependent firms’ directorates;116 the converse is not true. This result is also the one-sided by-product of the unequal relationship between the powerful central company and its affiliated dependent firms.

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112 Hasegawa, supra note 29, at 59.
113 Hovenkamp, supra note 76, § 7.2.
114 See supra Part II.B.1-2.
115 The Toyota vertical keiretsu provides an illustration of this point. Toyota Motor Corporation, the principal manufacturer, holds a 19% equity stake in Koito Manufacturing Company, a Toyota sub-contractor, and a 23.6% equity stake in Nippondenso Company, which is one of Toyota's three primary sub-contractors. Neither holds a stake in Toyota Motor Company, though Nippondenso Company holds a 5% stake in Toyota Automatic Loom Works Ltd., which created the car company in the 1940s. Hasegawa, supra note 29, at 59.
116 Evidence of this influence is provided by the attempted hostile takeover by U.S. corporate raider T. Boone Pickens of Toyota affiliate Koito Manufacturing Company. Although Pickens held more equity than Toyota (26.4% to 19%), Toyota was able to determine the composition of the board and deny Pickens' attempt at representation on Koito's directorate. Id.
Intercorporate operational integration is much greater in a vertical keiretsu than it is in a horizontal keiretsu. Because the activities of all companies along the vertical chain are oriented toward the production of revenue from related activities, the operations of the firms must be bound by much tighter operational links. These links join not only the principal manufacturer with its subcontractors, but also the principal manufacturer with its distributors. Both types of dependent firms are bound to the central firm through the use of vertical restraints. In addition, the integration of subcontractor operations with those of central firms is achieved through both joint product development and design and integrated production schedules. The integration of distribution firm operations with those of principal manufacturers is realized through cooperative promotional programs.

The close relationship between principal manufacturers and subcontractors may be cemented through exclusive dealing arrangements, either explicit or implicit. Whether or not this form of restraint is included in the relations of particular keiretsu companies, the activities of subcontractors are tightly integrated with those of the primary firm. As a result of the close relationship between subcontractors and the principal manufacturer, the risks and costs associated with the development of new products necessary for the primary manufacturing output will be shared by the related firms in the quest for the success of their joint product. Additionally, the production of high quality goods for the primary manufacturer is fostered by the mutual commitment of the parties. Total quality management, the basis for Japanese manufacturing, relies on this relationship for its success.

The storage costs of the manufacturer are reduced by the integration of the subcontractor into the manufacturer's activities. The subcontractor, certain of its demand and associated revenue, may produce only when necessary for the primary manufacturer. The


118 See Hovenkamp, supra note 76, § 8.12 (discussing the advantages of exclusive dealings relationships).

119 Through this system, the manufacturer of each product assigns the responsibility for quality control to each member of the factory staff, in particular to the factory workers. This fosters worker commitment to the output and its quality and prevents the massive waste generated by earlier Western quality control systems that relied on periodic inspections by quality control inspectors of finished products. This has improved the cost minimization efforts of Japanese manufacturing, as it eliminates the payroll expense of quality control inspectors and reduces the occurrence of defects.

120 This is one reason cited for the difficulty Japanese manufacturers would have with the integration of low-cost foreign inputs into their products. Despite their low cost, these goods are often rendered unattractive by the distance that would separate the Japanese manufacturer and its foreign suppliers. This would impede the quality management and just-in-time inventory systems on which the Japanese manufacturing system is based.
kanban (just-in-time) inventory system is the result of this tight integration. However, the success of the kanban inventory system may be difficult to maintain. As Japanese transportation infrastructure proves increasingly inadequate to handle growing traffic congestion, the just-in-time deliveries on which much of Japanese industry depends will become difficult to accomplish.

In order to encourage keiretsu distribution outlets to display only keiretsu goods and to maintain recommended retail prices, several forms of vertical restraints on distribution outlets are used. These may include resale price maintenance, exclusive dealing arrangements, rebates of various sorts, advertising subsidies, and refusals to deal. These restraints are described below.

The integration of distribution outlets with the manufacturing concern efficiently focuses the outlets’ resources on the promotion, distribution, and service of a single product line. This ensures both high quality distribution and servicing. In addition, it prevents free-riding by other products on the promotional efforts of the manufacturer; the phenomenon of free-riding develops when one product is promoted and a second product benefits from this promotion yet does not share in the promotional expense.

The efficiencies achieved through the vertical keiretsu maximize the profits that may be earned by the joint efforts of the primary manufacturer and its vertically integrated affiliates. The extra profits may be allocated according to any one of several decision rules. In reality, the decision rule determining the allocation of profits is

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121 The just-in-time inventory system is another one of the elements of Japanese manufacturing that facilitates the cost minimization that allows it to succeed internationally. Storage costs are a weighty expense; this is particularly true in Japan, where the scarcity of space mandates a premium. These costs are effectively eliminated through the kanban system, in which the components of the principal products are delivered to the central manufacturer only as they are required. The cost minimization that results is enabled by the tightly integrated operating relationship of the sub-contractors and principal manufacturer. Hasegawa, supra note 29, at 59.

122 There are a multiplicity of rebates used by keiretsu. Among them are sales share rebates (senyu ritsu), in which the rebate rate corresponds to the ratio of keiretsu sales to total sales, progressive rebates (ruishin), in which the rebate rate corresponds to increased sales, and loyalty rebates (chusei), in which rebate rates increase in accordance with the degree of conformity to the keiretsu’s marketing policy. Covey, supra note 117, at 71-72 (discussing the role of rebates in Japanese distribution); Japan to Honor Commitment to Retail Reform, Agrees to Allow Credit Cards, MITI Reports, 7 INT’L TRADE REP. (BNA) 906 (1990).

123 See infra Part III.C.2.a-d.

124 Covey, supra note 117, at 54.

125 Hovenkamp, supra note 76, § 8.12.

126 These rules include arbitrary division, equal division, and power-based division. According to the first rule, the extra profitability garnered from a more profitable arrangement might be allocated randomly among the participating parties. According to the second rule, the extra profitability might be evenly divided by the participating parties. According to the third rule, the extra profitability would be allocated in accordance with the relative power of the participating parties; in the case of the vertical keiretsu, in which the principal manufacturer is the most powerful party, the extra profits would accrue entirely to this party.
the relative power of the parties.\textsuperscript{127} Because the central manufacturer is the most powerful unit within the vertical keiretsu, it garners the extra profits and leaves its affiliates only slim profits deemed reasonable over the long term;\textsuperscript{128} this is often termed as “squeezing the affiliates” for maximum profits. Consequently, affiliates may earn little or no profit in the short term, but in the long term, the ongoing patronage of the principal manufacturer ensures stable returns to the affiliates.

Distribution outlets are not completely prevented from increasing the profits they earn by altering the price and quantity of products sold, so long as they have not entered into exclusive dealing arrangements that have binding vertical restraints. This situation has allowed discount retailers to emerge into the market and to challenge traditional keiretsu distribution networks.\textsuperscript{129} The intense competition from discount stores,\textsuperscript{130} the heavy expense of supporting keiretsu distribution outlets,\textsuperscript{131} and the high storage costs of maintaining inventory levels at individual outlets\textsuperscript{132} have reduced the relative efficiency of proprietary distribution networks.\textsuperscript{133} This has resulted in the downsizing of these networks. It has also led to requests by principal manufacturers that discount retailers raise prices in order to allow the principal manufacturers to recapture their former, high profit margins.\textsuperscript{134}

\begin{itemize}
  \item \textsuperscript{127} See Fujigane \& Ennis, supra note 17, at 27 (discussing the uneven distribution of profits); Hasegawa, supra note 29, at 58.
  \item \textsuperscript{128} The long-term nature of the slight profits enables the continuation of these firms. Fujigane \& Ennis, supra note 17, at 27.
  \item \textsuperscript{129} Japanese retailing is currently undergoing a great deal of change as larger stores and different pricing policies develop. For a discussion of these changes and those likely to evolve in the future, see Eijiro Hara et al., Distribution Keiretsu: Electronics Stores Rebel, TOKYO BUS. TODAY, Sept. 1990, at 35; George Palmer, WESTERN FIRMS JOSTLE FOR A SHARE IN JAPAN’S RETAIL REVOLUTION, 5 MULTINATIONAL BUS. 9 (1990); Carla Rapoport, Ready, Set, Sell — Japan is Buying, FORTUNE, Sept. 11, 1989, at 159.
  \item \textsuperscript{130} As discount stores increase in prevalence, Japanese consumers need no longer rely on keiretsu distributorships for all their needs in certain sectors. This competition forces these distributorships either to reduce their prices or, if these prices cannot be lowered because of systemic inefficiency, to exit the market.
  \item \textsuperscript{131} A wide variety of expenses are incurred in the support of keiretsu distributorships, including shared promotional expenses and inventory maintenance costs. Czinkota, supra note 106, at 66-67.
  \item \textsuperscript{132} This need is an indication of the inefficiency of proprietary distribution systems. Each distributorship must maintain a full inventory, with the associated storage costs, of a single line of products, as this constitutes most of what distribution outlets sell. \textit{Id.}
  \item \textsuperscript{133} While there is a growing trend toward discount retailing, its impact on Japan is not yet complete. In December 1991, Toys ‘R’ Us, an American discount toy retailer, opened its first Japanese store in the Ibaraki Prefecture, about forty miles north of Tokyo. \textit{Guess Who’s Selling Barbies in Japan Now?}, BUS. WK., Dec. 9, 1991, at 60. Toys ‘R’ Us plans to open additional stores in the near future, and other American retailers are expected to follow this lead. \textit{Id.} This presages a restructuring of Japanese retailing that will further reduce the role of keiretsu in the distribution of goods.
  \item \textsuperscript{134} Hara, supra note 129, at 36.
\end{itemize}
c. **Effects on the Market**

All producers seeking to sell their products in Japan are compelled to deal with the vertical *keiretsu* and their market foreclosure effects. An outsider can overcome vertical restraints utilized by *keiretsu* to cement proprietary subcontracting and distribution networks only with a significant expenditure on the establishment of new proprietary networks.\(^{135}\) Self-dealing within vertical *keiretsu* may deny entry to foreign products.\(^{136}\) Foreign producers are confronted with additional barriers arising from the unwillingness or inability of traditional non-*keiretsu* distribution outlets to stock foreign products.\(^{137}\) With the emergence of nonproprietary discount outlets, however, this unwillingness is changing. Any anticompetitive aspects of this structure must be assessed in the context of Japanese antitrust law.\(^{138}\)

### III. Competition Law

#### A. Introduction

As introduced earlier,\(^{139}\) the alleviation of the alleged anticompetitive practices inherent in Japanese industry requires three independent findings. These determinations comprise the foreclosure of the Japanese market, the existence of anticompetitive behaviour causing this foreclosure, and the effective applicability of Japanese competition law to the questionable behaviour. The first two matters have been outlined above.\(^{140}\) The third and most determinative matter must still be examined. The efforts invested in the continuing Structural Impediments Initiative negotiations may come to their in-

\(^{135}\) This need not entirely prevent new entry into proprietary distribution in Japan. However, the incredible expense and associated risk dissuade many potential entrants. Shapiro & Hamilton, *supra* note 8, at 16. One exception was BMW, which established proprietary dealerships following unsatisfactory results from previous dealer arrangements. Stories such as this are rare.

Companies seeking to enter Japanese distribution must do so with a great deal of sensitivity to local demand. In addition to ensuring that the product is suited to the local market, the packaging, presentation, and price must all communicate the social status of the item in accordance with local market expectations. *Id.* American car manufacturers notoriously failed to suit the product to the Japanese market when they attempted to sell cars with steering wheels on the wrong side to the Japanese mass market.

\(^{136}\) *Hovenkamp, supra* note 76, § 7.2.

\(^{137}\) Reluctance by these distribution outlets to carry foreign products results from the small size of non-*keiretsu* outlets and the lack of any central distribution network which might facilitate distribution of imported goods to small outlets. In addition, both the premium pricing of imports and the apparent cultural predisposition of Japanese distributors to domestic products increase this reluctance. Foreign products are deemed by some to be inappropriate for the unique characteristics of the Japanese consumer. Punke, *supra* note 1, at 59-61.

\(^{138}\) *See infra* Part IV.

\(^{139}\) *See supra* Part I.

\(^{140}\) *See supra* Part II.
tended fruition only if Japanese competition law is capable of controlling the activities at issue.

As noted above,141 the central role played by the zaibatsu in the militarization of Japan prior to, and during, World War II led the American Occupation authorities to dissolve these groups and to impose a rigid antitrust statute.142 This action was intended to preempt a recurrence of both the concentration of economic power and the distortion that resulted from anticompetitive activities.143 The legislation is entitled the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, but as noted earlier is com-

141 See supra notes 75-81 and accompanying text.
142 Directive 244 of the Supreme Commander for the Allied Powers (SCAP), entitled “Dissolution of Holding Companies” set out the following steps for the elimination of zaibatsu power: the dissolution of the zaibatsu and other enterprise groupings; abolition of measures promoting private monopolization; and establishment of a free competitive system. Dissolution of Holding Companies, Supreme Commander for the Allied Powers’ Instruction Number 244 to the Japanese Government (SCAPIN No. 244), Nov. 6, 1945, in Supreme Commander for the Allied Powers, General Headquarters, SCAPINS: Supreme Commander for the Allied Powers’ Instructions to the Japanese Government from September 4, 1945 to March 8, 1952, 39-40 (1952) [hereinafter SCAP INSTRUCTIONS].

The elimination of zaibatsu power was realized in several stages. In 1945, a series of SCAP directives froze the assets of eighteen zaibatsu. Sale or Transfer of Securities of Certain Business Firms, SCAPIN No. 215, Oct. 31, 1945, in SCAP INSTRUCTIONS, supra at 37-38; Establishment of a Schedule of Restricted Concerns, SCAPIN No. 403, Nov. 9, 1945, in SCAP INSTRUCTIONS, supra at 59; Regulation Affecting Restricted Concerns, SCAPIN No. 408, Dec. 8, 1945, in SCAP INSTRUCTIONS, supra at 60-61. The issuance of various Imperial Ordinances furthered the dissolution of the zaibatsu. See Imperial Ordinance No. 233 of 1946 (Holding Company Liquidation Commission Ordinance) (ordering holding companies to transfer the securities they held to the Holding Company Liquidation Commission and thereafter to dissolve); Imperial Ordinance No. 567 of 1946 (eliminating combinations through shareholding, personal relationships with zaibatsu, or contractual relationships with zaibatsu); Imperial Ordinance No. 592 of 1946 (ordering persons from fourteen of the zaibatsu families to transfer securities to the Holding Company Liquidation Commission). In 1947, the Elimination of Excessive Concentration of Economic Power Act, No. 207 (1947), was enacted. This Act empowered the Holding Company Liquidation Commission to identify and eliminate “excessive concentration of economic power.” See also Anti-Monopoly Law, supra note 16. For a further discussion of the steps taken to eliminate zaibatsu power, see IYORI & UESUGI, supra note 16, at 6-20.


Those forms of economic activity, organization and leadership shall be favored that are deemed likely to strengthen the peaceful disposition of the Japanese people, and to make it difficult to command or direct economic activity in support of military ends.

To this end, it shall be the policy of the Supreme Commander:

(a) to prohibit the retention in or selection for places of importance in the economic field of individuals who do not direct future Japanese economic effort solely towards peaceful ends; and

(b) to favor a program for the dissolution of the large industrial and banking combinations which have exercised control of a great part of Japan’s trade and industry.

Directive of the President of the United States to General MacArthur, Sept. 6, 1945, reprinted in IYORI & UESUGI, supra note 16, at 7.
monly referred to as the Anti-Monopoly Law (AML). The Japan Fair Trade Commission (FTC) was established by the AML as an independent agency empowered to monitor and enforce the AML. Although the introduction of antitrust law into the country was initially perceived in Japan as a penalty for the loss of the war, almost all Japanese economic actors have grown to accept and appreciate the law.

All competition law is motivated by the attempt to achieve economic efficiency that will benefit society. Underlying the law, though, is a fundamental tension between two conflicting objectives, economic decentralization and economic synergy. Each of these objectives is advanced as the optimum course by which to attain economic efficiency.

In theory, economic decentralization fosters innovation and, ultimately, efficiency through the struggle for innovation, competitiveness, and survival among numerous small economic units. This theory requires discouraging collaboration and dismantling all emerging concentrations of economic power into multiple component parts. Each of these small economic units will enter the struggle for survival and success. Economic synergy, however, is attainable through the joint efforts of numerous firms, whether they are bound by ownership or contract. This latter goal mandates the support of agglomeration of economic power and the advancement of economic concentration. The role of antitrust law is to locate the optimal balance between the two objectives, economic decentralization and economic synergy, in order to allow the economy to attain maximum efficiency.

The public policy objectives set out in the AML manifest these general principles of competition law in Japan. The primary policy objectives to be facilitated are noted in the beginning of the AML.

144 AML, supra note 16, translated in Iyori & Uesugi, supra note 16.
146 Article 22 of the Constitution, which guarantees the freedom of occupation, may be understood as a constitutional basis for competition policy in Japan. Kenpo [Constitution] art. XXII (Japan). The decision of the Consultative Group Coordinating Committee (COCOM) in Nihon Kogyo Tenrankai v. Japan, 20 Gyosai Reisyu 842 (1969), established the freedom of business activity to be one facet of the constitutionally-guaranteed freedom of occupation. Free business activity is premised on the freedom of competition in the marketplace and therefore requires an effective antitrust statute in order to ensure this freedom.
147 For interesting insights into competition law, see Hovenkamp, supra note 76; Phillip Areeda & Donald F. Turner, Antitrust Law (1980); The Law and Economics of Competition Policy (Frank Mathewson et al. eds., 1990).
148 Section 1 of Chapter I of the AML states:
This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, and the like, and all other undue restriction of business activities through combinations, agreements, and otherwise, aims to
They include the achievement of free and fair competition, the stimulation of initiative among entrepreneurs, and the motivation of business activities by enterprises. These outcomes, in turn, are intended to advance the democratic development of the national economy and to assure the consumer welfare.

The AML has several substantive sections. These sections prohibit private monopolization and unreasonable restraint of competition among competitor companies, excessive stockholdings and interlocking directorates, and unfair business practices. Additional sections pertain to exemptions from the substantive coverage of the AML, remedies for violations, and the establishment of the FTC. Of these sections, the ones most relevant to the alleged anticompetitive practices of the keiretsu are those dealing with shareholding and directorate offenses and with unfair business practices. Each of the provisions relate to the ties binding keiretsu companies together.

B. Shareholding and Directorate Offenses

Antitrust law must prevent the undue concentration of economic power through the unacceptable consolidation of corporate ownership and management. Consolidation to this degree may be achieved most directly through the ownership of a firm. However, it may also be effectively realized through the integration of corporate directorates. Provisions of the AML address both of these potentially anticompetitive situations. The restrictions on shareholding and limitations on interlocking directorates are intended to preempt the excessive centralization of economic power which characterized

promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.


149 Id.

150 The advancement of democratic economic development is an unusual objective that appears to be an amalgam of the political objective of democracy with the economic objective of development. What may be intended is the maximum decentralization of economic power to individual economic actors in order to give them economic empowerment that would encourage individual involvement in the democratic and political life of the country. If this understanding is the correct one, it would seem to preclude the emergence of firms manifesting concentrations of economic power. This might conflict with the AML's primary objective of "encourag[ing] business activities of enterprises." Id.


Japan at an earlier point in its history.\textsuperscript{157}

1. Shareholding Offenses

Several restrictions on shareholding, all of which are the outgrowths of the distinct corporate history of Japan,\textsuperscript{158} are included in the AML. These rules are in addition to the restrictions imposed on mergers\textsuperscript{159} and asset sales\textsuperscript{160} that are common to most countries in the Organization for Economic Cooperation and Development (OECD).\textsuperscript{161} The unusual Japanese provisions prohibit the establishment of holding companies, restrict the ownership of stock that might substantially reduce competition in any field of trade, and limit the ownership of excessive blocs of shares.\textsuperscript{162}

The first form of restriction imposes a prohibition against holding companies in Japan. This is an absolute ban that allows no con-

\textsuperscript{157} See supra Part II.C.2.a.

\textsuperscript{158} The economic power of the \textit{zaibatsu} motivated the original restriction on shares that might be held by individuals or corporations. The 1977 amendment of the AML added a further limitation on the cross-ownership of shares, as the result of the accumulation by large companies, particularly by \textit{sogo shosha}, of large blocs of shares. See AML, supra note 16, ch. IV, § 9-2, \textit{translated in} IYORI & UESUGI, supra note 16, at 222; IYORI & UESUGI, supra note 16, at 80.

\textsuperscript{159} Section 15 of Chapter IV of the AML outlines the provisions governing the anti-trust elements of mergers in Japan:

(1) No company in Japan shall effect a merger or consolidation in either of the following cases:

\begin{itemize}
  \item [i)] Where the effect of a merger may be substantially to restrain competition in any particular field of trade;
  \item [ii)] Where unfair business practices have been employed in the course of the merger or consolidation.
\end{itemize}


\textsuperscript{160} Section 16 of Chapter IV of the AML restricts the sale of assets where such a sale would either substantially reduce competition or promote unfair business practices:

The provisions of the preceding section shall apply mutatis mutandis to an act of a company coming under any one of the following cases:

\begin{itemize}
  \item [(i)] Acquiring the whole or a substantial part of the business in Japan of another company;
  \item [(ii)] Acquiring the whole or a substantial part of the fixed assets used for the business in Japan of another company;
  \item [(iii)] Taking on lease of the whole or a substantial part of the business in Japan of another company;
  \item [(iv)] Undertaking the management of the whole or a substantial part of the business in Japan of another company;
  \item [(v)] Entering into a contract which provides for a joint profit and loss account for business in Japan with another company.
\end{itemize}

\textit{Id.} ch. IV, § 16, \textit{translated in} IYORI & UESUGI, supra note 16, at 229.

\textsuperscript{161} The Organization for Economic Cooperation and Development is a group of industrialized nations that promotes economic growth among its members. Convention on the Organization for Economic Cooperation & Development [hereinafter the Convention], opened for signature Dec. 14, 1960, 12 U.S.T. 1729, T.I.A.S. No. 4891 (entered into force Jan. 1, 1961). Signatories to the Convention include Australia, Austria, Belgium, Canada, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United States.

\textsuperscript{162} See infra notes 163-170 and accompanying text.
consideration of mitigating factors. The severity of the restriction is a consequence of the previous extreme control of the zaibatsu through central holding companies. In determining the existence of a violation, consideration need only be given to the existence of a company whose primary purpose is the control of the business of another company through the possession of an equity stake. Strict liability ensues.

The second form of restriction imposes a qualitative constraint on shareholding. This constraint prohibits both the acquisition and the possession of shares when these actions would substantially reduce competition. It is effective regardless of the existence or absence of concerted activity between actors. The only relevant elements of the offense are the acquisition or ownership of equity and the substantial reduction in competition that may result. There is no single test to determine a substantial reduction in competition; the unique market effects of each shareholding must be assessed independently.

The third form of restriction imposes a quantitative constraint on shareholding. This constraint comprises two provisions which separately impose limits on the amount of equity that may be owned by nonfinancial and financial companies, respectively. The former provision limits intercorporate shareholding by large nonfinancial companies to a maximum of an acquiror's paid-up capital or net

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165 Section 9 of Chapter IV of the AML states:
(1) No holding company shall be formed.
(2) Any company (including a foreign company . . .) shall not operate as a holding company in Japan.
(3) The term "holding company" as used in the preceding two subsections means a company whose principal business is to control the business activities of a company or companies in Japan by means of holding of stock (including shares of partnership . . .).
AML, supra note 16, ch. IV, § 9, translated in IVORI & UESUGI, supra note 16, at 222.

164 Section 10 of the AML restricts the acquisition of shares:
(1) No company shall acquire or hold stock of a company or companies in Japan where the effect of such acquisition or holding of stock may be substantially to restrain competition in any particular field of trade, or shall acquire or hold stock of such company through unfair business practices.
Id. ch. IV, § 10(1), translated in IVORI & UESUGI, supra note 16, at 226.

165 The ruling In re Nippon Musical Instrument Co., 8 Kosei torihiki iinketsushu [hereinafter Shinketsushu] 51 (FTC, Jan. 30, 1957), illustrates the nature of the evaluation of effects on the relevant market. In that case, Nippon Musical Instrument Company owned 24.5% of the outstanding shares in its rival Kawai Musical Instrument Company. Each of the companies held substantial shares of the markets for several sorts of musical instruments. The shareholding was in substantial reduction of competition. However, Nippon Musical Instrument Company was charged under Section 17 of the AML rather than Section 10 as the result of the evasive measures it employed in order to gain ownership of the contested shares. See IVORI & UESUGI, supra note 16, at 81-82 (discussing the Nippon case).

166 Id. at 80.

167 Section 9 of the AML affects all companies with capital in excess of ten billion yen or with net assets in excess of thirty billion yen. AML, supra note 16, ch. IV, § 9(2), translated in IVORI & UESUGI, supra note 16, at 222-26.
assets. The latter provision restricts intercorporate shareholding by a financial company to five to ten percent of the outstanding shares of the target company. Both of these provisions provide exemptions from their coverage in certain exceptional situations. The test for the existence of violations of these provisions is purely a quantitative one; no consideration of the effects on competition is necessary.

2. Directorate Offense

Without a prohibition against interlocking directorates, firms might be able to gain anticompetitive concentrations of economic power similar to those deriving from ownership if there were no restrictions on shareholding. This consolidation of company operations could be effected through the interchange of directors. To prevent this, the AML prohibits an officer or an employee of one company from assuming a position as an officer of a second company when that might engender a substantial reduction in competition.

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168 Section 9-2, as amended in 1977, limits the maximum intercorporate stockholding by a giant company to the equivalent of the larger of the paid-up capital or the net assets of the acquiror company, unless one of the exceptional situations exempted from its coverage exists. The general provisions of the section state:

(1) Any stock company whose business is other than financial (this term refers to those engaged in banking, mutual banking, trust, insurance, mutual financing and securities businesses; the same meaning shall apply hereinafter) and whose capital is larger than ten billion yen or whose net assets (this term refers to the sum of an account arrived at by deducting the total liabilities from the total assets listed in the latest balance sheet and the amount by which the net assets have increased as the result of an issuance of new stock in accordance with the provisions of Article 280-2 of the Commercial Code [Law No. 48 of 1899], or as a result of a merger or the conversion of corporate bonds, if any; hereinafter the same meaning shall apply in this section) are larger than thirty billion yen shall not be allowed to acquire or hold stock of companies in Japan in excess of its capital or its net assets, whichever is larger (hereinafter referred to as the "base amount"), if by so doing value of such stock (if different value of such stock is listed separately in the latest balance sheet, said value can be used); the same meaning shall apply hereinafter which it has acquired or holds exceeds the base amount: Provided, that the foregoing shall not apply to the acquisition or holding of such stock in [the exceptional circumstances outlined in the remainder of the provision].

Id. ch. IV, § 9-2(1), translated in IYORI & UESUGI, supra note 16, at 222-25.

169 This limit is 5% for most financial service companies and 10% for insurance companies. Section 11 of the AML states:

(1) No company engaged in financial business shall acquire or hold stock of another company in Japan if by doing so it holds in excess of five percent (ten percent in the case of insurance company) of the total outstanding stock: Provided, that the foregoing shall not apply to such cases for which prior approval of the Fair Trade Commission is obtained in accordance with the Rules of the Fair Trade Commission.

Id. ch. IV, § 11, translated in IYORI & UESUGI, supra note 16, at 227. See also Daiwa Bank, 10 SHINKETSUSHU 36 (FTC, June 26, 1961) (decision in which Daiwa Bank found liable under Section 11); IYORI & UESUGI, supra note 16, at 83-84 (discussing the Daiwa Bank case).

170 See supra notes 168-69.

171 Section 13 of the AML states:

(1) Neither an officer nor an employee (meaning in this section a person
A quantitative substantiality standard is used in order to assess the anticompetitiveness of interlocking directorates. A violation of the AML occurs when the interlocking directorate fosters a substantial reduction of competition in any field of trade; the substantiality of the reduction in competition is evaluated on a quantitative basis by looking at the market share held by the alleged violator.\textsuperscript{172} The FTC has determined that such a reduction may only exist when the two companies whose directorates are interconnected engage in the same economic activity.\textsuperscript{173}

C. Unfair Business Practices

1. Economic Theory

Full freedom to contract permits parties to structure their contractual transactions in any manner that they wish. However, these arrangements must be consistent with the AML provisions governing unfair business practices. Potentially unfair business practices comprise a wide variety of vertical restraints on competitive decision-making by the constrained party, including resale price maintenance, exclusive dealing, and refusal to deal. Several economic rationales exist for the prohibition against unfair business practices. These rationales include the constraint of intrabrand competition, the facilitation of monopoly pricing, the coercion of company decision-making, and the foreclosure of markets to interbrand competition.\textsuperscript{174}

a. Economic Rationales Prohibiting Unfair Business Practices

First, competition may be severely hampered by restraining provisions which are frequently included in contractual arrangements between vertically related parties. These restrictions may be provisions of contracts either between an upstream firm and the depen-
dent downstream distributors or between the upstream subcontractors dependent on the contracting downstream firm. Long-term contracting between these firms establishes a fixed alignment of the interests of the dependent firm with those of the dominant firm. This eliminates competition, termed "intrabrand competition," between potential competitors of the dependent firm. Dependent firms need not compete either in terms of cost or in terms of quality in order to maintain the patronage of the dominant firm.175

Second, the manipulation of prices by dominant firms may be facilitated by the alignment of firms into vertical chains. A dominant firm may dictate to its distributor not only the price the distributor must pay the dominant firm, but also the price the distributor must charge customers. This allows the dominant firm to preserve for itself any excess profit extracted from the ultimate customers. The extraction of monopoly rents from ultimate customers adversely affects overall consumer welfare.176

Third, independent company decision-making may be inhibited by the stronger bargaining position enjoyed by the dominant firm in negotiation with the dependent firm. Two anticompetitive effects may result from the leverage of the dominant company. The dominant firm may be tempted to abuse its dominant position in order to obtain an advantage at the expense of the dependent firm; the vertical restrictions that may result will reflect the coercive influence of the dominant firm over the dependent firm. In addition, coercion of the dependent firm may lead to the inclusion of contractual provisions offensive to intrabrand competition or interbrand competition.177

Finally, markets may be foreclosed to interbrand competition through the use of vertical restrictions. This foreclosure may result even when explicit anticompetitive clauses are not included in the contracts of dependent firms. For example, any efficiency gained through alignment of firm interests reduces the costs of affiliated firms relative to those of unaffiliated companies. In order to achieve similar efficiencies and long-term cost reductions, it is necessary for competitor firms participating in single product markets to enter all the product markets contributing to the achievement of efficiency. This requirement of multiple market entry markedly increases the

175 See sources cited supra note 174.
176 See sources cited supra note 174.
177 Coercion is particularly offensive when considered in the context of the principle of alienation. This principle dictates that a property, once alienated, should no longer be subject to the control of the alienating party. Where a dominant firm alienates its product to a downstream firm, its influence over that product and its pricing should end. Dominant firm coercion defeats this. See THE LAW AND ECONOMICS OF COMPETITION POLICY, supra note 147, at 111.
front-end cost of entering any single market and thereby bars entry for many competitor firms.\textsuperscript{178}

In addition, the alignment of dependent firms with dominant firms in vertical chains reduces the number and, possibly, the quality of unaffiliated firms with which other firms may align themselves. Quality differences between affiliated players and unaffiliated ones may pose a further serious barrier to the entry of potential players into the relevant market; these differences may force unaffiliated current players to exit the market. Both of these market foreclosure effects may reduce interbrand competition. These effects carry the greatest impact when the dominant firm enjoys a substantial pre-dominance in the market. In other cases, market foreclosure effects are far less significant.\textsuperscript{179}

\textit{b. New Efficiency Analyses}

These considerations prevailed during much of the history of antitrust law in Japan and abroad. However, it gradually became clear that the mere evidence of the existence of most vertical restrictions was insufficient to determine anticompetitive results. The market share possessed by the dominant firm is also relevant to this determination. In recent years, additional efficiency analyses of vertical alignments have been introduced into administrative or judicial assessments of vertical restraints. These analyses consider the effects of long-term vertical restraints on economic efficiency, firm service, and interbrand competition before characterizing a vertical restraint as a violation of competition law.\textsuperscript{180}

First, the alignment of firm interests reducing interbrand competition allows firms to gain economic efficiency through the reduction of transaction costs.\textsuperscript{181} In addition, it allows firms to share the risks and costs of programs where all parties share an interest, including product and process research and development, promotional campaigns, and financing efforts.\textsuperscript{182} The efficiencies created through this alignment reduce the costs of the member firms below those incurred in the absence of their affiliation.\textsuperscript{183}

Second, the alignment of firm interests allows dependent firms to devote all of their resources toward the product of the affiliated dominant firm.\textsuperscript{184} This reduces the waste and free-rider problems which result from dependent firm involvement with more than one

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\textsuperscript{178} See sources cited supra note 174.
\textsuperscript{179} See sources cited supra note 174.
\textsuperscript{180} See source cited infra notes 187, 219.
\textsuperscript{181} See generally supra Part II.B.2.a.
\textsuperscript{182} See generally supra Part II.B.2.b.
\textsuperscript{183} See generally supra Part II.B.2.b.
\textsuperscript{184} See generally supra Part II.C.3.b.
\end{flushleft}
product. Distribution outlets are able to direct their energies towards the maximum possible promotion and servicing of a single line of products; similarly, subcontractors are able to strive toward the development of optimal components for one single line of principal products.

Third, and corollary to the first two outcomes, interbrand competition is actually heightened through the imposition of vertical restraints. This assertion is not inconsistent with the earlier characterization of vertical restraints as detrimental to interbrand competition. While the restraints may reduce new entry into the relevant markets, they heighten competition among existing players. The reduction of costs and the improvement of service allow current multiple market participants to compete more intensely based not only on cost, but also on quality and service.

In addition, in a corporate atmosphere where multiple market participation is commonly achieved through either actual firm entry or linkages established through the use of vertical restraints, these restraints may facilitate increased interbrand competition. The entry barriers facing a potential competitor seeking to expand into multiple markets in order to attain the efficiencies permitted by broader market participation are daunting if that firm can enter other markets only by incurring the significant start-up costs of new entry into each individual market. The avoidance of these heavy costs by permitting entry into new markets through the use of vertical restraints with existing firms minimizes barriers to entry.

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185 See generally supra Part II.C.3.b.
186 See generally supra Part II.C.3.b.
187 The recent decision of the United States Supreme Court in Eastman Kodak Co. v. Image Technical Serv., Inc., 112 S. Ct. 2072 (1992), does not negate this theory, though it has generated a lot of controversy. In that case, Eastman Kodak attempted to tie sales of basic photocopiers and micrographic equipment to the ongoing provision of parts and servicing. Id. at 2077. Independent service organizations brought an antitrust action against Eastman Kodak, alleging tied sales and unlawful monopolization. Id. at 2078. Eastman Kodak claimed that it was entitled to a presumption that, because it did not have power to affect inter-brand competition in the equipment market, therefore it could not have power over intra-brand competition in the parts and service markets. Id. at 2081. The independent service organizations countered this theory with empirical evidence of Kodak’s monopolization of the single-brand market for Kodak parts and service. The Supreme Court denied Kodak’s motion for summary judgment, rejecting Kodak’s argument that it was entitled to its presumption. Rather, the Supreme Court held that it was a triable issue of fact whether the sale of parts and services was a part of the broader equipment market or whether the distribution of parts and services constituted a distinct market subject to antitrust regulation. In so doing, the Court implicitly recognized the propriety of consideration of single-brand markets in certain circumstances, such as when the switching costs between the basic equipment are so high that single-brand follow-up markets are effectively independent product markets. Id. at 2087. The tying of these markets through the imposition of vertical restraints would therefore reduce inter-brand competition within the market for parts and services and constitute an anti-competitive act. Id. at 2088. In effect, the Court was merely recognizing the frictions inherent in this market. Id. For a discussion of the implications of this case, see Charles F. Rule, Back to the Dark Ages of Antitrust, WALL ST. J., June 17, 1992, at A-17.
For example, entry into an upstream market is often only possible when accompanied by simultaneous entry into a related downstream market. Vertical restraints between the upstream entrant and the downstream player would allow the upstream firm entry into both necessary markets at the cost of entry into a single market. Therefore, assuming that the affiliated firms do not enjoy a predominant market position that would substantially or entirely foreclose the market, consumer welfare may actually be improved through vertical restraints.

2. General Offenses

The AML prohibits unfair business practices. However, the ban is not absolute, as the practices at issue must meet all three defining conditions of the AML in order to be covered by the provision. These conditions comprise inclusion in the legal definition of unfair business practices, impediment of "fair competition," and designation by the FTC as unfair.

First, the conformity of the alleged practice with the definitional component of the test must be assessed. Article 2(9) of the AML provides a broad, inclusive definition of acts that may constitute unfair business practices. These include conspiring to refuse to deal with a company, coercing affiliates not to deal with a company, unreasonably coercing customers to deal with oneself, unjustly preferential dealings, and abuse of bargaining position.

Second, the effects of practices complying with the definitional component must constitute an impediment of fair competition in or-

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188 Section 19 of the AML is summary in its language: "No entrepreneur shall employ unfair business practices." AML, supra note 16, ch. V, § 19, translated in IYORI & UESUGI, supra note 16, at 231.

189 Section 2(9), which defines "unfair business practices" under the AML, determines the coverage of Section 19. Section 2(9) reads:

The term "unfair business practice" as used in this Act means any act coming under one of the following paragraphs which tends to impede fair competition and which is designated by the Fair Trade Commission:

i) Unduly discriminating against other entrepreneurs;
ii) Dealing at undue prices;
iii) Unreasonably inducing or coercing customers of a competitor to deal with oneself;
iv) Trading with another party on such conditions as will restrict unjustly the business activities of the said party;
v) Dealing with another party by unwarranted use of one's bargaining position;
vi) Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is a stockholder or an officer and his customers;
or, in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interest of such company.

Id. ch. 1, § 2(9), translated in IYORI & UESUGI, supra note 16, at 231.

190 Id.

191 Id.
order to be actionable by the FTC. The standard by which to assess the impediment of fair competition has varied over time and has differed according to the type of practice. These variations are examined below.

Third, all practices meeting the first two components of the test must be designated as an unfair practice by the FTC. These designations may be one of two sorts, general notification or specific notification. The former method constitutes a generally applicable specification of the acts described in the defining provision of the AML; the latter designation makes unfair specific practices of individual industries. The limited coverage of the second method and space constraints mandate a focus on the first method alone. General designation is currently defined in the 1982 FTC Notification Number 15, which lists sixteen offending practices. Many of these practices have possible relevance to the conduct of keiretsu, including resale price maintenance, exclusive dealing, refusal to deal, and abuse of dominant bargaining position.

Because litigation is relatively rare in Japan, few judicial statements on antitrust standards exist. The antitrust activities most rig-

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192 Id.
193 See infra Parts III.B.2.d-g.
194 The procedure is provided in Sections 71 and 72 of the AML. Section 71 provides that:

The Fair Trade Commission shall, when it designates specific business practices in the particular field of business in accordance with the provisions of Section 2(9), first hear the views of entrepreneurs operating in the same line of business as that of the entrepreneurs who employ the specific business practices concerned, hold a public hearing to obtain the views of the public and thereupon shall make the designation after due consideration of the views disclosed.

AML, supra note 16, ch. VIII, § 71, translated in IYORI & UESUGI, supra note 16, at 255. Section 72 states: “Designation under the provisions of Section 2(9) shall be made by a notification.” Id. ch. VIII, § 72, translated in IYORI & UESUGI, supra note 16, at 255.
195 IYORI & UESUGI, supra note 16, at 92-94.
196 Id.
197 Specific notification may be provided to offending industries; often these notifications are of a temporary duration, pending the elimination of the unfair practice. Past notifications have been directed at a wide range of abusive practices, including offering premiums, misleading representations, abuse of bargaining position, and price discrimination.

Fair Trade Commission (Japan) Notification No. 15 of 1982 [hereinafter FTC Notification No. 15], translated in IYORI & UESUGI, supra note 16, app. I, at 265-66. This relatively recent Notification replaced the long-standing FTC Notification No. 11 of 1953, which contained the original general notification of eleven offending practices. Following allegations of undue vagueness and abstraction, FTC Notification No. 15 was issued.

198 The practices covered by the FTC Notification No. 15 include: Concerted Refusal to Deal; Other Refusal to Deal; Price Discrimination; Discriminatory Treatment (Transaction); Discriminatory Treatment (Trade Assoc.); Unjustly Low Pricing; Unjustly High Pricing; Misleading Representations; Customer Inducement by Unjust Benefit; Tied Sales; Coercion; Reciprocal Exclusive Dealing; Resale Price Maintenance; Other Exclusive Dealing; Abuse of Dominant Position; Interference with Competitor Transaction; and Interference with Competitor Operation. FTC Notification No. 15, supra note 198, translated in IYORI & UESUGI, supra note 16, app. I, at 266-69.
idly regulated by the FTC and most extensively addressed by the Japanese courts comprise horizontal price/output manipulations, resale price maintenance, and exclusive dealing. Only the last two activities are relevant to an analysis of unfair business practices. Additionally, the possibility of abuse of dominant position and refusal to deal in keiretsu relationships should be considered.

a. Resale Price Maintenance

Resale price maintenance involves the enforced fixing of prices at artificial levels. It allows firms to extract monopoly rents from consumers through the anticompetitive enforcement of price levels. Except in the limited circumstances outlined in the AML, this form of vertical restraint is illegal under the AML and the related FTC Notification Number. The Japanese courts have condemned unequivocally this practice, applying a standard that approximates

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201 Id.
202 Section 24-2 of the AML provides an exemption to the illegality of resale price maintenance in limited situations:
(1) The provisions of this Act shall not apply to legitimate acts performed by an entrepreneur who produces or sells a commodity, the uniform quality of which is easily identifiable and which is designated by the Fair Trade Commission, and by another entrepreneur who buys such commodity, in order to fix and maintain the resale price thereof (the resale price means hereinafter the price at which the latter entrepreneur or a third entrepreneur who purchases from him sells such commodity): Provided, that the foregoing shall not apply if the said act tends to be grossly injurious to the interest of consumers in general or if it is done against the will of the entrepreneur who produces it, by an entrepreneur whose business is to sell the said commodity.
(2) The Fair Trade Commission shall not designate a commodity under the provisions of the preceding subsection unless it fulfills each of the following requirements:
   i) The commodity shall be for the daily use of the consumers in general;
   ii) Free competition shall exist with respect to the commodity.

203 FTC Notification No. 15 defines "resale price maintenance" as follows:
(12) Supplying a commodity to the opposite transacting party who purchases the said commodity from oneself while imposing, without proper justification, one of the restrictive terms specified below:
   (a) Causing the said party to maintain the sales price of the commodity that one has determined, or otherwise restricting the said party's free decision on sales price of the commodity, or
   (b) Having the said party cause an entrepreneur who purchases the commodity from the said party to maintain the sales price of the commodity that one has determined, or otherwise causing the said party to restrict the said entrepreneurs free decision on sales price of the commodity.

204 Judicial statements have been made in connection with this practice in the three "Powdered Milk Cases", in which resale price maintenance arrangements were utilized by the various parties. See, e.g., In re Wakodo K.K., 15 Shinketsushu 84 (FTC Decision No. 3 of 1966, Oct. 11, 1968), aff'd on First Appeal (kokoku), Wakodo K.K. v. FTC, 18 Shinketsushu 214 (Tokyo High Court July 17, 1971), aff'd on Second Appeal (jokoku), 29 MINSHU 888 (Supreme Court, 1st P.B., July 10, 1975); In re Morinaga Shoji K.K., 15 Shinketsushu 84
the North American standard of "per se illegality." According to this standard, once proven, price maintenance practices are condemned regardless of their market effects because they are always assumed to be anticompetitive. Although the Japanese Supreme Court has recognized the economic efficiency created by the enhancement of interbrand competition through price maintenance, it ruled that a company with a nondominant market position is prohibited from engaging in this anticompetitive practice because of the restriction it imposes on intrabrand competition.

The dearth of recent litigation prevents a determination on the continued existence of this rigid standard. A similar standard of illegality was originally applied in the United States. The United States rule since has been supplanted by a quantitative substantiality standard that attempts to incorporate the economic efficiencies of both increased interbrand competition and reduction in market foreclosure into the determination of the illegality of resale price maintenance. Moreover, Japanese courts have eased the similarly rigorous standards once applied to the other forms of vertical restraint, discussed below. The latter two occurrences may foreshadow a broadening of the Japanese judicial standard for resale price maintenance.

(FTC Decision No. 2 of 1966, Oct. 11, 1968); In re Meiji Shoji K.K., 15 Shinketsushu 67 (FTC Decision No. 1 of 1966, Oct. 11, 1968), aff'd on First Appeal (kokoku), Meiji Shoji K.K. v. FTC, 18 Shinketsushu 167 (Tokyo High Court July 17, 1971), aff'd on Second Appeal (jokoku), 29 Minshu 951 (Supreme Court 2d P.B July 11, 1975). For a discussion of these cases, see IVORI & UESUGI, supra note 16, at 102. 205 See sources cited supra note 204. 206 See sources cited supra note 204. 207 In Wakodo K.K., 29 Minshu at 888, the Supreme Court was confronted with a company with third place in market share in the powdered milk industry. Despite the efficiency gain to be had from enhanced small company competition facilitated by resale price maintenance agreements, the Court condemned the practice. Id. For a discussion of the case, see IVORI & UESUGI, supra note 16, at 102. 208 The most recent major court rulings were in 1975. Wakodo K.K., 29 Minshu at 888; Meiji Shoji K.K., 29 Minshu at 951. 209 In the early case of Dr. Miles Medical Co. v. John D. Park Sons Co., 220 U.S. 373 (1911), the Court ruled that resale price maintenance is illegal, per se, as a restraint of competition forbidden under section 1 of the Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1988)). 210 The early U.S. standard of per se illegality was eroded over the years by several conflicting judgments. In recent years, the Supreme Court has placed increasing emphasis on the economic efficiency of increased interbrand competition. In the case of Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court ruled that vertical contractual restrictions which reduce intrabrand competition but increase interbrand competition would be tolerated. Similarly, in Business Electric Corp. v. Sharp Electronics Corp., 485 U.S. 717, cert. denied, 485 U.S. 1005 (1988), the Court allowed the pro-competitive effects of heightened interbrand competition to affect its assessment of vertical restraints. For elaboration on the standard by which resale price maintenance is assessed, see Frank Mathewson & Ralph Winter, The Law of Economics and Vertical Restraints, in The Law and Economics of Competition Policy, supra note 147, at 113-16. 211 See infra Parts III.C.2.b-d.
b. **Exclusive Dealing**

Exclusive dealing may assume one of two forms: either the downstream firm requires the upstream firm to sell to it all of its output, or the upstream firm requires the downstream firm to buy only its output. Both forms amount to a secondary boycott of the competitors of the constraining firm.\(^{212}\) In many instances, this form of vertical restraint is illegal under the AML and the related FTC Notification Number 15.\(^{213}\)

The standard by which this offensive practice is assessed differs from that by which resale price maintenance is judged. Until recently, a quantitative substantiality test that stressed the market share of the firm and the consequent effects of exclusive dealings on competitor market share was applied.\(^{214}\) In a recent judgment,\(^{215}\) this test was broadened into a qualitative substantiality test.\(^{216}\) This evaluation incorporates both quantitative market share considerations and mitigating qualitative factors\(^{217}\) in an analysis of the efficiencies created by exclusive dealing arrangements and the actual effects of the restraint on the relevant market.\(^{218}\) This standard parallels a

\(^{212}\) Mathewson & Winter, *supra* note 210, at 127.

\(^{213}\) FTC Notification No. 15 describes the illegal forms of exclusive dealing as follows:

(11) Unjustly dealing with the opposite transacting party on condition that the said party shall not deal with a competitor, thereby tending to reduce transaction opportunities for the said competitor.

\(^{214}\) In three cases in which leading manufacturers incorporated both exclusive dealing clauses and resale price maintenance provisions into distributor contracts, the FTC based its determinations almost entirely on the significant market share held by each of the offending upstream companies. In re Muto Kogyo K.K., 21 Shinketsushu 148 (FTC [Recommendation] No. 44, Nov. 22, 1974); In re Pijon K.K., 22 Shinketsushu 115 (FTC [Recommendation] No. 35, Jan. 7, 1976); In re France Bed K.K., 22 Shinketsushu 127 (FTC [Recommendation] No. 2, Feb. 20, 1976). For additional discussion of these cases, see Thomas R. Radcliffe, *Exclusive Dealing Arrangements Under Japanese Antimonopoly Law: The Toyo Seimaki Case*, 18 L. JAPAN 76, 80 (1986); Covey, *supra* note 117, at 74-75.

\(^{215}\) Toyo Seimaki v. FTC, 1106 Hanji 47, 49 (Tokyo High Ct., Feb. 17, 1984). In this case, the appellant manufacturer with the leading market share in retail rice industry equipment included exclusive dealing provisions in its distributor contracts. After the FTC made its determination based exclusively on the quantitative substantiality test that stressed market share, the manufacturer appealed. The result was the application of the new qualitative substantiality standard by the Tokyo High Court. *Id.*

\(^{216}\) Radcliffe, *supra* note 214, at 88.

\(^{217}\) To assess the actual impact of the arrangement on the relevant market, the *Toyo Seimaki* court considered several factors. These factors included the distribution level affected (i.e., wholesale, retail, etc.), the type of product affected (durable goods, convenience goods, etc.), the number of competitors in the upstream and downstream markets, the difficulty inherent in establishing alternative distribution channels, the fluctuations in the market share of the upstream firm and its competitors, the duration of the exclusive dealing agreement, and the extent of channelization characteristic of the industry. *Toyo Seimaki*, Hanrei Jiho (No. 1106) at 54-55.

\(^{218}\) The *Toyo Seimaki* court stressed the importance of assessing not only the firm’s market share, but also the effect of the arrangement on competitors. The court stated:

[T]he existence of the possibility of hindering fair competition, as such, after all, should be decided upon examination of the extent to which the exclusive dealing condition would limit the distribution routes which can be used by
similar United States qualitative rule of reason developed in recent jurisprudence.\(^{219}\)

Rebates often are used in order to foster exclusive dealing.\(^{220}\) The courts raise a presumption of illegality when rebates are large or steeply progressive or when their method of calculation is unclear.\(^{221}\) The uses of sales share rebates (senyu ritsu), those correlated with the percentage of total share of a specific brand, and progressive rebates (ruishin), those variable with increases in sales, have been ruled illegal when substantial market foreclosure results.\(^{222}\) Because of the lack of any recent judicial statements on this matter, it is unclear whether this more rigid quantitative standard applying to rebates persists following the adoption of the broader qualitative substantiality rule with respect to other forms of exclusive dealing.

c. Abuse of Dominant Position

A firm, whether upstream or downstream, may abuse its dominant bargaining position when it exerts coercive influence over other firms concerning the nonprice terms of a transaction.\(^{223}\) This of-

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\(^{219}\) Recent U.S. administrative decisions and court rulings dropped the earlier rigid adherence to market share as the sole determinant of the reasonability of exclusive dealing arrangements. Instead, these decisions adopted a "rule of reason" standard, finding that several factors in addition to market share are relevant to the "exclusive dealing" analysis. See, e.g., Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, cert. denied, 486 U.S. 1005 (1988) (endorsing the rule of reason standard); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); In re Beltone Elec. Corp., 100 F.T.C. 68 (1982). For example, in Beltone Electronics, several factors in addition to market share were considered relevant. Included among these are careful delineation of the relevant market, the amount of actual foreclosure in that market, the duration of the exclusive dealing arrangement, and the justifiability of the arrangements. Beltone Elec. Corp., 100 F.T.C. at 68. See also Tampa Elec. Co., 365 U.S. at 320 (Court evaluated the exclusive dealing contract by considering factors such as the economic impact of the contract on the relevant market, the foreclosure of that market, the duration of the restraint, and the claimed justification for the restraint; the Court concluded that exclusive dealing contract was justified in this case).

\(^{220}\) Covey, supra note 117, at 72.

\(^{221}\) Id. at 72.


\(^{223}\) FTC Notification No. 15 describes actionable abuse of dominant position in the following terms:

(14) Taking any act specified in one of the following subparagraphs, unjustly in the light of the normal business practices, by making use of one's dominant bargaining position over the opposite transacting party:
fense is evaluated based on the standard of normal conduct for negotiation among parties of equal economic standing.\textsuperscript{224} If the dominant party's behaviour is considered unduly harmful to the other party, the dominant party may be held in violation of the relevant Notification provision.\textsuperscript{225} The extent of market share held by the dominant firm has no relevance to this determination; the sole determinant is the relationship between the two firms.\textsuperscript{226} Because the determination of an abuse of position is a difficult one, it is generally accompanied by a specific designation as an unfair practice.\textsuperscript{227} The General Notification may not always be sufficient to clearly designate individual practices.\textsuperscript{228}

d. Refusal To Deal

Refusal to deal violates the AML\textsuperscript{229} only when it is either the product of collusion between two or more firms or is the result of the

\begin{itemize}
  \item[(a)] Causing the said party in continuous transaction to purchase a commodity or service other than the one involved in the said transaction,
  \item[(b)] Causing the said party in continuous transaction to provide for oneself money, service or other economic benefits,
  \item[(c)] Setting or changing transaction terms in a way disadvantageous to the said party,
  \item[(d)] In addition to any act coming under the preceding three subparagraphs, imposing a disadvantage on the said party regarding terms or execution of transaction, or
  \item[(e)] Causing a company which is one's opposite transacting party to follow one's direction in advance, or to get one's approval, regarding the appointment of officers of the said company (meaning those as defined in Paragraph 3 of Section 2 of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade).
\end{itemize}

FTC Notification No. 15, supra note 198, translated in IVORI & UESUGI, supra note 16, at 269.
\textsuperscript{224} Id.
\textsuperscript{225} IVORI & UESUGI, supra note 16, at 103.
\textsuperscript{226} See Snow Brand Dairy Co., 24 Shinketsushu 65 (FTC, Nov. 28, 1977); Meiji Dairy Co., 24 Shinketsushu 86 (FTC, Nov. 28, 1977); Mitsubishi Bank, 9 Shinketsushu 1 (FTC, June 3, 1957); Taisho Pharmaceutical Co., 7 Shinketsushu 99 (FTC, Dec. 10, 1955); Nippon Kogyo Bank, 5 Shinketsushu 61 (FTC, Nov. 6, 1953); IVORI & UESUGI, supra note 16, at 100-04.
\textsuperscript{227} See sources cited supra note 226.
\textsuperscript{228} See sources cited supra note 226.
\textsuperscript{229} FTC Notification No. 15 defines refusal to deal as follows:

\begin{enumerate}
  \item Without proper justification, taking an act specified in one of the following subparagraphs concertedly with another entrepreneur who are in a competitive relationship with oneself (hereinafter, referred to as "competitor"): (a) Refusing to deal with a certain entrepreneur or restricting the quantity or substance of a commodity or service involved in the transaction with a certain entrepreneur, or (b) Causing another entrepreneur to take an act which comes under the preceding subparagraph.
  \item Unjustly refusing to deal, or restricting the quantity or substance of commodities or services involved in the transaction with a certain entrepreneur, or causing another entrepreneur to take any act which comes under one of these categories."
\end{enumerate}

efforts of a market-dominating firm. Absent market dominance, refusal to deal by an independent enterprise is not actionable. Refusal to deal is generally a symptom of other anticompetitive forms of transacting and is rarely an independent offensive act. It provides a necessary additional cause of action when the primary anticompetitive activity is neither easily discerned nor clearly evidenced.

IV. Analysis: Keiretsu Under the Competition Law

A. Shareholdings and Directorates

Keiretsu relationships constructed with extensive intercorporate shareholding and interlocking directorates are susceptible to claims of anticompetitiveness. These relationships must violate provisions of the AML in order to constitute valid assertions of illegality. Each of the AML provisions will be examined in this context.

The existence of holding companies in keiretsu structures would be immediately actionable. However, the absence of holding companies from keiretsu is axiomatic. The lack of an identifiable controlling party is one of the essential defining characteristics of the keiretsu.

Equity ownership violating the qualitative prohibition against substantial restraint of trade would violate the AML. Precedent indicates that a restraint finding will only be made when the investing company and target firm engage in the same economic activity;

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230 In Taisho Pharmaceutical Co. v. Shinketsushu at 99, the FTC ruled that actions of an independent entrepreneur constituted refusal to deal. Id. See also IYORI & UESUGI, supra note 16, at 103 (briefly discussing case and its holding).

231 Id. at 97.

232 This assessment of refusal to deal is similar to the one employed in the United States under section 1 of the Sherman Antitrust Act, which bans restraint of competition. Concerted activities by two or more firms or restrictive activities by a monopolist may constitute an actionable refusal to deal. Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (enjoining newspaper which had almost complete control over the media advertising in a local area from refusing to accept advertisements from businesses which also chose to advertise with a competing radio station); Fashion Originators' Guild v. F.T.C., 312 U.S. 457 (1941) (enjoining group which tended to control garment manufacturing industry from refusing to sell to retailers when the effect was to foreclose the market for other garment manufacturers); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) (individual retailers had the right not to deal with wholesalers, but group of retailers acted anticompetitively when they conspired not to deal with certain wholesalers). An independent enterprise is considered free to deal and not to deal with the parties of its choice. See United States v. Colgate & Co., 250 U.S. 300 (1919) ("In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."). See also Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (allowing state-run operation to stop selling to out-of-state customer in favor of protecting the interests of its citizens); Mathewson & Winter, supra note 210 (discussing vertical restraints generally).

233 See supra note 163 and accompanying text.

234 See supra Part III.B.1.
keiretsu companies engaging in substantially different forms of activity would not be susceptible.\textsuperscript{235} An action should be successful only when three elements exist, an equity relationship linking two keiretsu companies involved in the same economic activity, substantial restraint of trade, and causation of the restraint of trade by the cross-shareholding.\textsuperscript{236}

Equity stakes violating the quantitative restrictions might give rise to a successful action under the AML provision. However, the close attention paid by investing companies to these provisions renders this result unlikely. Shareholdings held by large keiretsu banks and financial service companies are problematic only if they exceed the allowable five to ten percent share.\textsuperscript{237} Similarly, the equity stakes of sogo shosha and large enterprises are actionable only if they are in excess of the level permitted to large companies by the quantitative restriction in the AML.\textsuperscript{238}

Interlocking directorates of companies would be troublesome only if competition between the linked companies is substantially limited as a result.\textsuperscript{239} The leading FTC ruling on this matter indicates that keiretsu firms are prohibited from exchanges of directors when the firms engage in similar economic activities.\textsuperscript{240} However, typical keiretsu arrangements such as the interchange of directors and the meeting of company presidents from companies involved in different economic activities appear not to violate the provisions.

Overall, keiretsu shareholding and directorate practices seem less susceptible to legal challenges on grounds of antitrust violations.

\textbf{B. Unfair Business Practices}

The functional inter-relationship of keiretsu companies accomplished through extensive intra-keiretsu contracting for goods and services often involves business practices vulnerable to claims of unfairness. As noted above,\textsuperscript{241} vertical keiretsu may engage in any of several forms of vertical restraint, while horizontal keiretsu typically engage in reciprocal dealings. Principal companies in both forms of keiretsu may engage in an abuse of their dominant positions.\textsuperscript{242} A determination of the actual existence of AML violations requires a detailed assessment of individual company practices. It is important

\begin{itemize}
  \item \textsuperscript{235} See supra Part III.B.2.
  \item \textsuperscript{236} See generally supra Parts III.B.1-2.
  \item \textsuperscript{237} See generally supra Parts III.B.1-2.
  \item \textsuperscript{238} See generally supra Parts III.B.1-2.
  \item \textsuperscript{239} See generally supra Part III.B.2.
  \item \textsuperscript{240} Hiroshima Ry. Co. & 4 Others, 20 Shinketsushu 62 (FTC, July 17, 1973). In that case, the FTC ordered officers who held key positions with both a railway and a bus company to resign from one of the companies. \textit{Id. See also} Iwori & Uesugi, supra note 16, at 84 (discussing case).
  \item \textsuperscript{241} See supra Parts II.C.2-3.
  \item \textsuperscript{242} See supra Part III.C.2.c.
\end{itemize}
to recognize in all cases that restraint may be achieved through either contractual or noncontractual arrangements between an upstream firm and downstream firm. Some generalized statements may facilitate the understanding of the competitive nature of keiretsu practices.

Resale price maintenance utilized in keiretsu distribution practices may be vulnerable to a successful challenge, particularly in light of the relative vigour with which the FTC has pursued this form of violation. The possibility of a successful challenge is enhanced by the rigid judicial standard approximating per se illegality applied to resale price maintenance in the past. This standard requires evidence only of the existence of the practice and not of its anticompetitive effects on firm market share and efficiencies.

However, developments in the standards for assessing exclusive dealings in Japan and resale price maintenance in the United States may foreshadow a broadening of the judicial standard applied to resale price maintenance in Japan. The new rule would incorporate quantitative or qualitative elements. In general, the continued existence of resale price maintenance in keiretsu relationships may be one cause of the systemic high prices faced by Japanese consumers; investigation should be undertaken to assess the likelihood of success in challenging this practice.

Exclusive dealing will not be easily challenged. Following the recent ruling of the Tokyo High Court, exclusive dealing is subject to a qualitative substantiality test. Proof of the mere existence of intra-keiretsu dealings is insufficient to attach antitrust liability to companies. Consideration must be given not only to the market share held by the constraining firm, but also to the factors mitigating the imposition of restraints. Such an analysis would likely permit the continuation of many of the keiretsu transactions.

The fierce interbrand competition in the industries in which keiretsu are active limits keiretsu firm market share in these sectors. The exclusive dealings of any single keiretsu would be insufficient to have substantial market foreclosure effects. Further, mitigating factors include the significant number of firms in competition with the constraining firm in many of these industries and the large degree of channelization and firm alignment typical of many of these industries. The keiretsu may argue that Japan's corporate history and close-knit culture are mitigating factors by themselves. The combination

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243 See supra Part III.C.2.a.
244 See supra Part III.C.2.a.
245 See supra Part III.C.2.a.
246 See supra Part III.C.2.a.
247 Toyo Seimaki v. FTC, Hanrei Jiho (No. 1106) 47 (Tokyo High Court, Feb. 17, 1984).
248 See supra Part III.C.2.b.
of these elements renders the successful challenge of keiretsu exclusive dealing arrangements extremely unlikely. This should not preclude antitrust action, however, in instances when these elements are lacking.

Reciprocal dealings between members of horizontal keiretsu need not be exclusive.\textsuperscript{249} If they are not exclusive, the principle of freedom of contract and the economic efficiencies realized through intra-keiretsu transactions fully justify the practice and make it appear unsailable on the basis of antitrust law. If the reciprocal dealings were exclusive, they might be successfully challenged under antitrust principles.

Refusal to deal may be a ground for challenging keiretsu practices that may not be as easily characterized as other forms of antitrust violations.\textsuperscript{250} However, success is not likely in the absence of concerted refusals to deal or market dominance.\textsuperscript{251} When neither of these conditions exist, keiretsu firms are free to deal and to refuse to deal with the firms of their choice. Neither condition typifies keiretsu transactions. Intense interbrand competition belies the existence of concerted inter-keiretsu refusal to deal. This same fierce interbrand competition denies any single keiretsu the ability to attain a market dominating position from which its refusal to deal would constitute an unfair business practice.

Abuse of dominant positions may pervade keiretsu dealings.\textsuperscript{252} If intra-keiretsu negotiations involve coercion of the dependent firm to accept nonprice terms harmful to its interests, the dominant party may have abused its position.\textsuperscript{253} This appears likely in vertical keiretsu arrangements and transactions involving the principal manufacturer and its affiliates. It may also be true of some horizontal keiretsu and the relations between the central sogo shosha and the bank and other firms in the keiretsu.

The terms which the central firms impose on the dependent firms are the product of vast discrepancies in the leverage available to each firm. Because similar terms probably would not result from negotiations between firms of equal economic power, the imposition of terms in many keiretsu relationships appears to constitute actionable abuses of dominant position. However, despite the apparent abuse of negotiating position, a successful challenge is by no means assured. While short-term firm interests may be harmed by terms imposed by abusive negotiations with a principal firm, long-term firm interest is certainly furthered by the relationship accompanying

\textsuperscript{249} See generally supra Part II.B.2.a.
\textsuperscript{250} See supra Part III.C.2.d.
\textsuperscript{251} See supra Part III.C.2.d.
\textsuperscript{252} See generally supra Part III.C.2.c.
\textsuperscript{253} See supra Part III.C.2.b.
the imposed terms. The FTC General Notification is inadequate in order to contend with this dilemma.\textsuperscript{254} Therefore, specific FTC notification is required to treat each situation individually.

C. Evidentiary Burden

Even when anticompetitive acts meeting the definitions and judicial standards of the law exist, the evidentiary burden is often insurmountable. This situation results from the frequent absence of unassailable written evidence and the reluctance of dependent Japanese firms to undertake conflictive litigation.\textsuperscript{255} The dependent firms' reluctance derives from their fear of the harm that litigation would cause to their ongoing relations with dominant firms and the Japanese societal reluctance to engage in excessively litigious behaviour.\textsuperscript{256}

In order to facilitate the identification of \textit{keiretsu} relationships and to ease the related evidentiary burden, Japanese law now requires disclosure of relationships that are typical of \textit{keiretsu}.\textsuperscript{257} The relationships that must be disclosed include not only intercorporate shareholding and interlocking directorates, but also relational contracting.\textsuperscript{258} These disclosure measures are intended only to reveal the existence of \textit{keiretsu}. They are not sufficient to satisfy the evidentiary burden required to support allegations of anticompetitive activity.

First, the AML requires disclosure by companies of cross-corporate shareholdings\textsuperscript{259} and directorates.\textsuperscript{260} In addition, in order to enhance the transparency of \textit{keiretsu} equity relationships, the Ministry of Finance (MOF) recently promulgated new regulations requiring disclosure of the beneficial ownership of an equity stake in excess of five percent of the outstanding voting shares of a company.\textsuperscript{261} The

\textsuperscript{254} See FTC Notification No. 15, supra note 198, translated in IVORI \& UESUGI, supra note 16, at 266-67.
\textsuperscript{255} Punke, supra note 1, at 77-78.
\textsuperscript{257} AML, supra note 16, ch. IV, translated in IVORI \& UESUGI, supra note 16, at 222-30.
\textsuperscript{258} Id. ch. IV, § 13(3), translated in IVORI \& UESUGI, supra note 16, at 228.
\textsuperscript{259} Section 10(2) of the AML requires the filing of an annual shareholding report by every domestic non-financial company in Japan with assets in excess of two billion yen and every foreign non-financial company when those companies own stock in another company in Japan, held by either the company itself or by a trustee. AML, supra note 16, ch. IV, § 10(2), translated in IVORI \& UESUGI, supra note 16, at 226.
\textsuperscript{260} Section 13(3) of the AML requires the filing of a report upon the assumption by an officer or employee of one company of the position of officer with another company in competition with it in Japan. This requirement exists only where one of the two subject companies has assets in excess of two billion yen. Id. ch. IV, § 13(3), translated in IVORI \& UESUGI, supra note 16, at 228.
\textsuperscript{261} These regulations, which took effect December 1, 1990, were issued in response to commitments undertaken by the Japanese Government during earlier stages of the Structural Impediments Initiative negotiations. See Laurence W. Bates, \textit{Japan's New Disclosure
report must include information on the purpose of share ownership and the existence of significant contractual or equity-related relationships between the parties.\textsuperscript{262}

Although these regulations are intended to foster the visibility of keiretsu and allow for antitrust action to be taken when appropriate, their impact should be minimal. The noted low level of share ownership by keiretsu firms protects many equity relationships from disclosure.\textsuperscript{263} These regulations would have greater effect if keiretsu firms held excessive stakes through proxy companies in evasion of the AML; it is by no means clear that such a situation currently exists.

Second, the new Related Party Transaction Regulations,\textsuperscript{264} promulgated by the MOF, mandate the disclosure of all "significant transactions" between "related parties" in order to elevate the visibility of keiretsu relationships.\textsuperscript{265} The definition of "related parties" extends beyond parties connected through equity relationships to include parties linked by significant financial, operational, and managerial relationships.\textsuperscript{266} Similarly, the definition of "significant transactions" includes a variety of financial and operational transactions.\textsuperscript{267} Because the definition of these terms in the Regulations allows for a great deal of flexibility in the determination of "related parties" and "significant transactions," they are valuable in exposing the keiretsu, which are characterized by fluidity.

\textbf{D. Sanctions}

When the legal and evidentiary burdens are met, the AML provides sanctions. Violations of the shareholding and directorate pro-

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\textsuperscript{262} The new regulation is intended to give a truer picture of intra-keiretsu ownership of affiliate firms. The requisite disclosure covers all securities, actual and potential, that are owned beneficially by a person or a group of persons. \textit{Id.} at 12.

\textsuperscript{263} See supra Part II.B.1.a.

\textsuperscript{264} The Related Party Transaction Regulations were similarly issued as a result of the Structural Impediments Initiative. They were promulgated on December 25, 1990 and took effect on April 1, 1991. Bates, supra note 261, at 12.

\textsuperscript{265} \textit{Id.}

\textsuperscript{266} The Related Party Transaction Regulations identify "related parties" according to the following connections:

1) significant shareholdings by parent, subsidiary, and affiliate companies;
by major shareholders, both corporate and individual; by directors and their immediate families; by associated companies, their directors and subsidiaries; and by commonly-controlled companies.

2) significant shareholding of actual or potential voting securities.

3) appointment of a high-level executive or a substantial portion of the board of directors.

4) substantial financial or operational transactions.

5) other significant factors not expressly outlined.

For more information, see \textit{id.} at 12.

\textsuperscript{267} The Related Party Transaction Regulations define "significant transactions" to include "substantial sales transactions," "substantial financial transactions," and "substantial capital transactions." \textit{Id.} at 13.
visions may be met with a criminal penalty, either a fine or a term of imprisonment or some combination of both punishments.\textsuperscript{268} In the alternative, these violations may be corrected by FTC remedial measures including forced dispositions of offensive shareholding, forced resignations of officers holding offending positions in a company, and any other necessary measures.\textsuperscript{269} Only FTC remedial measures such as an order to cease and desist the offending practice or an order to delete violating contractual clauses may be used against unfair business practice violations.\textsuperscript{270} If a final order is violated, a criminal fine and/or a prison term may be imposed on the offender. In the alternative, an administrative fine may be imposed on the violator.\textsuperscript{271}

The apparent severity of the AML sanctions, both criminal and

\textsuperscript{268} Section 91 of the AML states that "Any person committing one of the following offenses shall be punished by penal servitude for not more than one year or by a fine of not more than two million yen..." AML, supra note 16, ch. X, § 91, translated in IYORI & UESUGI, supra note 16, at 259-60. The offenses named in this provision include improper or excessive shareholdings and improperly held positions in more than one company. Id.

\textsuperscript{269} Section 17-2 of the AML outlines the remedial measures that may be taken:

(1) Where there exists any act in violation of the provisions of Section 9-2(1), 10, 11(1), 15(1) (including such cases where the said provisions are applied mutatis mutandis by Section 16) or the preceding section, the Fair Trade Commission may, in accordance with the procedure as provided for in Division II, Chapter VIII, order the entrepreneur concerned to submit or file a report, or to dispose of the whole or a part of his stocks, to transfer a part of his business, or to take any other measures necessary to eliminate such acts in violation of the said provisions.

(2) Where there exists any act in violation of the provisions of Section 9(1) or (2), 13, 14 or the preceding section, the Fair Trade Commission may, in accordance with the procedure as provided for in Division II, Chapter VIII, order the person violating such provisions to submit or file a report, or to dispose of the whole or a part of his stocks, to resign from his position as an officer in a company, or to take any other measures necessary to eliminate such violation.

Id. ch. IV, § 17-2, translated in IYORI & UESUGI, supra note 16, at 229-30.

\textsuperscript{270} Section 20 of the AML states:

When there exists any act in violation of the preceding article, the Fair Trade Commission may, in accordance with the procedure as provided for in Division II, Chapter VIII, order the entrepreneur concerned to cease and desist from the said act, to delete the clauses concerned from the contract and to take any other measures necessary to eliminate the said act.

Id. ch. V, § 20, translated in IYORI & UESUGI, supra note 16, at 231.

\textsuperscript{271} Section 90 of the AML addresses several situations, including unlawful concerted activity, international agreements, and non-observance of final decisions. Id. ch. X, § 90, translated in IYORI & UESUGI, supra note 16, at 259. This provision reads:

Any person committing one of the following offenses shall be punished by penal servitude for not more than two years or by a fine of not more than three million yen:

. . .

iii) Any person who does not comply with the decision as provided for in Section 48(4), 53-3 or 54(1) or (2), after it has become final and conclusive.

Id. The final decisions enumerated in this provision include: recommendations, id. ch. VIII, § 48(4), translated in IYORI & UESUGI, supra note 16, at 245; consent orders, id. ch. VIII, § 53-3, translated in IYORI & UESUGI, supra note 16, at 249-50; FTC decisions, id. ch. VIII, § 54(1), translated in IYORI & UESUGI, supra note 16, at 250; and surcharge orders, id. ch. VIII, § 54(2), translated in IYORI & UESUGI, supra note 16, at 250.
remedial, is deceptive. First, criminal action is rarely taken. This outcome results from many factors, including the weighty burden of proof imposed in any criminal trial\textsuperscript{272} and the absence of sufficient social stigma associated with anticompetitive conduct; the lack of stigma is curious because anticompetitive behaviour constitutes concealed theft from consumers.\textsuperscript{273} Additional factors include the remedial nature of Japanese justice\textsuperscript{274} and the systemic overburdening of the Japanese procuracy that results from the dearth of lawyers in Japan.\textsuperscript{275} The lack of criminal action is also motivated by the reluctance of the FTC to undertake criminal action because of the personal ties that connect many members of Japan’s bureaucratic, political, and business circles.\textsuperscript{276} Because the FTC is reluctant to utilize the criminal provisions available to it, the deterrent power of the criminal provisions is extremely weak.

Second, the efficacy of administrative remedial measures, though greater than that of criminal penalties, is still limited. This situation derives from both the narrow scope of FTC orders and the lack of effective sanctions in the event of corporate noncompliance with FTC remedial measures. The narrow scope of FTC orders results from the requirement that orders redress only those facts set out in the FTC decision. Consequently, structural causes of an anticompetitive action are not treated. The lack of effective sanctions in the event of noncompliance with a final FTC order lingers despite the available criminal or administrative measures; neither of these

\textsuperscript{272} Criminal actions require proof beyond a reasonable doubt. In contrast, civil actions require a lesser burden of proof to be met, as proof must only be on a balance of probabilities. See generally IVORI & UESUGI, supra note 16, at 125-29 (discussing Japanese civil and criminal procedures).

\textsuperscript{273} Curiously, anticompetitive activity that exacts higher prices from consumers is not regarded with the same societal disdain as that reserved for common theft. While members of society are certainly aware when they have been robbed or mugged, they are clearly less aware of being “bushwhacked” by faceless corporations extorting society. See KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 43 (1976).


\textsuperscript{275} The low number of lawyers is frequently cited as one reason for the relative absence of litigation from Japanese society. See, e.g., Haley, Antitrust Sanctions & Remedies, supra note 25, at 487 (noting the low number of prosecutors in Japan). There are approximately 124,000 attorneys in all of Japan, or 101.6 attorneys per 100,000 population. John Heilemann, The Rule of Lawyers, ECONOMIST, July 18, 1992, at 3. In contrast, there are 312 lawyers for every 100,000 people in the United States. More likely, the low number is the product of a non-adversarial society that does not require a legal services establishment as extensive as that required in the United States or Canada.

\textsuperscript{276} Haley, Antitrust Sanctions & Remedies, supra note 274, at 487.
measures are particularly compelling. Criminal sanctions, as explained above, have little impact on corporate decision-making. Similarly, administrative fines do not restrain corporations from contravening the AML because the relatively low values of fines convert them into mere costs of doing business.

However, the efficacy of remedial measures is reinforced through the threat of adverse publicity. This is the one outcome of an antitrust action that may seriously harm an accused company. Publicity may ignite a response from the public in the form of consumer pressure or, in the extreme, consumer boycott. The more likely source of pressure, however, is the relevant economic ministry who may exercise severely constraining administrative guidance. In either case, companies engaged in anticompetitive activities may be pressured to comply with FTC remedial measures in order to avoid the deleterious effects of negative publicity.

V. Conclusion

This analysis indicates that American hopes for dismantling the keiretsu through the rigid application of competition law are misplaced. Even if the conduct of individual keiretsu is found to reduce

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277 See supra notes 268-76 and accompanying text.
278 Since 1977, administrative fines under Section 97 are limited in value to 500,000 yen. Haley, Antitrust Sanctions & Remedies, supra note 274, at 488.
279 See id. at 506-08 (discussing use of adverse publicity as a means of enforcing Japanese antitrust sanctions).
280 Administrative guidance is used by many government agencies as an instrument of leverage to achieve the goals of government policy. The process consists of an agency making a request of, or giving guidance to, an entity within its jurisdiction, according to established law. This is done in order to achieve some administrative objective. Although this type of guidance seems arbitrary, and therefore contrary to the Rule of Law, it is not in Japan. Administrative guidance is often explicitly authorized by statute. If a statute does not refer to this type of guidance, it may still be used; the law establishing each of the ministries allows them to take actions necessary to achieve governmental objectives, within the parameters acceptable under Japanese law and within the areas of their jurisdiction. Japanese courts have ruled administrative guidance permissible in limited circumstances. Japan v. Idemitsu Kosan, K.K., 985 Hanji 3 (Tokyo High Ct., Sept. 26, 1980), translated in J. Mark Ramseyer, The Oil Cartel Criminal Cases: Translations and Postscript, 15 L. JAPAN 57, 66 (1982), aff'd in part and rev'd in part, 1108 Hanji 3 (Japan Sup. Ct., Feb. 24, 1984); Japan v. Sekiyu Renmei, 983 Hanji 22 (Tokyo High Ct., Sept. 26, 1980), translated in Ramseyer, supra, at 57. In these decisions, which are commonly known as the "Oil Cartel Cases", administrative guidance, even without explicit authorization, was found legal so long as the guidelines were reasonable and oppressive methods were not used. Idemitsu Kosan, 985 Hanji at 3; Sekiyu Renmei, 983 Hanji at 3.

market access for potential new entrants, a successful challenge using the provisions of the AML would by no means be assured. This situation is evidence not of excessively loose Japanese law, but rather of the general absence of anticompetitive elements from keiretsu transactions.

FTC reluctance to challenge many keiretsu practices is founded on an implicit recognition of the economic efficiency attainable through the mechanism of the keiretsu. This efficiency, achieved by the escalation of interbrand competition, enables the fulfillment of certain objectives of competition law, including improved consumer welfare. The recognition of the value of increased interbrand competition is increasingly incorporated into the judicial analysis of competition law, both in Japan and in the United States. Judgments increasingly accept the reduction of intrabrand competition in affirming the facilitation of heightened interbrand competition.281

Although the efficiency of the keiretsu reduces the potential utility of competition law, it indicates other possible courses for new entrants to follow in the Japanese market. Because firms, whether Japanese or American, cannot compete with the more efficient keiretsu firms, they must adopt different strategies. Options for them include nonentry or retreat from the Japanese market, participation in existing keiretsu, or establishment of proprietary keiretsu.

It is unclear which of the last two options promises the greater likelihood of success. The former depends entirely on the willingness of the keiretsu to open up to non-keiretsu firms, whether foreign or domestic.282 This will happen in a widespread manner only if the non-keiretsu firms invest substantial sums in order to establish production plants in sufficient proximity to the central firms so as to enable the reliable integration of efficient production of sufficient

281 The recent Kodak decision in the United States does not negate this trend. Eastman Kodak Co. v. Image Technical Serv., Inc., 112 S. Ct. 2072, 2092 (1992). Economic analysis played an important role in the decision; however, economic theory was not permitted to overcome specific record evidence to the contrary in a motion for summary judgment. The Court recognized the existence of a triable issue of fact as a result and denied the motion. Id.

282 A willingness by keiretsu manufacturers to purchase from non-keiretsu suppliers has recently been indicated by Japanese automobile manufacturers. Toyota Motor Corporation recently decided to purchase components from Hitachi Ltd., a member of the rival Nissan Motor Corporation keiretsu. Toyota to Launch Cross-Keiretsu Purchase from Hitachi, Nikkei News Bulletin, Jan. 20, 1992. Nissan, too, has recently opened its keiretsu to outsiders; it now includes two U.S. firms, Garrett Turbo Inc. and Texas Instruments Japan Ltd. Satoshi Isaka, Nissan Paves a New Road for Foreign Parts Suppliers, JAPAN ECON. J., May 18, 1991, at 1. These keiretsu purchases are touted as signs of the new openness of corporate Japan; more likely, they are exceptions that affirm the general rule. The willingness that Japanese car companies have recently shown to import American cars and car parts are almost entirely the result of administrative guidance and foreign pressure. There is little within the keiretsu structure that would motivate these purchases, as they do not facilitate keiretsu-based practices of total quality management and just in time inventory. See Toyota to Launch Cross-Keiretsu Purchase from Hitachi, supra; Isaka, supra, at 1.
quality. The latter option involves only the entering firm, but requires substantial investment in the simultaneous entry into several markets. This expenditure may, however, be minimized through the utilization, like existing keiretsu, of mechanisms which are either binding or restrictive. In either case, the keiretsu must be viewed with admiration, and not with trepidation. Rather than advocating the dismantling of the keiretsu, American policy-makers should foster the emulation of the beneficial features of these distinctive corporate groups.